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**TRIAL CHAMBER V**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

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

**PUBLIC**

**Public Redacted Version of "Defence Observations on 'Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528"' 26 June 2020**

**Source:** Defence of Patrice-Edouard Ngaïssona

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

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## I. Introduction

1. Before Pre-Trial Chamber II issued its “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (“Confirmation Decision”),<sup>1</sup> never had a pre-trial chamber confirmed a case to trial, but decline to confirm the overwhelming amount of charges initially brought by the Prosecution. Cases that have been confirmed to trial were confirmed almost in their entirety with few changes to the temporal and geographical scope of the case as initially pleaded by the Prosecution at confirmation.<sup>2</sup>
2. The Confirmation Decision drastically changed the factual and temporal scope of the Prosecution’s case against Mr Ngaïssona<sup>3</sup> and the Prosecution’s anticipated evidence, including its list of witnesses, must reflect it. Yet, on 20

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<sup>1</sup> ICC-01/14-01/18-403-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-403-Red.

<sup>2</sup> For example in confirmation of charges proceedings for Article 5 crimes, pre-trial chambers have generally confirmed almost the entirety of the charges originally brought by the Prosecution. *See Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2007, ICC-01/04-01/06-803-tENG, page 154; *Prosecutor v. Banda and Jerbo*, Corrigendum of the “Decision on the Confirmation of Charges”, 7 March 2011, ICC-02/05-03/09-121-Corr-Red, para. 162; *Prosecutor v. Kenyatta*, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, paras 428-429; *Prosecutor v. Ruto and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373, page 138; *Prosecutor v. Gbagbo*, Decision on the confirmation of charges, 2 June 2014, ICC-02/11-01/11-656-Red, para. 278; *Prosecutor v. Ntaganda*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309, page 63; *Prosecutor v. Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, page 104; *Prosecutor v. Al Mahdi*, 24 March 2016, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-84-Red, para. 58; *Prosecutor v. Al Hassan*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, ICC-01/12-01/18-461-Corr-Red, pages 451-467.

<sup>3</sup> The Prosecution sought to confirm 111 counts of war crimes and crimes against humanity with respect to 13 different incidents which spanned 14 different locations. Document Containing the Charges, para. 629. The Chamber confirmed 31 counts with respect to Mr Ngaïssona, with respect to 4 of the 13 different incidents, namely crimes occurring in Bangui (including Cattin and Boeing), the Yamwara school base, the PK9-Mbaïki axis, and Bossangoa.[cite confirmation]

April 2020, the Prosecution declared that “[n]early all evidence submitted [...] at confirmation remain[ed] highly relevant to the confirmed charges”.<sup>4</sup>

3. The Defence for Mr Patrice-Edouard Ngaïssona (“Defence”) presents the following observations on the “Prosecution’s Submission in Compliance of the Single Judge’s ”Order to provide a Preliminary Witness List” (“Prosecution’s Submissions”) and its related Preliminary Witness List.<sup>5</sup> The Defence submits that the Prosecution’s anticipated evidence must take into account the Confirmation Decision for the following reasons. First, the Pre-Trial Chamber declined to confirm factual allegations pertaining to Mr Ngaïssona’s acts and conduct on the basis of insufficient probative evidence. Thus, this evidence cannot now be used to prove the same facts a trial since it would exceed the scope of the confirmed charges. Secondly, the Prosecution cannot call live witnesses or introduce via rule 68(2)(b) witness statements whose testimony touches upon expressly unconfirmed incidents to sustain the alleged contextual elements of crime since it would also exceed the scope of the confirmed charges. Third, the Prosecution would not be prejudiced by not presenting such evidence since in no way does the course of action suggested by the Defence impact the Prosecution’s right to present evidence to sustain the charges.
4. Lastly, the Defence reserves the right to make further observations in this regard during the upcoming Status Conference.

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<sup>4</sup> ICC-01/04-01/08-488-Conf, Section C.

<sup>5</sup> ICC-01/14-01/18-553 and ICC-01/14-01/18-553-AnxA.

## II. Confidentiality

5. The present observations are filed as confidential pursuant to regulation 23bis(2) of the Regulations of the Court as they contain confidential information about witnesses.

## III. Procedural History

6. On 11 December 2019, Pre-Trial Chamber II issued the Confirmation Decision, partially confirming the charges against Mr Patrice-Edouard Ngaïssona.<sup>6</sup>
7. On 22 May 2020, Trial Chamber V filed its “Order to Provide a Preliminary Witness List”, directing the Prosecution to file, no later than 15 June 2020, a list of (i) witnesses that it is already certain it will call to testify (“Preliminary Witness List”) and (ii) witnesses that it is certain not to call to testify, in light of the reduced scope of the charges following confirmation.<sup>7</sup>
8. On 4 June 2020, Trial Chamber V filed its “Second Order Scheduling First Status Conference” (“Second Order”) setting up the First Status Conference to take place on 9 July 2020.<sup>8</sup>
9. On 15 June 2020, the Prosecution filed its Prosecution’s Submissions.

## IV. Applicable Law

10. Pursuant to article 74(2) of the Rome Statute (“Statute”), “[t]he “decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial”.

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<sup>6</sup> ICC-01/14-01/18-403-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-403-Red.

<sup>7</sup> Order to Provide a Preliminary Witness List, 22 May 2020, ICC-01/14-01/18-528.

<sup>8</sup> ICC-01/14-01/18-543, page 5, para. 7.

11. Articles 67(1)(a) and (b) of the Statute also provides that in the determination of any charge, the accused shall be guaranteed “[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks” and “[t]o have adequate time and facilities for the preparation of the defence [...]”.
12. Finally, and importantly, pursuant to article 64(2) of the Statute: “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

## V. Submissions

### A. The Pre-Trial Chamber significantly reduced the geographic and temporal scope of the charges and the Prosecution’s evidence must reflect this reduction

13. The Confirmation of Charges is one of the International Criminal Court’s unique procedural features that distinguishes this Court from other international criminal jurisdictions, such as the *ad hoc* tribunals where such a procedure is completely absent.<sup>9</sup> The purpose of the confirmation hearing is well established by the jurisprudence of this Court. The Appeals Chamber has held that:

[article 61 of the Statute] clearly shows that the confirmation of charges hearing exists to separate those cases and charges which should go to trial from those which should not, a fact supported by the drafting

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<sup>9</sup> See Judgement on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’ (“Bemba AJ”), Separate Opinion of Judge Van den Wyngaert and Judge Morrison, para 19.

history. It serves to ensure the efficiency of judicial proceedings and to protect the rights of persons by ensuring that cases and charges go to trial only when justified by sufficient evidence.<sup>10</sup>

14. The Confirmation Decision, taken as a whole, defines the scope of the charges.

As held by Trial Chamber I in the *Lubanga* case, “[p]ursuant to Article 74(2) of the Statute, the judgment “shall not exceed the facts and circumstances, described in the charges and any amendments to the charges”. The *charges and any amendments thereto establish the factual scope of the Decision* pursuant to Article 74(2)” (emphasis added).<sup>11</sup>

15. In the view of the Appeals Chamber, also in the *Lubanga* case,;

the term 'facts' refers to the factual allegations which support each of the legal elements of the crime charged. These factual allegations must be distinguished from the evidence put forward by the Prosecutor at the confirmation hearing to support a charge (article 61 (5) of the Statute), as well as from background or other information that, although contained in the document containing the charges or the confirmation decision, does not support the legal elements of the crime charged. *The Appeals Chamber emphasises that in the confirmation process, the facts, as defined above, must be identified with sufficient clarity and detail, meeting the standard in article 67 (I) (a) of the Statute*” (emphasis added).<sup>12</sup>

16. The Prosecution’s submissions do not take into account the object and purpose of the confirmation hearings proceeding, when it submits that “there is no ratio or presumed correlation between the scope of the criminal charges and that of the relevant evidence required to prove them.”<sup>13</sup> Such a submission completely glosses over the Pre-Trial Chamber’s explicit decision to decline to confirm 80 counts, and only retain 31.<sup>14</sup>

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<sup>10</sup> ICC-01/04-01/10-514, para. 39.

<sup>11</sup> ICC-01/04-01/06-2842, para. 3.

<sup>12</sup> ICC-01/04-01/06-2205, footnote 163.

<sup>13</sup> Prosecution’s submissions, para. 9

<sup>14</sup> Compare the schedule of charges contained in the Document containing the Charges, para. 628 with the Confirmation Decision’s operative part. Confirmation Decision, pp 104-112.

17. Such a massive reduction in confirmed charges makes it incumbent on the Prosecution to parse through its evidence such that its presentation does not exceed the scope of the charges as confirmed by the Pre-Trial Chamber. This means that evidence led by the Prosecution to establish facts during the confirmation stage, that were expressly found to not meet the required “substantial grounds to believe” threshold cannot now be used to establish those same facts for the purposes of satisfying any of the elements of the confirmed charges.
18. For example, the Prosecution argues that after the 5 December 2013 attack, Mr Ngaïssona allegedly continued promoting the Anti-Balaka practical acts and objectives as its leader, through financing the group, and purchasing weapons and ammunition.<sup>15</sup> The Prosecution further emphasizes that the Pre-Trial Chamber recognized that it had witness statements which related to such allegations. Missing from the Prosecution’s submissions is that while evidently, the Pre-Trial Chamber acknowledged the existence of such statements before it, the Pre-Trial Chamber found that such witness statements and interviews did not establish that Mr Ngaïssona contributed or promoted the alleged crimes committed by the Anti-Balaka through financing the group.<sup>16</sup> Therefore, to allow the Prosecution to call witnesses to establish the facts concerning such financing when the Pre-Trial Chamber specifically excluded them from the ambit of the charges because they were insufficiently supported by the evidence would render meaningless the confirmation procedure.

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<sup>15</sup> Prosecution Submissions para. 9 footnote 7 incorporating by reference ICC-01/14-01/18-488, para. 17.

<sup>16</sup> Confirmation Decision, para.176.

19. Indeed to accept the Prosecution's submissions would open the door to the trial proceedings re-litigating factual issues with respect to Mr Ngaïssona's acts and conduct that the Pre-Trial Chamber expressly determined did not satisfy the requisite threshold to be discussed at trial. This will lead to examinations of witnesses on factual allegations, which fall outside the scope of the charges. If the Prosecution reintroduces this evidence to establish such conduct, then the Defence will be obligated to show (again) how such evidence did not establish the lower threshold at confirmation, and thus it is impossible for it to satisfy the higher threshold necessary at trial.

20. Such an outcome would not be in accordance with the Trial Chamber's obligation to ensure the expeditiousness of the proceedings under article 64, and Mr Ngaïssona's right to be tried without undue delay under article 67. Not only will it add potentially hundreds of hours spent on the examination of witnesses,<sup>17</sup> but it will also mean that the confirmation process, which took a year and during which Mr Ngaïssona was detained would have had no impact on the expeditiousness of the proceedings.

21. Recently, the Pre-Trial Chamber highlighted in the present case the importance of a pre-trial chamber's gatekeeper function with respect to cases in which a pre-trial chamber confirms the charges. In its decision rejecting the Prosecution's request to amend the charges with respect to Mr Ngaïssona, the Pre-Trial Chamber reasoned that it is a critical function of the pre-trial chamber to set the factual boundaries of the trial and to not confirm charges which are not supported by evidence to the requisite standard.<sup>18</sup>

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<sup>17</sup> The Prosecution estimates needing 400 hours of in court testimony, which does not include the time needed for the Defence to cross examine witnesses. ICC-01/14-01/18-474, para. 15.

<sup>18</sup> ICC-01/14-01/18-517, para.23.

22. The approach of the Pre-Trial Chamber in the instant case stands in stark contrast to the pre-trial chamber which confirmed the charges against Mr Bemba. In the Appeals Judgment on the conviction of Mr Bemba, the Appeals Chamber found that his conviction exceeded the scope of the charges for criminal acts, which were confirmed to trial, but which were introduced via auxiliary documents, after the trial chamber was seized of the case.<sup>19</sup> However, the Appeals Chamber rejected Mr Bemba's appeal with respect to criminal acts that were found in the Amended DCC during the pre-trial phase, but for which the Pre-Trial Chamber found there was insufficient evidence to meet the "substantial grounds to believe" standard.
23. The dispositive reason for this finding was that the Pre-Trial Chamber in that case "[...] did not consider that it had to 'confirm' all (or indeed any) individual criminal acts." <sup>20</sup> Further, the Pre-Trial Chamber confirmed counts spanning across CAR territory.<sup>21</sup> Thus, all parties were on notice that the Pre-Trial Chamber did not intend to exclude any of the criminal acts in the amended DCC against Mr Bemba.<sup>22</sup>
24. The instant case is clearly distinguishable from *Bemba* for two reasons. First, unlike in *Bemba*, here, the Pre-Trial Chamber did intend to eliminate most of the Prosecution's factual allegations from its confirmation decision. It determined that while the Anti-Balakas may have formally been under the National Coordination, they retained a high degree of autonomy in terms of operational matters, such that Mr Ngaïssona had limited if any knowledge

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<sup>19</sup> *Bemba* AJ, para.115.

<sup>20</sup> *Ibid.*, para. 113.

<sup>21</sup> *Ibid.*, para. 81

<sup>22</sup> *Ibid.* Moreover, the Appeals Chamber found that the Pre-Trial Chamber erred in making broad findings with respect to categories of crimes rather than individual criminal acts. *Ibid.*, para. 110.

and control over their criminal actions.<sup>23</sup> It next proceeded to a thorough evaluation of the Prosecution's evidence that failed to show a nexus between Mr Ngaïssona and the crimes charged.<sup>24</sup> Second, the confirmed charges do not span the territory of CAR like in *Bemba*. Indeed, all the criminal acts pertaining to several localities in the instant case were not confirmed by the Pre-Trial Chamber, and thus the operative part of the confirmed counts makes no mention of them, and the operative part of the decision declines to confirm them.<sup>25</sup> The exclusion of these localities reduced the temporal scope of the charges, such that charges confirmed for trial span from 5 December 2013 with the last alleged criminal act occurring on 28 February 2014. Prior to the confirmation, the DCC imputed alleged crimes to Mr Ngaïssona up until December 2014.<sup>26</sup>

25. Given the clear intention of the Pre-Trial Chamber in this case to limit the factual scope of the charges, the Defence submits that the Preliminary Witness List should be further refined so as to not needlessly prolong the proceedings regarding factual allegations which the Pre-Trial Chamber refused to confirm. This would include removing witnesses from its list who are called to establish Mr Ngaïssona's subsequent acts to establish Mr Ngaïssona's prior intent.<sup>27</sup> Given the Pre-Trial Chamber declined to confirm such acts they cannot be used now to establish Mr Ngaïssona's prior intent.

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<sup>23</sup> Confirmation Decision, para. 164.

<sup>24</sup> Confirmation Decision, Section V: The Chamber's findings on non-confirmed charges, paras 164-239

<sup>25</sup> These localities are: Boeing Muslim Cemetery, Boy-Rabe, Yaloké, Gaga, Zawa, Bossemtélé, Boda, Carnot, Berbéati, and Guen. Confirmation Decision, para. 175.

<sup>26</sup> DCC, schedule of Charges, page 242.

<sup>27</sup> Prosecution Submissions para. 9 footnote 7 incorporating by reference ICC-01/14-01/18-488, paras 12-13.

26. The Prosecution submits it has refined its witness list in light of the reduced scope of the charges.<sup>28</sup> However, its intention to call over [REDACTED] witnesses concerning the case of Mr Ngaïssona, which concerns alleged crimes occurring over a time span of less than three months in four locations,<sup>29</sup> all of which formed one “course of action” according to the Confirmation Decision belies this claim. While the Defence observes the removal of [REDACTED] that were not confirmed by the Pre-Trial Chamber,<sup>30</sup> the list of insider witnesses remains for the most part unchanged.<sup>31</sup>

**B. In view of the charges being reduced, the Prosecution should have refined its list of witnesses with respect to the contextual elements of the crimes**

27. The Prosecution submits that its reduced Preliminary Witness List has “taken account of the breadth of the contextual elements of the charged crimes as confirmed”.<sup>32</sup> The Defence, however, having made a preliminary assessment of both the Prosecution’s Submissions and the Preliminary Witness List, will elaborate below on how this has not been the case in reality.

28. The contextual elements, such as the widespread nature of an attack or the existence of an armed conflict not of international character form, respectively, an intrinsic part of the legal elements of the crimes against

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<sup>28</sup> Prosecution submissions para. 8.

<sup>29</sup> The Prosecution’s case before the confirmation of charges hearing spanned 14 locations whereas the Pre-Trial Chamber confirmed that crimes occurred in four locations, namely Bangui including Catting and Boeing, the Yamwara school base, the PK-9 Mbaïki axis, and Bossongoa. *Compare* the schedule of charges contained in the Document containing the Charges, para. 628 *with* the Confirmation Decision’s operative part. Confirmation Decision, pp 104-112.

<sup>30</sup> The Defence notes this is the case for Witnesses [REDACTED].

<sup>31</sup> The prosecution in its list eliminates only [REDACTED] witnesses which in the Defence’s submission are insider witnesses. The only insider witnesses the Prosecution has removed from its list of witnesses are: [REDACTED].

<sup>32</sup> Prosecution’s Submissions, para. 11.

humanity and war crimes charged. They must, as developed above,<sup>33</sup> be identified by the Pre-Trial Chamber in the decision confirming the charges *with sufficient clarity and detail*.

29. This has been emphasized by Judge Tarfusser who stated that these contextual elements of the crimes are essential elements of the crime, “singling out the acts listed in article 7 [and 8] from the corresponding ordinary crimes and bringing them within the boundaries of the Court’s jurisdiction” and therefore cannot be “made up of events not clearly singled out in the charges”.<sup>34</sup>
30. This is also consistent with the accused’s right to receive detailed information of the charges promptly, under article 67 (1) (a) of the Statute, as well as his or her right to have adequate time for the preparation of the defence, under article 67 (1) (b) of the Statute.
31. In the Confirmation Decision, the Pre-Trial Chamber, citing Judge Tarfusser’s separate opinion in *Abu Garda*, took the approach of “enter[ing] *no* factual findings in respect of the events for which the evidence submitted allegedly supporting the link to either of the suspects is either missing or otherwise unsuitable to meet the relevant evidentiary threshold” (emphasis added).<sup>35</sup> It explained that “whenever the evidence does not allow for the establishment of a link between the charged events and the suspect [...], not only is the Pre-Trial Chamber under a duty to decline to confirm the charges, but it is also advisable “to refrain from delving into the legal analysis of the fact” [...].”<sup>36</sup> Therefore, the Pre-Trial Chamber purposely refrained from delving into the facts and their related legal analysis for the alleged crimes committed by the

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<sup>33</sup> See paragraph 15 above.

<sup>34</sup> Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, para. 47.

<sup>35</sup> Confirmation Decision, paras 59, 165.

<sup>36</sup> *Ibid.*

Anti-Balaka at the Boeing Muslim Cemetery, in Boy-Rabe (Bangui), Yaloké, Gaga, Zawa, Bossemtélé, Boda, Carnot, Berbérati and Guen.<sup>37</sup>

32. These events which have not been addressed by the Pre-Trial Chamber at all and not proved to the requisite standard at the confirmation stage cannot now be relied upon by the Prosecution to prove the contextual elements of the alleged war crimes and crimes against humanity as confirmed. In the *Gbagbo* case, 41 incidents - which the Prosecution had decided from the outset not to include in the charges - have been considered as part of the factual allegations to prove an attack against the civilian population, but in that case they had been identified by the Pre-Trial Chamber as “substantiated by evidence with a sufficient level of specificity”.<sup>38</sup> It is noteworthy that, regrettably, the approach taken in the matter of these other incidents in the *Laurent Gbagbo and Charles Blé Goudé* case has contributed to “the level of legal and conceptual confusion which has blurred this case from the beginning”.<sup>39</sup>

33. Similarly, in the *Bemba* case, the Pre-Trial-Chamber relied both on direct and indirect evidence to conclude that there were substantial grounds to believe that there had been attacks in a certain number of locations and that therefore the attack was widespread.<sup>40</sup> It is on this specific ground that the Trial Chamber considered that the relevant additional details provided in the Second Amended DCC of the Prosecution had not exceeded the scope of the charges.<sup>41</sup>

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<sup>37</sup> See, e.g., Confirmation Decision, paras 165, 175, 183, 198, 207, 214, 221.

<sup>38</sup> ICC-02/11-01/11-656-Red, para. 73.

<sup>39</sup> Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, para. 41.

<sup>40</sup> ICC-01/05-01/08-424, para. 117.

<sup>41</sup> ICC-01/05-01/08-836, para. 55. See also *ibid.*, para. 80, where the Chamber found that the “introduction [...] of the ‘systematic’ element in the Second Amended DCC exceeds the scope of the charges” since the Pre-Trial Chamber only confirmed that the attack was “widespread” and did not make any findings as to the “systematic” nature of the attack, considering that these elements are

34. However, in the present case, the alleged incidents in the localities cited in paragraph 31 above have been expressly excluded from the scope of the charges pursuant to the Confirmation Decision. In addition, there is no trace of an appropriate level of specification of the aforementioned events in the section of the Confirmation Decision relating to the contextual elements. Although the Pre-Trial Chamber accepted the broader allegations of (i) widespread attack in “several western CAR prefectures” and (ii) armed conflict not of an international character from September 2013 until December 2014,<sup>42</sup> it did not make any explicit findings in regard to this broad geographical and temporal scope, let alone pointing to the existence of reliable evidence that could have supported such broad findings.<sup>43</sup> More specifically, as explained, while relying on detailed facts underlying the confirmed charges,<sup>44</sup> the Pre-Trial Chamber did not enter into any analysis of the facts underlying the alleged crimes specifically excluded from the scope of the charges - nor has it cited one witness in this regard - for the purpose of concluding that the relevant contextual elements were proved to the required threshold.

35. The Defence therefore submits that the Pre-Trial Chamber’s findings regarding the widespread character of the alleged attack or the “spread of the clashes between the two parties” were not sufficiently detailed and clear, so far as any non-confirmed incidents are concerned, to fall within the facts and

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presented in the alternative in Article 7. The Chamber concluded that it would therefore make no findings in this Judgment as to whether the attack was “systematic”.

<sup>42</sup> Confirmation Decision, paras 70, 72.

<sup>43</sup> See Confirmation Decision, paras 70, 64. To support its conclusion of alleged attacks across different Western CAR Prefectures during the alleged period of the charges, the Pre-Trial Chamber merely refers, in footnote 136 of the Confirmation Decision, to evidence relating to the crimes *charged*, the latest having allegedly occurred end of February 2014. In footnote 137, referring exclusively to the alleged commission of other inhumane acts, the Pre-Trial Chamber relies [REDACTED]. See ICC-OTP-2001-7017, para. 378.

<sup>44</sup> Confirmation Decision, footnote 136.

circumstances of the case for the purpose of proving the contextual elements of the alleged confirmed crimes. Thus, to allow the Prosecution to rely on witness statements addressing these questions would exceed the scope of facts and circumstances of the charges.

36. In light of the above development, and, in particular, of the extraneousness of the aforementioned non-charged incidents, which fall outside the scope of the charges, these excluded alleged incidents should not now become the subject-matter of either the documentary evidence or of the forthcoming testimonies, whether they are given live or under rule 68(2) of the Rules, and whether they are relied upon to prove the conduct of the accused or the contextual elements of the alleged crimes as confirmed.<sup>45</sup>

37. Yet, from a preliminary analysis of the Preliminary Witness List, it appears that the Prosecution intends to rely on many crime-based or fact witnesses whose statements relate exclusively to alleged incidents that have expressly been excluded from the charges.<sup>46</sup>

38. By announcing that in reducing its list, and asserting that it had “taken account of the breadth of the contextual elements of the charged crimes as confirmed, including evidence of an non international armed conflict in existence *through at least August 2014*” (emphasis added),<sup>47</sup> the Prosecution seems indeed to agree with the Defence that contextual elements of war crimes may not be proved with alleged evidence of crimes that have been excluded from the charges, to the extent that certain non-charged incidents

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<sup>45</sup> Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, paras 42-49. In particular, in paragraph 49, Judge Tarfusser states: “However, I believe that the first, fundamental and decisive reason making it impossible to rely on any of these [20 other] incidents – and the ensuing absence of the need to look at them and at the evidence tendered in their support in any detail – is that they all fall outside the scope of the charges”.

<sup>46</sup> See e.g. in the table of disclosed witness the Prosecution intends to certify under rule 68(2): witnesses [REDACTED].

<sup>47</sup> Prosecution’s Submissions, para. 11.

were alleged in the Document Containing the Charges to have lasted until after August 2014.<sup>48</sup> The specific reference by the Prosecution to the latest crime charged against Mr Yekatom, *i.e.* the war crime of conscription, enlistment and use of children under the age of 15 to participate actively in hostilities “between at least December 2013 and August 2014”, indeed suggests that none of the crimes excluded from the scope of the charges, to the extent that some of them lasted after August 2014, will be relied upon to prove the existence of an non international armed conflict.<sup>49</sup> However, the Prosecution appears then inconsistent in that it seems to intend to rely on witness testimonies or statements related to the non-confirmed charges to prove the widespread character of the attack up until December 2014, when the last alleged crime against humanity charged is actually alleged to have lasted up until end of February 2014.<sup>50</sup>

39. In the same vein, with respect to the alleged evidence that the Anti-Balakas would constitute an organization within the meaning of article 7(2)(a) of the Statute, none of the reasons taken into account by the Pre-Trial Chamber to determine there was an organization, involved alleged facts posterior to February 2014.<sup>51</sup> Therefore, the Prosecution has the opportunity to prove, beyond reasonable doubt, that there was an organization without [REDACTED] about the functioning, in the course of 2014, of (i) the alleged national coordination or (ii) any alleged local coordination, all the more than “the Prosecutor has not proven to the required threshold that a sufficiently strong link existed between Ngaïssona and the *National Coordination in Bangui*,

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<sup>48</sup> See ICC-01/14-01/18-282-Conf-AnxB1, pages 232-245.

<sup>49</sup> Confirmation Decision, page 105.

<sup>50</sup> Prosecution’s Submissions, para. 11, Annex A.

<sup>51</sup> Confirmation Decision, para. 69.

on the one hand, and the ComZones in the field”<sup>52</sup> or that “the purpose of the National Coordination meetings [...] was to advance and contribute to the national reconciliation and the restoration of peace in CAR”.<sup>53</sup>

40. Accepting the list of witnesses as it stands now would also be highly prejudicial to the right of the accused to an expeditious trial. The charges as confirmed should shape the temporal scope of the trial. It would result “in more focussed debates in the courtroom and would contribute to the expeditiousness of the proceedings in avoiding the submissions of hundreds of documents [and the hearings of dozens of testimonies] showing a link to the charged events which, at best, will be tenuous”.<sup>54</sup> In the *Katanga and Ngudjolo* case, Judge Cotte asked the Prosecution to work on a re-evaluation of its list of witnesses and on the expected duration of the various testimonies “to allow each witness to give testimony on the areas that are of greatest use or the areas in which he can provide a substantive contribution”<sup>55</sup> and by considering unnecessary to examine witnesses “which in its view only provide indirect or very general information [...]”.<sup>56</sup> In respect specifically of the contextual elements of the crimes, Judge Cotte expressed the Trial Chamber’s attempt “to pinpoint all aspects that are not absolutely necessary so that [it] can really focus on the substantive issues so that [it] can have a useful discussion or proceedings”.<sup>57</sup>

41. The use of rule 68(2) of the Rules to have witness statements, expected to prove the contextual elements of the crimes, admitted into the case record, with a view to counterfeiting the expeditiousness issue, would be misplaced,

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<sup>52</sup> Confirmation Decision, para. 170. Note, for example, that [REDACTED] are included in the Preliminary Witness List.

<sup>53</sup> Confirmation Decision, para. 211.

<sup>54</sup> Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-Conf-AnxB, para. 49.

<sup>55</sup> ICC-01/04-01/07-T-76-Red-ENG CT2 WT, page 3, lines 6-8.

<sup>56</sup> ICC-01/04-01/07-T-76-Red-ENG CT2 WT, page 15, lines 18-23.

<sup>57</sup> ICC-01/04-01/07-T-76-Red-ENG CT2 WT, page 4, lines 15-18.

in light of the expected subject-matter of the testimonies in question. If the Prosecution would pursue this route and formally request the admission of prior recorded testimonies to prove contextual elements of the crimes, the Defence would in all likelihood strongly oppose on the ground that questions as to the contextual elements of the crimes relate to core issues materially in dispute and for which cross-examination is essential.

**C. Requiring the Prosecution to limit its presentation of evidence to the confirmed charges in no way hampers its right to present its case**

42. The Prosecution in paragraphs 9 and 12 of the Prosecution's Submissions suggests that further refining its list of witnesses would run counter to the Prosecution's right to a fair trial, which guarantees that it be allowed to present relevant and probative evidence.<sup>58</sup> The Defence submits that fair trial rights, at their core exist to ensure the rights of an accused; such fair trial rights are enshrined under article 67 of the Statute. No such provision exists with respect to the Prosecution. The Defence will however respond to the Prosecution's arguments regarding its right to a fair trial. This submission is fundamentally flawed since nowhere in the Defence's submissions or in the Single Judge's Order is it suggested that the Prosecution be limited in presenting evidence related to the charges in the present case. Indeed, the Defence submits that the presentation of evidence at trial should be focused on leading evidence to establish facts that are strictly circumscribed by the confirmed charges.

43. Prior to the confirmation of charges procedure, the Prosecution has unfettered discretion to shape and formulate the charges and to present any evidence that

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<sup>58</sup> Prosecution submissions, para. 11.

satisfies them.<sup>59</sup> This discretion ends with the Confirmation Decision, which confirms charges that are sustained by sufficient evidence to meet the “substantial grounds to believe” standard, and then the Trial Chamber either acquits or convicts on the basis of the confirmed charges.<sup>60</sup> Thus, the Prosecution has the fair trial right guarantee to present relevant and probative relevant evidence, but within the confines set by the Pre-Trial Chamber, which in this case significantly reduced the geographical and temporal scope of the charges with respect to Mr Ngaïssona.

44. To proceed otherwise, would go against the Trial Chamber’s obligation to ensure the expeditiousness of the proceedings under article 64, and Mr Ngaïssona’s right to be tried without undue delay. Indeed, allowing the Prosecution to present the same evidence as prior to confirmation would translate to hundreds of hours spent in the court examining witnesses, and assessing rule 68(2)(b) statements on factual issues which are extraneous to the charges. If the factual allegations established by these witnesses exceed the scope of the charges and therefore cannot be relied upon, allowing their presentation would violate Mr Ngaïssona’s right to be tried without undue delay.

Respectfully submitted on 16 July 2020,




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<sup>59</sup> See *Bemba AJ*, Separate Opinion of Judge Van den Wyngaert and Judge Morrison, para. 19.

<sup>60</sup> *Ibid.*