



Original: **English**

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

Date: **31 August 2020**

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 *PROSECUTOR* v. *ALFRED YEKATOM* AND *PATRICE-
EDOUARD NGAÏSSONA***

Public

Prosecution's Submissions on the 'Scope of the Charges'

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pursuant to Trial Chamber V’s (“Chamber”) 9 July 2020 direction,¹ the Office of the Prosecutor (“Prosecution”) provides its submissions on the “remaining issues in relation to the charges”,² following the 11 December 2019 Confirmation of Charges Decision.³

2. The confirmed charges against YEKATOM and NGAISSONA are sufficiently specific and accord with article 74(2) and regulation 52 of the Regulations of the Court (“RoC”). The Confirmation Decision identifies the factual allegations underlying the charges with sufficient clarity and detail. The Accused are adequately informed of the nature, cause, and content of the charges pursuant to article 67(1)(a). In addition, further detail of the charges may be provided in auxiliary documents.⁴ As the Chamber has already found, YEKATOM has received adequate notice with respect to the charges of murder in the context of the attack on Bangui, and the recruitment and use of children under 15 years in hostilities.⁵ Indeed, both Accused have sufficient notice of all of the confirmed charges.

3. There are no substantive issues materially affecting the Parties’ and Participants’ understanding of the ‘scope of the charges’ concerning YEKATOM. As set out in the operative language of the Confirmation Decision (“Operative Part”), the charges confirmed against YEKATOM remain substantially unchanged relative to the Document Containing the Charges⁶ (“DCC”), save certain modes of liability.⁷

4. Regarding NGAISSONA, the Confirmation Decision substantially reduced the number of charges alleged in the DCC. Specifically, it did not confirm NGAISSONA’s alleged individual criminal responsibility for Anti-Balaka crimes against Muslim civilians perpetrated in Bossemptele, Berberati, Guen, Boda, Yaloke, Gaga, Zawa, and Carnot (“Provincial Incidents”). In addition, NGAISSONA’s responsibility for other crimes, including the Anti-Balaka’s recruitment and use of child soldiers through August 2014, was not confirmed.

¹ See ICC-01/14-01/18-T-012-ENG ET, lns. 12-22.

² ICC-01/14-01/18-T-012-ENG ET, ln. 21.

³ ICC-01/14-01/18-403- Red-Corr (“Confirmation Decision”).

⁴ ICC-01/04-01/06-3121-Red, paras 124, 132; ICC-01/04-02/06-2359, para. 37; *see also* ICC-01/14-01/18-585, para. 34.

⁵ ICC-01/14-01/18-585, para. 34.

⁶ ICC-01/14-01/18-282-Conf-AnxB1.

⁷ See ICC-01/14-01/18-503-Red.

5. On this basis, NGAISSONA's prior submissions⁸ erroneously contend that the reduction in the 'scope of the charges' requires a corresponding automatic reduction in the 'scope of the evidence' for trial. NGAISSONA conflates these related but distinct notions in seeking to preclude the Prosecution's submission of relevant and probative evidence going to proof of material elements of the confirmed charges. Thus, notwithstanding the plain reading of the Confirmation Decision, the Prosecution considers that further clarity on this matter is necessary.

6. Given the timing of the Parties' and Participant's prospective submissions as directed, the Prosecution reserves its right to respond to the Defence's submissions, insofar as this Submission may not fully anticipate the Defence's arguments.

II. SUBMISSIONS

7. The limitation on *relevant* evidence NGAISSONA advances would not only undermine the Prosecution's right to effectively present its case, but constrain the Trial Chamber's truth-finding function. Moreover, it is predicated on a deeply flawed approach to the assessment of evidence in international criminal trials.

8. In a case like this, involving two accused, direct and imputed criminal responsibility, and a matrix of crimes committed by and through a network comprising an organised armed group with a degree of centralised coordination, circumscribing the relevant evidence is both artificial and damaging to a trial. Clearly, a given item of evidence can be probative of different elements of a criminal case, and thus multifaceted. For instance, evidence of an accused's role as a central planner or enabler within a structure can prove, *inter alia*, (a) the existence of an organisation; (b) the capacity of the organisation to establish a policy (thus, qualifying it as an 'organisation' for crimes against humanity); (c) the existence or implementation of that policy – or the means of its dissemination within the group; (d) the contributions of the accused to the resultant crimes, support of the criminal activity, or knowledge of the likelihood of their commission, and the applicable mode of criminal responsibility under article 25; and (e) the accused's intent under article 30. The Defence's suggestion that such evidence may be parsed on the basis of the number of charges – loses sight of this basic tenet.

⁸ See ICC-01/14-01/18-473-Red; see also ICC-01/14-01/18-573-Red.

9. Therefore, from the outset, it is important to underscore the distinction between the ‘scope of the charges’ as confirmed, and the ‘scope of the evidence’ relevant to proving their material elements. The Confirmation Decision sets the bounds of the facts and circumstances regarding the charges at trial. It does not, however, constrain the relevant *evidence* which proves them. The ‘scope of the evidence’ at trial is thus determined only by a Trial Chamber’s proper application of the statutory evaluative criteria, namely its relevance, probative value, and potential prejudice⁹, not solely by the ‘scope of the charges’ in the abstract, but in respect of the matters at issue.

A. The Nature of ‘Charges’

10. Although the relationship between a confirmation decision and a subsequent trial is established in the Court’s practice and jurisprudence, the contours of what comprises a ‘charge’ are not as clear. As Pre-Trial Chamber II recently observed, “[...] it cannot be said that a definite understanding of the notion of what constitutes a charge has been reached within the jurisprudence of the Court”.¹⁰ Nevertheless, it is clear that “both the facts and their legal characterisation concur to make a charge.”¹¹ In this respect, the “facts and circumstances” which delimit a trial per article 74(2)¹² necessarily respond to the elements of the crimes and modes of liability — which must be established beyond reasonable doubt.¹³ In other words, the *elements* of the confirmed charges largely dictate the evidential scope of a trial. And, to the extent that the Operative Part of the Confirmation Decision here cross-references the narrative section (“Narrative Part”) and the DCC, they too inform the understanding of the charges and their scope.¹⁴

⁹ See *e.g.*, articles 64(9) and 69; rules 63, 64 of the Rules of Procedure and Evidence (“Rules”); ICC-01/05-01/08-1386, para. 37 (“irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial”); see ICC-01/05-01/13-1989-Red, para. 192 (“‘Recognising’ the submission of the evidence was the formal action taken by the Chamber to confirm that the relevance, probative value and potential prejudice of the evidence would be considered when deliberating the judgment”).

¹⁰ ICC-01/14-01/18-517, para. 18.

¹¹ ICC-01/14-01/18-517, para. 18; ICC-01/09-01/11-373, para. 44; see also ICC-01/09-02/11-382-Red, para. 56.

¹² See article 74(2) (“The decision shall not exceed the facts and circumstances described in the charges”).

¹³ ICC-01/04-01/06-3121-Red, para. 22; ICC-01/04-02/12-271-Corr, paras. 124-125; ICC-01/05-01/13-2275-Red, para. 96; ICC-01/05-01/08-3636-Red, para. 42.

¹⁴ The *Ntaganda* Trial Chamber—bearing in mind the characteristics of that confirmation decision—has further determined that “in principle, the ‘operative paragraphs’ of the Confirmation Decision [...] must be read in context and understood by reference to other relevant portions of the Confirmation Decision, as well as to the [C]harges as presented in the DCC.”: see ICC-01/04-02/06-450, para. 40. The Appeals Chamber has confirmed

11. The Chamber's Practice Manual confirms this construction. It provides that the “‘material facts and circumstances’ (*i.e.* the facts and circumstances that must be described in the charges (cf. Article 74(2) of the Statute) [...] *are the only facts subject to judicial determination* to the applicable standard of proof at confirmation and trial stages, respectively) and their legal characterisation.”¹⁵ Thus, a determination on these ‘material facts’ does not constrain the *evidence* relevant to their proof — *i.e.*, ‘subsidiary facts’.

12. Several chambers, including the Appeals Chamber, have distinguished between ‘material facts’ and evidence not subject to judicial determination.¹⁶ Thus, the term ‘facts and circumstances described in the charges’ attends to those “factual allegations *which support each of the legal elements of the crime charged*”.¹⁷

13. In the Kenya Situation, Pre-Trial Chamber II similarly observed:

“among the different facts placed before the Chamber for its consideration, a distinction must be made between the facts underlying the charges - *i.e.* the ‘facts described in the charges’, which, as such, are the only ones that cannot be exceeded by the Trial Chamber once confirmed by the Pre-Trial Chamber - and facts or evidence that are *subsidiary* to the facts described in the charges, *serving the purpose of demonstrating or supporting their existence*”.¹⁸

Again, in essence, this refers to *evidence* relevant to, and probative of, material elements of the confirmed charges.

14. Likewise, seizing on this distinction, the Chamber's Practice Manual defines ‘subsidiary facts’ as “those facts that are relied upon by the Prosecutor as part of his/her

this approach: ICC-01/05-01/13-2275-Red, para. 198. The Pre-Trial Chamber in this case deviated from the Chamber's Practice Manual in this respect ([Chamber's Practice Manual](#) (2019), para. 66); although this is unfortunate, it does not mean that the charges are not specific enough.

¹⁵ [Chamber's Practice Manual](#) (2019), para. 35 (emphasis added), last visited 27 August 2020

¹⁶ See *e.g.* ICC-02/11-01/11-325, para. 27 (“[...]the material facts underlying the charges on which the Prosecutor seeks to bring the person to trial [must] be clearly and comprehensively identified and distinguished from those facts of a mere subsidiary nature”); see ICC-01/04-01/06-2205, fn. 163 (“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) ...”); ICC-01/09-01/11-373, para. 47 (“[...] a distinction must be made between the facts underlying the charges [...] and facts or evidence that are subsidiary to the facts described in the charges, [...]”); see also [Chamber's Practice Manual](#) (2019), para. 36.

¹⁷ See ICC-01/09-01/11-373, para. 46 (emphasis added). See also ICC-01/04-01/06-2205 OA15 OA16, para. 90, fn. 163.

¹⁸ ICC-01/09-02/11-382-Red, para. 59 (emphasis added); see also ICC-01/09-01/11-373, para. 47 (citing , ICC-02/05-03/09-121-Corr-Red, para. 36).

argumentation in support of the charges and, as such, are *functionally ‘evidence’*”.¹⁹ Moreover, given the manual’s imperative that “[t]here shall be no confusion between the material facts described in the charges and the ‘subsidiary facts’”²⁰ regarding the confirmation process, it is clear that a confirmation decision may not restrict evidence at trial going to proof of the confirmed charges, and particularly material elements thereof. For article 61(7) purposes, the ‘facts and circumstances’ described in the charges is distinguishable from the evidence through which they are proven.²¹

15. The Chamber’s Practice Manual reflects the Court’s consensus, including that, “[i]n decisions confirming the charges, *in order not to predetermine issues or pre-adjudicate probative value of evidence which will be fully tested only at trial*, the Pre-Trial Chamber should keep the reasoning strictly limited to what is necessary and sufficient for the Chamber’s findings on the charges”.²² It must be presumed that the Confirmation Decision reflects this limitation and purpose.

16. As such, this Chamber’s deference to the Pre-Trial Chamber’s findings on the confirmed charges²³ is confined to and justified only with respect of their material elements. Although the ‘scope of the charges’ is limited by the ‘facts and circumstances describing them under article 74(2), “[n]o binding effect (whether on factual or legal matters) is [...] attached to the reasoning provided in the Confirmation Decision by which the Chamber explains how it reached its final determination under article 61(7) of the Statute [...]”.²⁴ Rather, the Chamber must independently apply articles 64 and 69²⁵ in determining the appropriate ‘scope of the evidence’ at trial. In turn, the appropriate “scope of the evidence” must be determined with due consideration, *inter alia*, to the Prosecution’s right to adequately present its case at trial, and to substantiate each of its components with sufficient evidence.

17. A Trial Chamber’s responsibility to assess evidence cannot be ceded to, nor constrained by, a Pre-Trial Chamber. As the Appeals Chamber has held, “it should be underlined that

¹⁹ [Chamber’s Practice Manual](#) (2019), para. 36 (emphasis added).

²⁰ [Chamber’s Practice Manual](#) (2019), para. 36 .

²¹ ICC-01/05-01/08-3343, para. 31.

²² [Chamber’s Practice Manual](#) (2019), para. 63 (emphasis added); *see* ICC-02/04-01/15-428, para. 26.

²³ ICC-01/14-01/18-T-012-ENG, p.63, ln. 12; *see also* ICC-01/14-01/18-545, para. 15.

²⁴ ICC-02/04-01/15-1147, para. 19, citing ICC-02/04-01/15-428, para. 26.

²⁵ *See* article 69(3) (“[t]he parties may submit evidence relevant to the case, in accordance with article 64”).

irrespective of the approach the Trial Chamber chooses [submission or admission], it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial.”²⁶

18. For this reason, NGAISSONA’s contention that the Chamber should restrict prospective evidence absent an evaluation of its relevance to matters which remain at issue in the case, such as the modes of liability and the contextual elements of crimes against humanity or war crimes, is untenable.²⁷ This is particularly true of evidence bearing on material elements of the confirmed charges. By definition, such evidence is relevant to, and probative of, the ‘facts and circumstances’ described in the Confirmation Decision.

19. A Chamber’s determination of whether prospective trial evidence is relevant, that is, whether there is a link between the evidence and the charge to be proved²⁸ cannot be done in the abstract. Whether such prospective evidence “tends to make the existence of any fact that is of consequence to the determination of an issue in a case more or less probable than it would be without that evidence”,²⁹ should not be resolved in advance of its consideration and purpose. Doing otherwise limits a Chamber’s ability to assess the relevance and probative value of a given item in view of other evidence presented at trial or even the totality of evidence in the case³⁰ — an approach expressly sanctioned by the Appeals Chamber.³¹ It is also axiomatic that an assessment of the relevance and probative value of an item of evidence

²⁶ ICC-01/05-01/08-1386, para. 37 (emphasis added).

²⁷ ICC-02/04-01/15-1210, para. 10 (“evidence that is not squarely part of the facts and circumstances described in the charges could still have been relevant to other parts of the case, such as other confirmed charges or the contextual elements charged”); ICC-02/04-01/15-T-85-Red2, p. 7, ln. 15 to p. 8, ln. 9 (“the attacks and criminal conduct outside of the charged time period [...] can be put forward as evidence to support the facts and circumstances in the charged time period”); ICC-02/04-01/15-T-182-Red2, p. 7 lines 11-15 (“the Prosecution has the right to ask questions with regard to contextual elements [...]t. We may entertain also other than the four attacks that be evidence of other facts and circumstances described in the charges, and especially example is including contextual elements. Modes of liability and so on and so forth”); *see similarly* ICC-01/04-02/06-968, paras. 13-17.

²⁸ ICC-01/09-02/11-382-Red, para. 79 (“Relevance requires a nexus between the specific piece of evidence and a charge or a fact of the case to be proven, in the sense that a piece of evidence is relevant to the Chamber’s determination of a specific fact if it tends to make the existence of such fact more or less probable. Therefore, in assessing the relevance of the evidence, the Chamber shall establish the extent to which this evidence is rationally linked to the fact that it tends to prove or to disprove”); *see also* Stahn C. and Da Silva RB, in “Article 69”, in Fernandez, Pacreau and Ubéda-Saillard in *Statut de Rome de la Cour pénale internationale. Commentaire article par article*, 2nd ed. (Pedone, 2019), p. 1915.

²⁹ ICC-01/05-01/08-424, para. 41.

³⁰ *See* ICC-01/05-01/13-1285, para. 10.

³¹ *See* ICC-01/05-01/13-2275-Red, para. 600.

can only be made after it is submitted to the Court – not before,³² as NGAISSONA’s prior submissions suggest.

B. The Scope of the Charges

20. Bearing in mind that a charge comprises a set of facts and their legal characterisation, the Operative Part of the Confirmation Decision succinctly describes the charges against the Accused.³³ It also cross-references the Narrative Part and the DCC, in the context of which the charges must be understood.³⁴

21. The Operative Part identifies the specific crimes against humanity and war crimes charged here, including their respective context, temporal scope, geographical particulars, and the relevant modes of liability, satisfying the applicable evidentiary threshold of “substantial grounds”.³⁵ It also broadly recites the manner in which the Accused participated in the charged crimes, *inter alia*, in the language of the Statute.

22. In YEKATOM’s case, the Operative Part describes his contributions to the 21 crimes with which he is charged as follows:

“(i) structuring, training and equipping his Anti-Balaka elements; (ii) preparing the Anti-Balaka attacks and advances, and participating and leading his group in the execution of these attacks and advances; (iii) issuing orders to Anti-Balaka members, including patently illegal instructions; and (iv) conscripting and/or enlisting children under the age of fifteen years into his group and using them to assist him in the camp-bases, giving orders for them to be stationed at barriers and checkpoints as well as to actively participate in hostilities.”³⁶

23. For NGAISSONA, the Operative Part describes his contributions to the 30 crimes with which he is charged, as follows:

³² See ICC-01/05-01/13-2275-Red, para. 598 (“noting a Chamber’s obligation to consider the relevance or probative value on the submission of evidence or thereafter”); see also ICC-01/14-01/18-602, para. 16 (noting the limitations of rule 64(1), precluding objections to evidence *before* the time of submission) (citing ICC-01/05-01/08-1386, paras. 48-49).

³³ ICC-01/14-01/18-403-Red-Corr, pp. 100-107.

³⁴ See *above* fn. 14 .

³⁵ See article 61(7).

³⁶ ICC-01/14-01/18-403-Red-Corr, p. 103.

“(i) taking steps to structure the Anti-Balaka; (ii) financing the Anti-Balaka, including for the purchase of weapons; (iii) issuing instructions to Anti-Balaka members, including with regard to the 5 December 2013 Attack and attacks preceding it; and (iv) liaising with Anti-Balaka members exercising key functions, including [REDACTED]”.³⁷

i. The context of the charged crimes

24. As noted, the Operative Part sets out the context applicable to the confirmed article 7 and article 8 crimes. These are further elaborated³⁸ in the Narrative Part, as are the culpable acts and conduct of the Accused, and the descriptions of the charged crimes themselves.

25. It is critical to the Chamber’s assessment and determination of the ‘scope of the charges’ to take specific account of the relevant contextual elements. Indeed, these comprise substantive and material elements of all 51 charges of war crimes and crimes against humanity.³⁹ Indeed, the NGAISSONA Defence has previously conceded that “questions as to the contextual elements of the crimes *relate to core issues materially in dispute*”.⁴⁰ The relevance and materiality of evidence going to their proof is incontestably probative of the ‘facts and circumstances’ of the confirmed charges.

26. For both Accused, the Operative Part describes the relevant material facts comprising the contextual elements in identical terms, incorporating by reference specific paragraphs of the DCC. Thus, regarding the charged war crimes, it provides that they were:

“all committed in the context of and associated with an armed conflict not of an international character ongoing in the territory of the CAR from September 2013 until at least December 2014 between the Seleka and the Anti-Balaka, including Yekatom’s group as set out in paragraphs 50-52 and 115-118 of the DCC and paragraphs 61-66 of the present decision”.⁴¹

27. Regarding the charged crimes against humanity, it further provides that they were:

³⁷ ICC-01/14-01/18-403-Red-Corr, pp. 106-107.

³⁸ The Operative Part references specific paragraphs in the narrative of the Confirmation Decision and DCC, thus incorporating them.

³⁹ See articles 7(1) and 8(2) of the Elements.

⁴⁰ ICC-01/14-01/18-573-Red, para. 41 (emphasis added).

⁴¹ ICC-01/14-01/18-403-Red-Corr, pp. 101, 105 (emphasis added).

“all committed as part of a widespread attack conducted by the Anti-Balaka, including Yekatom’s group, between September 2013 and December 2014, against the Muslim civilian population and those perceived as collectively responsible for, complicit with, or supportive of the Seleka, pursuant to or in furtherance of a criminal policy to primarily target the Muslim population in Bangui and in western CAR Prefectures in retribution for Seleka exactions as set out in paragraphs 90-114 of the DCC and paragraphs 62-65 of the present decision”.⁴²

28. The Narrative Part of the Confirmation Decision informs the Operative Part, as well as the expressly cited provisions of the DCC which are incorporated therein. These further substantiate the material ‘facts and circumstances’ bearing upon the scope of the contextual elements, and elucidate the relevance and materiality of prospective trial evidence – *i.e.*, the ‘scope of the evidence’ relating to the confirmed charges. This is easily gleaned from the evidence cited in for relevant factual findings.

a. War crimes

29. In the context of the charged war crimes, the Narrative Part of the Confirmation Decision provides:

“... there are substantial grounds to believe that the Anti-Balaka constituted an organisation within the meaning of article 7(2)(a) of the Statute throughout the time relevant to the charges for the following reasons (i) from June 2013 onwards, the Anti-Balaka developed a military-like structure, with elements organised into sections and companies, under a functioning command structure with clear reporting lines; (ii) a large number of members were recruited, reaching 52,000 by February 2014; (iii) recruits received training from former FACA members; (iv) from September 2013 onwards, the Anti-Balaka proved to have the capacity to carry out coordinated attacks, the most notable being the 5 December 2013 Attack on Bangui; and (v) beginning in January 2014, the pre-existing *de facto* structure was formalised under the authority of the National Coordination”,⁴³ and

“... that there are substantial grounds to believe that an armed conflict not of an international character, within the meaning of article 8(2)(d) and (f) of the Statute was

⁴² ICC-01/14-01/18-403-Red-Corr, pp. 103, 106 (emphasis added).

⁴³ ICC-01/14-01/18-403-Red-Corr, para. 69; *see also* ICC-01/14-01/18-403-Red-Corr, para. 73, fn. 161 (referring to these findings in respect of the Pre-Trial Chamber’s determination that the Anti-Balaka constituted an armed group). It is also important to note that the charged war crimes as confirmed in this case span from 5 December 2013 through August 2014. Thus, evidence of composition of the Anti-Balaka as an organised armed group engaged in conflict during at least this period is manifestly relevant and probative of the confirmed charges.

ongoing in the territory of the CAR from September 2013 until at least December 2014 between the Seleka and the Anti-Balaka. In reaching this finding, the Chamber has taken into account (i) the spread of the clashes between the two parties over several western CAR prefectures; (ii) the number of elements deployed; (iii) the number of deaths (most notably following the 5 December 2013 Attack on Bangui); (iv) the high number of refugees and internally displaced persons; (v) the fact that the conflict has attracted the attention of the United Nations Security Council; and (vi) the repeated attempts to bring about the cessation of hostilities.”⁴⁴

30. The prospective trial evidence which goes to proof of these categories, whether directly or circumstantially, and particularly as articulated in the cited provisions of the DCC,⁴⁵ is highly relevant to the ‘facts and circumstances’ and thus, the ‘scope of the charges’.⁴⁶ Contrary to NGAISSONA’s previous submissions,⁴⁷ these substantive factual findings are neither restricted to 2013, nor limited to August 2014.

b. Crimes against humanity

31. In the context of the charged crimes against humanity, in addition to paragraph 69 of the Confirmation Decision cited above, the Narrative Part further provides:

“... there are substantial grounds to believe that, from September 2013 until December 2014, the Anti-Balaka carried out attacks pursuant to an organisational policy of a criminal nature, targeting the Muslim civilian population in western CAR who, based on their religious or ethnic affiliation, were perceived as collectively responsible for the crimes allegedly committed by the Seleka, complicit with, or supportive of the Seleka (article 7(1) and (2)(a) of the Statute). The Chamber is satisfied to the required threshold that this attack was *widespread as it resulted in a large number of victims, in a broad geographical area comprising several western CAR prefectures and spanning a long period of time, from September 2013 to December 2014 (article 7(1) of the Statute)*. Lastly, as further detailed below, the Chamber is satisfied that the conduct underlying the charges of crimes against humanity confirmed by the Chamber was *committed as part of the aforementioned*

⁴⁴ ICC-01/14-01/18-403-Red-Corr, para. 72.

⁴⁵ ICC-01/14-01/18-403-Red-Corr, para, pp.101, 105 (citing the DCC, ICC-01/14-01/18-282-Conf-AnxB1, paras. 50-52 and 115-118.

⁴⁶ ICC-01/14-01/18-403-Red-Corr, para. 144, p. 101 (referencing the charged war crime of enlisting or conscripting children under the age of 15 and using them in hostilities).

⁴⁷ ICC-01/14-01/18-573-Red, para. 39.

widespread attack against the civilian population, in light of the identity of the victims, the aims pursued, the nature of the acts and their consequences.”⁴⁸

32. Evidence going to proof of the existence of the ‘widespread attack’ as confirmed,⁴⁹ including its nature (*e.g.*, the pattern of constituent acts and crimes, objectives, and targets), extent, duration, geographical and temporal parameters, and the breadth of victimisation, is highly relevant to the ‘facts and circumstances’ described. Indeed, the Narrative Part describes the article 7(1) ‘attack’ committed pursuant to the Anti-Balaka’s criminal organisational policy as comprising:

“... deliberate attacks carried out by Anti-Balaka groups as a form of retributive violence [targeting the Muslim population] throughout Bangui, including Boeing and Bimbo, and **across western CAR Prefectures**, including Ouham (Bossangoa), Mambere-Kadei (**Berbérati, Carnot, Guen**), Lobaye (**Boda**), Ouham-Pende (**Bossemptélé**) and Ombella-M’Poko (**Yaloké, Gaga, Zawa**, Boali). These attacks involved the commission of murder, deportation and forcible transfer of population, imprisonment and other forms of severe deprivation of physical liberty, torture, rape, persecution and other in humane acts”.⁵⁰

33. Moreover, the relevant sections of the DCC incorporated in the Operative Part further elucidate the Anti-Balaka attack, the acts and crimes, policy, including the acts and conduct of the Accused during the perpetration of crimes which comprised, *inter alia*, the Provincial Incidents.⁵¹ In this context, the term ‘attack’ must be accorded its ordinary construction, namely: “denot[ing] a course of conduct involving the multiple commission of acts referred to in paragraph (1) of [article 7]”.⁵² As regards crimes against humanity, the term ‘attack’ “is not restricted to the use of armed force but may also encompass circumstances where there is

⁴⁸ ICC-01/14-01/18-403-Red-Corr, para. 70.

⁴⁹ See ICC-01/14-01/18-403-Red-Corr, pp. 103, 106; *but see* ICC-01/14-01/18-403-Red-Corr, para. 122 (“[t]he Chamber is further satisfied that the conduct set out above was committed as part of a widespread or systematic attack against a civilian population”). It is unclear why this legal characterisation does not appear in the Operative Part of the Confirmation Decision.

⁵⁰ ICC-01/14-01/18-403-Red-Corr, para. 64 (“emphasis added”).

⁵¹ See ICC-01/14-01/18-403-Red-Corr, pp. 103, 106 (incorporating DCC, ICC-01/14-01/18-282-Conf-AnxB1, paras. 90-114); see in particular, footnote 250, referencing: “the Charged Crimes committed in **BOEING** and **CATTIN** (paras.246-256), **BOEING** Muslim Cemetery (paras.269-274), **Yamwara School** (paras.296-302), **BOY-RABE** (paras.317-323), **PK9 – MBAIKI AXIS** (paras.340-347), **BOSSANGO** (paras.376-388), **YALOKÉ, GAGA** and **ZAWA** (paras.407-426), **BOSSEMPTÉLE** (paras.444-456), **BODA** (paras.473-490), **CARNOT** (paras.513-522), **BERBERATI** (paras.543-555), and **GUEN** (paras.578-595). See generally, Section VII (paras.242-611). On widespread attacks against the Muslims after DJOTODIA’s resignation, see CAR-OTP-2001-7017, at 7087, 7088, 7097, 7099, paras.292, 294, 355, 370; CAR-OTP-2001-4249, at 4249; CAR-OTP-20012068, at 2068”). All of this is incorporated by reference in the Confirmation Decision.

⁵² ICC-01/04-02/06-309, para. 23; *see also* ICC-01/04-02/06-2359, para. 662 (further stating that “[t]he requirement that the acts form part of a ‘course of conduct’ indicates that Article 7 is meant to cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts”).

mistreatment of the civilian population".⁵³ The forced enclaving of Muslim civilians in the Provincial Incidents at these locations which almost invariably lasted throughout 2014 and beyond as alleged in the DCC comprises part of the article 7(1) attack as a matter of *evidence*.

34. Given the Pre-Trial Chamber's findings, relevant proof of the contextual elements of crimes against humanity would also comprise evidence tending to substantiate the Anti-Balaka's existence as an 'organisation' and therefore, going to its structure, form, membership, and its functioning during the relevant period of the confirmed widespread attack *i.e.*, "between September 2013 and December 2014".⁵⁴ Importantly, it would encompass evidence going to prove that the "organization actively promote[d] or encourage[d]"⁵⁵ the criminal policy "pursuant to or in furtherance of"⁵⁶ which the article 7(1) attack (which included the charged crimes) was perpetrated. The *promotion* or *encouragement* of the criminal policy by the organisation may obviously be demonstrated by evidence of the acts and conduct of the group as a whole during the relevant period, its members, its subgroups, its leadership, and its individual leaders.⁵⁷

C. The Scope of Evidence

i. The vast majority of the evidence presented during the confirmation proceedings remains relevant to and probative of the confirmed charges

a. Context

35. NGAISSONA's previous arguments on the 'scope of the charges' are incorrect. The following flawed submissions for instance, typify his misreading of the Confirmation Decision:

⁵³ See *Prosecutor v. Prlić, et al*, Case No. IT-04-74-T, Judgement, 29 May 2013, para. 35; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Judgement, 30 May 2013, para. 962; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgement – Volume I of IV, 24 March 2016, para. 473; *Prosecutor v. Ndindiliyimana, et al*, Case No. ICTR-00-56-T, Judgement, 17 May 2011, para. 2087; ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-T, Judgement, 6 September 2011, para. 82, *Prosecutor v. Gotovina, et al*, Case No. IT-06-90-T, Judgement, 15 April 2001, para. 1702; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, para. 327. *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-69-23/IT-96-23-1, Judgement, 12 June 2002, para. 86.

⁵⁴ ICC-01/14-01/18-403-Red-Corr, pp. 103, 106.

⁵⁵ See article 7(3) of the Elements, fn. 6; see ICC-01/14-01/18-403-Red-Corr, para. 64 ("the Anti-Balaka also developed a criminal policy of targeting the Muslim population in western CAR").

⁵⁶ ICC-01/14-01/18-403-Red-Corr, pp. 103, 106, and para. 64.

⁵⁷ ICC-01/14-02/18-2-Red, p. 11 (noting evidence of NGAISSONA's furtherance of the Anti-Balaka's organisational policy "the establishment of which he had contributed to").

“Mr Ngaïssona’s role as the official National Coordinator is not relevant to the crimes which were confirmed by the Pre-Trial Chamber.”⁵⁸

36. The Pre-Trial Chamber not only pointed to NGAISSONA’s authority as the Anti-Balaka National Coordinator,⁵⁹ but expressly referred to his role regarding his criminal responsibility for crimes committed by YEKATOM. Specifically, the Pre-Trial Chamber found that crimes committed by YEKATOM and his group during the 5 December 2013 Attack on Bangui and its aftermath, including the crimes involved in the takeover of villages in Lobaye continuing through February 2014, were attributable to NGAISSONA in part because “Yekatom and his group had been operating under the Coordination, including Ngaïssona.”⁶⁰

37. Clearly, NGAISSONA’s role as the Anti-Balaka National General Coordinator during this period is highly probative and forms part of, the confirmed ‘facts and circumstances’, including in relation to the Anti-Balaka’s implementation of the criminal policy, pursuant to which the widespread article 7(1) attack described in the Operative Part was carried out.⁶¹

38. In a later submission, NGAISSONA argued somewhat inconsistently:

“The exclusion of [the non-confirmed incident] 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”.⁶²

39. *First*, in the context of these Submissions, the above ignores that the case is joint – and the ‘scope of the charges’ must account for both Accused. Thus, as the Chamber is aware, YEKATOM faces charges of war crimes committed through August 2014. Evidence concerning the structure, capacity, organisation, arming, and conduct of operations by the Anti-Balaka through this period is therefore relevant and probative of the charges, particularly noting the continuing nature of certain charged crimes.⁶³

⁵⁸ ICC-01/14-01/18-473-Red, paras. 13, 16.

⁵⁹ ICC-01/14-01/18-403-Red-Corr, para. 176. This is further addressed below.

⁶⁰ ICC-01/14-01/18-403-Red-Corr, para. 142.

⁶¹ See ICC-01/14-01/18-403-Red-Corr, pp. 106 (referencing paragraphs 90-114 of the DCC, and particularly paras. 95-98).

⁶² ICC-01/14-01/18-573-Red, para. 25.

⁶³ ICC-01/14-01/18-585, para. 32.

40. *Second*, NGAISSONA conflates the crimes for which the Pre-Trial Chamber found substantial grounds to believe that he was individually criminally responsible and those for which he was not (i.e., the Provincial Incidents), but which nevertheless constitute evidence of material elements of the confirmed charges.

41. The Pre-Trial Chamber determined the relevant context in this case when it found that the article 7(1) Anti-Balaka attack took place from September 2013 through December 2014.⁶⁴ The attack within this time frame is therefore the appropriate subject of prospective trial evidence. As the Pre-Trial Chamber in the *Ntaganda* case stated concerning article 7 crimes:

“[a]s the charged crimes must take place within an “attack”, the Prosecutor is free to present further additional acts to the ones charged, with a view to demonstrating that an “attack” within the meaning of articles 7(1) and 7(2)(a) took place.”⁶⁵

42. In addition to the *Ntaganda* case, the Appeals Chamber in the *Bemba* case observed:

The Appeals Chamber notes that the Trial Chamber relied on the criminal acts that it found had been established beyond reasonable doubt, including those listed in the preceding paragraph [acts, which did not fall within the facts and circumstances described in the charges in terms of article 74 (2)], also for its finding regarding the contextual element of crimes against humanity. In the view of the Appeals Chamber, this did not amount to an error. *While the Trial Chamber could not convict Mr Bemba of these criminal acts, they could nevertheless be taken into account for the finding regarding the contextual element of crimes against humanity, which operates at a higher level of abstraction.*⁶⁶

43. Here, notwithstanding the Pre-Trial Chamber’s determination of insufficient grounds to hold NGAISSONA individually responsible for Anti-Balaka crimes concerning the Provincial Incidents,⁶⁷ the Anti-Balaka attacks against Muslim civilians in those locations are not altogether excluded from the confirmed charges. The Pre-Trial Chamber expressly

⁶⁴ See ICC-01/14-01/18-403-Red-Corr, para. 70.

⁶⁵ ICC-01/04-02/06-309, para. 23.

⁶⁶ ICC-01/05-01/08-3636-Red, para. 117 (emphasis added) (“*Bemba Appeals Judgement*”); *contra* ICC-01/14-01/18-573-Red, para. 17 (arguing incongruently 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”). Even if true, nothing in the Court’s jurisprudence precludes the use of the same evidence at trial for a different purpose – as long as it meets the requisite evaluative criteria of relevance, probative value, and there is no unfair prejudice.

⁶⁷ ICC-01/14-01/18-403-Red-Corr, paras. 206, 213, 220, 226, 233, 239.

determined that the Provincial Incidents comprised part of the article 7(1) ‘attack’ on the Muslim population “across western CAR Prefectures”,⁶⁸ and was a part of the Group’s policy.⁶⁹ As such, Anti-Balaka violence committed against Muslim civilians in those locations is relevant to establish “a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1 ... pursuant to or in furtherance of a[n] ... organizational policy” which also includes the charged crimes.⁷⁰ Indeed, the violence comprising the Provincial Incidents is a part of that course of conduct, as confirmed in this case.

44. NGAISSONA’s contention that “the alleged incidents in the localities cited [Provincial Incidents] ... have been expressly excluded from the scope of the charges pursuant to the Confirmation Decision”⁷¹ is incorrect. While indeed, the Provincial Incidents are not among the crimes for which the Pre-Trial Chamber found sufficient grounds to substantiate NGAISSONA’s individual criminal responsibility, they are well within the ‘scope of the evidence’ and the ‘scope of the charges’, as proof of the elements of the charged crimes, obviously including their contextual elements. This is even more so, given the Chamber’s express attribution of the crimes committed in the locations of the Provincial Incidents to the Anti-Balaka.⁷²

45. Notably, the evidence of Anti-Balaka military operations and the related crimes committed throughout the western Prefectures also directly substantiates the existence of an ongoing armed conflict with the Seleka between September 2013 and December 2014, as a contextual element of war crimes.⁷³ The Operative Part of the Confirmation Decision describes the commission of these crimes “in the context of and associated with [such] armed conflict”.⁷⁴

⁶⁸ ICC-01/14-01/18-403-Red-Corr, para. 64.

⁶⁹ ICC-01/14-01/18-403-Red-Corr, para. 64; the Operative Part of the Confirmation Decision (p. 103, 106) cross-references to paragraphs 62 to 65 of the Confirmation Decision and, significantly paragraphs 90 to 114 of the DCC. *See in particular* paragraph 100 of the DCC and footnote 250 (ICC-01/14-01/18-282-Conf -AnxB1) referencing the Provincial Incidents. Significantly, these are incorporated by reference into the Operative Part of the Confirmation Decision.

⁷⁰ Article 7(3) of the Elements.

⁷¹ ICC-01/14-01/18-573-Red, para. 34.

⁷² *See* paragraph 52, below.

⁷³ ICC-01/14-01/18-403-Red-Corr, para. 72, and pp. 103, 106.

⁷⁴ ICC-01/14-01/18-403-Red-Corr, pp. 103, 106.

b. Organisation

46. As shown above, the crimes committed by the Anti-Balaka in the period between September 2013 and December 2014 are highly relevant and probative of (i) the pattern of crimes committed against the Muslim civilian population in western CAR, (ii) the identity of the perpetrator group, (iii) the nature of the organisation, (iv) its structure and composition, (v) its running, (vi) its operations, (vii) its criminal organisational policy, and (viii) the implementation and perpetuation of that policy.

47. The nature of the Anti-Balaka as an ‘organisation’ in this context necessarily encompasses the role of its *de facto* Coordination and National Coordination, its members, and its leadership. This obviously includes NGAISSONA’s role as a principal and leader in the group – particularly, during the period in which the Anti-Balaka was carrying out its widespread attack.

c. Organisational policy

48. Similarly, evidence underlying certain findings of the Pre-Trial Chamber goes to proof of NGAISSONA’s relationship to the Anti-Balaka’s criminal policy:

“The Chamber has before it numerous witness statements and transcripts of witness interviews according to which Ngaïssona continued to finance the Anti-Balaka after his appointment as National General Coordinator. According to some of these witnesses, albeit fewer, this included the purchase of weapons and ammunition.”

49. Such conduct (which extends beyond January 2014)⁷⁵ is clearly relevant to and probative of the encouragement or promotion of the group’s ‘organisational policy’ to attack the Muslim civilian population within the meaning of article 7(3) and articulated in the Operative Part.⁷⁶ Indeed, “[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack”.⁷⁷ By contrast, direct evidence of affirmative conduct is even stronger, regardless of whether itself it amounts to a criminally culpable “contribut[ion] specifically to the alleged

⁷⁵ *Contra* ICC-01/14-01/18-473-Red, para. 13; *cf* ICC-01/14-01/18-403-Red-Corr, paras. 167-170, 176.

⁷⁶ ICC-01/14-01/18-403-Red-Corr, pp. 103, 106.

⁷⁷ Article 7(3) of the Elements, fn. 6.

crimes committed by the Anti-Balaka”.⁷⁸ The promotion or encouragement of the group’s *policy* need only be directed to the “course of conduct”⁷⁹ that constitutes the widespread or systematic attack, not a given constituent act or crime.

50. In this sense, the Confirmation Decision is not entirely clear. On the one hand, it describes the article 7(1) attack as having occurred “from September 2013 until December 2014”.⁸⁰ On the other hand, it describes NGAISSONA’s actions in validating the conduct of the direct Anti-Balaka perpetrators by, for example, sanctioning their continued membership in the group, affirming their positions as ComZones, and appointing them as representatives of the Anti-Balaka at peace negotiations”⁸¹ *prior to* December 2014, as “*post facto*” to that attack.⁸² Nevertheless, the Chamber is only bound by the delineation of the facts and circumstances of the charges in the Operative Part of the Confirmation Decision⁸³ — nothing more. Thus, evidence going to their proof is within the bounds of the trial, regardless of the reasoning propounded by the Pre-Trial Chamber’s assessment of the significance of that evidence.⁸⁴ In any case, it is clear that the Pre-Trial Chamber evaluated NGAISSONA’s actions in validating the conduct of the direct Anti-Balaka perpetrators only in relation to specific crimes constituting *part* of the “course of conduct”⁸⁵ and not the article 7(1) attack as a whole (*i.e.*, comprising the period as confirmed).

51. However, even assuming *arguendo* that this validation and other acts were *ex post facto* to the ongoing attack — which they were not by definition, having occurred before the end of December 2014⁸⁶ — they remain relevant. Indeed, post-offence (*i.e.*, *ex post facto*) conduct can even amount to a basis to impose criminal responsibility.⁸⁷ Thus for instance, such

⁷⁸ ICC-01/14-01/18-403-Red-Corr, 176; *contra* ICC-01/14-01/18-573-Red, para. 18.

⁷⁹ Article 7(3) of the Elements.

⁸⁰ ICC-01/14-01/18-403-Red-Corr, para. 70.

⁸¹ See ICC-01/14-01/18-403-Red-Corr, para. 182.

⁸² See ICC-01/14-01/18-403-Red-Corr, para. 182.

⁸³ See ICC-02/04-01/15-428, para. 27 (“even assuming, *arguendo*, that the Chamber’s reasoning in Confirmation Decision was somehow deficient [...] this would have no impact on the delineation of the facts and circumstances of the charges reproduced in the operative part of the Confirmation Decision”).

⁸⁴ See paragraph 15 above; ICC-02/04-01/15-1147, para. 19, citing ICC-02/04-01/15-428, para. 26.

⁸⁵ See article 7(3) of the Elements.

⁸⁶ See *e.g.*, ICC-01/05-01/13-2275-Red, para. 780, 781 (where the Appeals Chamber rejected the characterisation as *ex post facto*, acts undertaken “while the execution of the common plan was still ongoing”).

⁸⁷ See *e.g.*, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, paras. 204, 229-230 (citing the International Law Commission’s Commentary concerning *ex post facto* assistance); *see also*, *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgement, 9 May 2007, para. 199; *Prosecutor v. Haradinaj, et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008, para. 145; *see similarly* ICC-01/05-01/13-1989-Red, para. 96 (finding that for being held responsible for aiding and abetting: “[t]he assistance may be given before, during or after the offence has been perpetrated”).

evidence goes directly to proof, *inter alia*, of (1) the identity, structure, cohesion, and condonation⁸⁸ of the ‘organisation’ responsible for the article 7(1) attack; and (2) the promotion, encouragement, or furtherance of the criminal organisational policy within its ranks. Both issues unquestionably comprise elements of the *confirmed charges* and are therefore properly within their evidentiary scope.

52. Relatedly, the Pre-Trial Chamber found that, in respect of the Provincial Incidents, “the concerned Anti-Balaka groups were formally and politically under the umbrella of the National Coordination”.⁸⁹ In turn, it also found that “the National Coordination fell under Ngaïssona’s authority”.⁹⁰ Notwithstanding its finding that NGAISSONA may have had only limited knowledge and control over these groups’ criminal actions,⁹¹ the fact that the finding was made at all underscores the Pre-Trial Chamber’s determination that these Anti-Balaka groups were perpetrators of the article 7(1) attack, as described in the facts and circumstances. Correspondingly, the evidence underlying these findings goes directly to the Anti-Balaka’s implementation of the criminal organisational policy, including by and through its members, leadership, and leaders – whether by positive acts, complicity, or failures to act.

d. Prior intent

53. An Accused’s intent with respect to the commission of a crime can be inferred from their subsequent conduct. Contrary to NGAISSONA’s prior submissions, the Prosecution is not restricted from presenting relevant evidence temporally beyond the charged crimes toward proving the Accused’s *mens rea* either at the time of their commission or of his culpable acts.⁹² As noted, the Trial Chamber is not bound by “the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.)”.⁹³

⁸⁸ See ICC-01/05-01/08-3636-Annex1-Red, Dis. Op. Monageng and Hofmański, paras. 496, 525 (noting the condonation of the attack (or attackers motives) as indicative of the organisational policy).

⁸⁹ ICC-01/14-01/18-403-Red-Corr, para. 164.

⁹⁰ ICC-01/14-01/18-403-Red-Corr, para. 176.

⁹¹ ICC-01/14-01/18-403-Red-Corr, para. 164.

⁹² See ICC-01/09-01/11-2027-AnxI, Dis. Op. Carbuccion Herrera, para. 64; *Prosecutor v. Mrkšić et al*, Case No. IT-95-13/1-A, Judgement, 5 May 2009, para. 41; *Prosecutor v. Kunarac et al*, Case No. IT-96-23 & 23/1, Judgement, 12 June 2002, para.100; *Prosecutor v. Milosević*, Case No. IT-98-29/1-T, Judgment, 12 December 2007, paras. 918-919; *see also e.g.*, ICC-01/04-02/06-2359, para. 696;

⁹³ [Chamber’s Practice Manual](#) (2019), para. 62.

54. NGAISSONA's acts and conduct after the 5 December 2013 Bangui Attack and his continued involvement with the Anti-Balaka throughout the course of its widespread attack (i.e., through December 2014), is relevant to, and probative of, his intent in contributing to the crimes with which he is specifically charged. The use of such circumstantial evidence is well-recognised in criminal proceedings.⁹⁴ In the same way that an accused's conduct after charged acts may be related to a prior promise, an effort to avoid apprehension, or to further the criminal objective to which they earlier subscribed, they are clearly relevant to that accused's state of mind.

55. As established in the Narrative Part of the Confirmation Decision, NGAISSONA's continued involvement with the Anti-Balaka as a leader within the group's *de facto* structure and formalised National Coordination,⁹⁵ and his continued promotion of the group's practical acts and ideological objectives during its pervasive campaign of violence against Muslim civilians in western CAR "pursuant to an organisational policy of a criminal nature",⁹⁶ is relevant and probative of his intent concerning his charged contributions.

56. NGAISSONA's "purchase of weapons and ammunition"⁹⁷ for instance, is a clear example of evidence highly probative of his prior intent — that is, what he meant for the group to achieve from its inception and in relation to his contributions in the first place. The same is true regarding evidence demonstrating NGAISSONA's uninterrupted involvement with the Anti-Balaka's activities and political objectives through December 2014.

III. CONCLUSION

57. In sum, the Chamber should refrain from prejudging the relevance and probative value of prospective evidence so as to limit its scope at trial on the sole basis of the reduced number

⁹⁴ See e.g., ICC-01/05-01/13-1989-Red, para. 410 (relating to *post factum* conduct), para. 735 *et seq.*, and para. 800 (noting, in the context of an *ex post facto* cover-up, the relevance and probative value of such evidence as follows: "... the above-mentioned intercepts prove that the three co-perpetrators clearly intended to take measures to conceal their *prior activities*. The discussions are therefore revealing with regard to the co-perpetrators' *earlier activities*") (emphasis added); see *Prosecutor v. Popović, et al*, Case No. IT-05-88-T, Judgement, 10 June 2010, para. 1067. "[t]he Trial Chamber notes that the reburial operation, which took place during September and October 1995, is corroborative of the Trial Chamber's finding that the mass executions following the fall of Srebrenica [July 1995] were planned and organised as part of a wide scale, premeditated killing operation").

⁹⁵ See ICC-01/14-01/18-403-Red-Corr, paras. 69 (finding that "beginning in January 2014, the pre-existing *de facto* structure was formalised under the authority of the National Coordination), and para. 167 (finding that "the National Coordination fell under Ngaïssona's authority).

⁹⁶ See ICC-01/14-01/18-403-Red-Corr, para. 70.

⁹⁷ ICC-01/14-01/18-403-Red-Corr, para. 176.

of charges for which the Pre-Trial Chamber found sufficient evidence of NGAISSONA's individual criminal responsibility.

58. The crimes ascribed to the Anti-Balaka as a group⁹⁸ and organisation⁹⁹ committed pursuant to a criminal policy from September 2013 through December 2014 and that comprised the widespread attack of which the confirmed charges are part, constitute relevant evidence in this case. Indeed, that evidence goes to several material elements of the confirmed charges, as relates to the contextual elements, the specific crimes, and the applicable modes of liability. The latter includes not only evidence of the Accused's personal intent, which can be established circumstantially by post-offence conduct, but also embraces knowledge of the Anti-Balaka's intention to commit the types of crimes charged.¹⁰⁰ Evidence that shows that the group actually committed those crimes as well as other violent acts of the same nature in a singular widespread attack (*i.e.*, course of conduct), necessarily bears upon its intention to commit the *charged crimes*. As such, they are evidence of material elements of the confirmed crimes and thus within the 'facts and circumstances' of the case and 'scope of the charges'.

59. For all of the reasons set forth above, the Prosecution considers that the 'scope of the charges' in the Operative Part of the Confirmation Decision must not be conflated with the 'scope of the evidence' relevant to prove the confirmed charges. To restrict prospectively relevant and probative evidence in this manner, absent any determination of the applicable evaluative evidentiary criteria, misunderstands the Confirmation Decision and its purpose, and moreover would be deleterious to the integrity and fairness of the prospective trial.



Fatou Bensouda, Prosecutor

Dated this 31st day of August 2020
At The Hague, The Netherlands

⁹⁸ See article 25(3)(d).

⁹⁹ See article 7.

¹⁰⁰ See article 25(3)(d)(ii) (requiring that an accused know of the group's collective intention to commit the type of crime charged). See also article 25(3)(c); ICC-01/05-01/13-2275-Red, paras. 21, 1400 (noting that "[a] person may be said to be acting for the purpose of facilitating the commission of a crime, even if he or she does not know all the factual circumstances in which it is committed [...]").