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**International  
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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 Response to ‘Prosecution’s Submissions on the ‘Scope of the Charges’, ICC-01/14-01/18-640”, ICC-01/14-01/18-650-Conf, 11 September 2020**

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

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

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## I. Introduction

1. In the “Prosecution’s Submissions on the ‘Scope of the Charges,’” (“Prosecution’s Submissions”) the Prosecution does not raise any remaining issues regarding the scope of the charges, as expressly ordered by the Chamber.<sup>1</sup> Rather, the Prosecution repeats the same arguments as it made both in its “Response to the NGAISSONA ‘Defence Submissions pursuant to Trial Chamber V’s ‘Order Scheduling First Status Conference’”<sup>2</sup> and during the first status conference before the Chamber.<sup>3</sup>
2. Since the Prosecution continues to mischaracterize the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (“Confirmation Decision”)<sup>4</sup> and maintains its position that the vast majority of the evidence remains relevant to the confirmed charges, it is incumbent on the Defence to respond. The Defence endeavours to limit its response (“Response”) to raising new arguments or clarifying previous ones regarding the Prosecution impermissibly expanding “the facts and circumstances” beyond the Confirmation Decision in order to satisfy the material elements for proving the contextual elements of the charges, and the alleged intent of Mr Ngaïssona. The Prosecution’s mischaracterization of the Confirmation Decision, a decision which the Prosecution for which the Prosecution did not seek leave to appeal and thus is *res judicata*, has resulted in certain witnesses’ anticipated testimony, whether in whole or in part, falling outside the scope of the confirmed charges.

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<sup>1</sup> ICC-01/14-01/18-T-012-ENG, p. 63.

<sup>2</sup> ICC-01/14-01/18-488-Conf; paras 10-19

<sup>3</sup> ICC-01/14-01/18-T-012-ENG ET, pp. 40-41.

<sup>4</sup> ICC-01/14-01/18-403-Conf.

3. Now that the Presiding Judge of this Chamber has opted for the submission regime of evidence,<sup>5</sup> it is even more crucial that any interpretation issue in relation to the Confirmation Decision be cleared so as to provide the Prosecution with clear guidelines as to which evidence may be presented as part of the scope of the charges and which cannot.
4. The Defence notes with concern that for a significant number of witnesses, the Prosecution intends to introduce their prior recorded statements under rule 68(3) of the Rules, including insiders whose interviews consist of hundreds of pages of transcripts on a diversity of topics, some of which are no longer within the scope of the charges.<sup>6</sup> While the use of rule 68(3) might give the artificial impression that the Prosecution attempts to ensure the efficiency of the proceedings, in this particular case where over 70 percent of the charges have not been confirmed, accepting the totality of these transcripts on the case record would be highly prejudicial to Mr Ngaïssona. It would trigger an obligation for the Chamber to consider the totality of these transcripts and would in practice give the Prosecution an additional opportunity to circumvent the scope of the Confirmation Decision, while remaining within the maximum number of hours to present its case. These insiders should testify live but strictly on themes that remain relevant to and probative of the charges. Rather than through the use of rule 68(3), this can be achieved by reducing the scope of questioning of the witnesses in question.

## **II. Confidentiality**

5. The Response is filed as confidential pursuant to regulation 23bis(2) of the Regulations of the Court as it contains confidential information about witnesses. A public redacted version shall be filed as soon as possible.

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<sup>5</sup> ICC-01/14-01/18-631, paras 52 and seq.

<sup>6</sup> [REDACTED].

### III. Applicable Law

6. The Defence incorporates by reference its submissions on applicable law contained in ICC-01/14-01/18-573-Conf (“Defence Observations on Temporary Witness List”).

### IV. Submissions

#### A. The evidence for which the Pre-Trial Chamber decided to enter no factual findings no longer remains relevant to and probative of the contextual elements of crimes

7. The Defence does not contend that evidence that does not squarely fall within the facts and circumstances pertaining to the confirmed charged crimes cannot still be relevant to substantiate other parts of the case, such as the contextual elements. The Defence contends however that the Pre-Trial Chamber’s decision to refrain from making any factual findings in respect of the Provincial Incidents combined with its reference to Judge Tarfusser’s Dissenting Opinion in the *Abu Garda* case,<sup>7</sup> which led, very logically, to a complete lack of specification of the Provincial Incidents in the section of the Confirmation Decision relating to the contextual elements, makes the Pre-Trial Chamber’s intent clear that the Provincial Incidents should be excluded from the facts and circumstances of the case. This includes excluding them from any discussion on an alleged attack under article 7 or on the existence of an ongoing armed conflict under article 8.
8. The Pre-Trial Chamber’s clear intent to avoid pre-determining “legal issues which may be of relevance for *future* cases relating to the same event which might be brought before *this* or another Chamber at a subsequent stage”

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<sup>7</sup> Confirmation Decision, para. 59.

(emphasis added) underlines the Pre-Trial Chamber's position that no legal findings in relation to the Provincial Incidents should ever be made in *this* case, including at the trial stage.<sup>8</sup> Therefore, should the Provincial Incidents be part of the Chamber's legal determination for the purpose of determining whether for instance, these alleged crimes should be considered as part of any multiple commission of acts of article 7(1) of the Statute, then factual and legal findings would necessarily need to be made in relation to the elements of those alleged crimes, which would plainly contravene the Confirmation Decision.

9. For instance, [REDACTED], [REDACTED] and [REDACTED], still appearing on the Provisional Witness List, are expected to testify about the alleged crimes allegedly committed by the Anti-Balaka in Berberati, including pillaging, destructions of mosques, the creating of enclaves, forcible displacement of the Muslim population. These three witnesses are actually cited countless times in the DCC to support the allegations made by the Prosecution with respect to these specific counts in Berberati,<sup>9</sup> all of which the Pre-Trial Chamber not only declined to confirm but refused to make any factual findings about, leaving this task to Pre-Trial Chamber II or another Pre-Trial Chamber in the context of the confirmation decision of another potential *suspect* in the CARII situation.<sup>10</sup> Therefore, it would be outside the Trial Chamber's mandate to now make any factual findings in relation to any elements of these alleged crimes in Berberati for the purpose of determining whether these acts formed part of a course of conduct within the meaning of article 7 or of an armed conflict not of international character under article 8.

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<sup>8</sup> Confirmation Decision, para. 59.

<sup>9</sup> Document Containing the Charges, [REDACTED].

<sup>10</sup> Confirmation Decision, para. 59: "[...] Considering the breadth and complexity of the situation in the CAR, where the Prosecutor's investigation is still ongoing, it indeed cannot be excluded that this or another Chamber of the Court will be called in the future to adjudicate the facts or some of the facts underlying the charges in this case in respect of other suspects. [...]".

The same reasoning applies to witnesses expected to testify about the alleged crimes committed in Bossempaté, Carnot, Guen, etc. In the same vein, the scope of questioning of certain alleged Anti-Balaka elements or commanders should be streamlined to exclude the parts of their testimonies expected to cover the Provincial Incidents.<sup>11</sup>

10. In the *Bemba* case, the Pre-Trial Chamber had decided not to rely on certain criminal acts for the purpose of confirmation because of evidential shortcomings it had identified.<sup>12</sup> Because the Appeals Chamber found that “the Pre-Trial Chamber did not intend to exclude the criminal acts in question from the case against Mr Bemba”, it considered that “the criminal acts in question form[ed] part of the “facts and circumstances described in the charges” and were therefore within the scope of this trial”.<sup>13</sup>

11. In the present case, as demonstrated above, and contrary to the Prosecution’s submissions, the Pre-Trial Chamber went way beyond simply determining that there were “insufficient grounds to hold NGAISSONA individually responsible for Anti-Balaka crimes concerning the Provincial Incidents”.<sup>14</sup> The Pre-Trial Chamber in the present instance excluded the Provincial Incidents from the case against Mr Ngaïssona as a whole, including from the discussions on the contextual elements. Reaching this conclusion based on the Confirmation Decision<sup>15</sup> does not suggest that the Defence conflates any concepts.<sup>16</sup>

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<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

<sup>13</sup> ICC-01/05-01/08-1386, para. 113.

<sup>14</sup> Prosecution’s Submissions, para. 43.

<sup>15</sup> Confirmation Decision, para. 59.

<sup>16</sup> Prosecution’s Submissions, para. 40.

12. The Provincial Incidents are not, as incorrectly argued by the Prosecution,<sup>17</sup> obviously included in the scope of the charges for the purpose of proving the contextual elements of the charged crimes. This is further shown by the lack of appropriate level of specification made by the Pre-Trial Chamber in relation to the Provincial Incidents when addressing the question of the contextual elements in the Confirmation Decision.<sup>18</sup> The Defence here incorporates by reference paragraphs 14-15, 28-30 and 34-36 of its Observations on the Temporary Witness List. And clearly the Pre-Trial Chamber could not have meant to include by reference, in the facts and circumstances of the charges for the purpose of the contextual elements, the Provincial Incidents as presented by the Prosecution in the DCC since the Pre-Trial Chamber decided not to consider them for the purpose of this case.<sup>19</sup>

13. The Defence submits that the question of the cross references of certain paragraphs of the Confirmation Decision and the DCC, rather than other paragraphs in the Operative Part of the Confirmation Decision, and the consequences that may or may not be drawn from it,<sup>20</sup> is a matter of academic

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<sup>17</sup> Prosecution's Submissions, para. 44.

<sup>18</sup> See Confirmation Decision, paras 61-66 and footnote 137 referring to its findings on the confirmed charges, [REDACTED] and [REDACTED]. See also the contrast between the evidence cited by the Pre-Trial Chamber, in the footnotes corresponding to paragraph 63, in relation to events before the Bangui attack, and the evidence cited in the footnotes corresponding to the second sentence of paragraph 64, in relation to events having occurred after the Bangui attack.

<sup>19</sup> Prosecution's Submissions, para. 43. The Defence also notes that in the sections of the DCC relating to war crimes that, according to the Prosecution, have been incorporated by reference in the Operative Part and the evidence of which would therefore be particularly relevant, the Provincial Incidents are not mentioned. If the Chamber were to follow the Prosecution's reasoning, the Provincial Incidents could therefore be introduced as evidence to prove crimes against humanity but not war crimes. See DCC, paras 50-52 and 115-118, as cross-referenced in the Operative Part. See also Prosecution's Submissions, para. 45.

<sup>20</sup> The Defence observes that after having pointed out which paragraphs of the narrative part of the Confirmation Decision and the DCC had been incorporated by reference in the Operative Part and having recalled that these incorporations would "elucidate the relevance and materiality of prospective trial evidence", the Prosecution goes on quoting and relying on paragraphs 69, 72, 70 or even 122 of the Confirmation Decision which are not cited in the Operative Part. See Prosecution's Submissions, paras 26-28.



debate. Indeed, in accordance with the Chambers Practice Manual, no binding effect can be attached to the analysis of the evidence with respect to the confirmed charges (for the evidence that has been analysed) included therein.<sup>21</sup> The only general principle that remains relevant is that the Operative Part of the Confirmation Decision must be read in context and understood by reference to other relevant portions of it.<sup>22</sup> In the present case, it must be understood from the Confirmation Decision and its context that the Pre-Trial Chamber has decided to exclude the Provincial Incidents from the case altogether. While the Prosecution is generally free to present further additional acts as the ones charged with a view to demonstrating, for instance, an attack, it can only do so if those additional acts are part of the facts and circumstances of the case. This is not the case here with respect to the Provincial Incidents, in light of the Pre-Trial Chamber's Confirmation Decision.<sup>23</sup>

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<sup>21</sup> The Chambers Practice Manual (2019) underscores in para. 62 that: "[t]he binding effect of the confirmation decision is attached only to the charges and their formulation as reflected in the operative part of decision. No such effect is attached to the reasoning provided by the Pre-Trial Chamber to explain its final determination (narrative of events, analysis of evidence, reference to subsidiary facts, etc.). The subject-matter of the confirmation decision is limited to the charges only, and does not extend to the Prosecutor's argumentation/submissions as such, whether provided in the same document containing the charges or in a separate brief".

<sup>22</sup> ICC-01/04-02/06-450, para. 40.

<sup>23</sup> The Pre-Trial Chamber's statement, made in in the *Ntaganda* Confirmation Decision, that "the Prosecutor is free to present further additional acts to the ones charged, with a view to demonstrating that an "attack" [...] took place" is distinguishable from the present case. This statement was made at the time the Pre-Trial Chamber was about to specify – but had not yet done so – which facts and circumstances were to be included in the contextual elements of the *Ntaganda* case. And it did so, as regards to the existence of a widespread and systematic attack, based on specific and detailed evidence it presented in its Confirmation Decision. However, in the present case, the Pre-Trial Chamber refrained from entering into any factual findings about the non-confirmed charges. Also, as developed, 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 circumstances of the case for the purpose of proving the contextual elements of the alleged confirmed crimes. Therefore, the Prosecution can no longer, post confirmation, rely on elements that are outside the facts and circumstances of the charges to prove the contextual elements. ICC-01/04-02/06-309, paras 23-30. See also ICC-01/04-01/06-2205, footnote 163, which define facts as "the factual allegations which support

14. Finally, the Prosecution submits that the contextual elements “comprise substantive and material elements of all 51 charges of war crimes and crimes against humanity” and that the “relevance and materiality of evidence going to their proof is incontestably probative of the ‘facts and circumstances’ of the confirmed charges”.<sup>24</sup> The Defence agrees and this is the reason why rule 68(2) of the Rules cannot be used for certain witnesses expected to testify on contextual elements which the Defence reiterates “relate to the core issues materially in dispute”.<sup>25</sup> Therefore, allowing these testimonies would be doubly prejudicial to the accused: alleged facts purposely excluded by the Pre-Trial Chamber from future trial discussions would be reinserted into the debate and be subject to judicial determination, and the discussions relating thereto during trial would unduly increase the number of trial hours and further affect the expeditiousness of the trial.

15. Thus, to allow the Prosecution to rely on witnesses addressing the Provincial Incidents for the purpose of proving certain contextual elements, including that there was allegedly an organized armed group or a criminal organisational policy, would exceed the scope of facts and circumstances of the charges and would be unduly prejudicial to the accused.<sup>26</sup>

**B. The evidence found to have an insufficient nexus with the crimes charged or which was found to be incapable of satisfying the substantial grounds to believe evidentiary standard no longer remains relevant to and probative of the contextual elements of the crimes or the alleged intent of Mr Ngaïssona**

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each of the legal elements of the crime charged”, thereby including the contextual elements, and which “must be identified with sufficient clarity and detail”.

<sup>24</sup> Prosecution’s Submissions, para. 25.

<sup>25</sup> The Defence incorporates by reference paragraph 41 of the Defence Observations on the Temporary Witness List.

<sup>26</sup> See Prosecution’s Submissions, para. 46.

16. The Prosecution submits that 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 the evidence, reference to subsidiary facts, etc).<sup>27</sup> The Prosecution cites the Chambers Practice Manual (2019) in support of this proposition, in addition to Pre-Trial Chamber II decision in *The Prosecutor v. Ongwen* to reject “the Defence request for leave to appeal the decision on the confirmation of charges” (“Ongwen Decision”).<sup>28</sup> The Prosecution’s submissions omit completely that both the *Ongwen* Decision and the Chambers Practice Manual refer to the non-binding nature of the Pre-Trial Chamber’s analysis of the evidence in the context of the charges being confirmed against the accused. The *ratio legis* underlying this rule is to protect the accused such that they may receive a fair trial, where the Trial Chamber judges are fully and freely able to assess in its decision under article 74 of the Rome Statute whether the Prosecution has discharged its burden in proving the confirmed charges beyond a reasonable doubt under article 66 of the Rome Statute.
17. The same reasoning does not apply in the event a Pre-Trial Chamber declines to confirm the charges. Indeed, the Chambers Practice Manual distinguishes between decisions confirming and decisions declining to confirm the charges when it states “decisions declining to confirm the charges may require, depending on the circumstances, a more detailed analysis, given that, as a result thereof, proceedings are terminated.”<sup>29</sup> Therefore, the Pre-Trial Chamber’s analysis of the Prosecution’s evidence, which is ultimately found to have an insufficient nexus with the crimes charged, or which is insufficient to prove certain factual allegations whether they be alleged material or

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<sup>27</sup> Prosecution’s submissions, paras 16, 53.

<sup>28</sup> *Ibid.*, citing Chambers Practice Manual (2019), para. 63, and ICC-02/04-01/15-428, para. 26.

<sup>29</sup> Chambers Practice Manual (2019), para. 63.

subsidiary facts, is binding upon the Trial Chamber. This same evidence should not be reintroduced at trial to prove factual allegations that a Pre-Trial Chamber determined did not meet “the substantial grounds to believe” evidentiary standard. The judicial inquiry into these factual allegations is terminated by the decision to decline to confirm the charges.

### **i. Organisation**

18. The Defence disagrees with the Prosecution’s submission that “[t]he 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”.<sup>30</sup>

19. *First*, the Pre-Trial Chamber never recognized the existence of a *de facto* coordination under the authority of which the Anti-Balakas would have been organised. While the Pre-Trial Chamber recalled the Prosecution’s allegation that “by September 2013 the Anti-Balaka were organized and structured under a de facto coordination”,<sup>31</sup> it did not confirm this allegation in its subsequent findings. The reasons given by the Pre-Trial Chamber for the existence of an organisation were that:

(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

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<sup>30</sup> Prosecution’s Submissions, para. 47.

<sup>31</sup> Confirmation Decision, para. 68.

(v) beginning in January 2014, the pre-existing *de facto structure* was formalised under the authority of the National Coordination (emphasis added).<sup>32</sup>

20. None of these reasons included the conclusion that a *de facto* coordination under which the Anti-Balakas would have been structured, existed. The alleged role of a *de facto* coordination for the purpose of proving an organisation should therefore be excluded from the trial discussions since the Confirmation Decision did not establish that there was any *de facto* coordination controlling that alleged *de facto* structure prior to 2014.

21. *Second*, while the Pre-Trial Chamber noted that “the concerned Anti-Balaka groups were formally and politically under the umbrella of the National Coordination”,<sup>33</sup> the Pre-Trial Chamber refused to confirm any effective control of the National Coordination over the groups in the provinces and their alleged criminal actions in 2014.<sup>34</sup> More specifically, it found that the participation of alleged Anti-Balaka leaders to meetings organised by the National Coordination in Bangui was not connected to the alleged crimes committed in the provinces. Therefore, any anticipated testimony from alleged provincial Anti-Balaka elements, such as [REDACTED], [REDACTED], [REDACTED], or other witnesses, attesting to (i) the operational link between the National Coordination and the alleged Anti-Balaka elements in the provinces or (ii) any particular coordination meetings with alleged provincial leaders, such as those preparing the Brazzaville forum, are not relevant to or probative of the existence of a criminal organisation.<sup>35</sup>

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<sup>32</sup> Confirmation Decision, para. 69.

<sup>33</sup> Confirmation Decision, para. 164.

<sup>34</sup> Confirmation Decision, paras 164, 170.

<sup>35</sup> See Confirmation Decision, para. 205, stating that the evidence does not establish that the participation of [REDACTED] “in meetings organised by the National Coordination was connected to the alleged crimes” in this province. See similar finding in relation to Boda, paras 217-218.

22. *Third*, for the same reasons, the nature of the organisation does not “obviously include NGAISSONA’s role as a principal and leader in the group” as not only the Pre-Trial Chamber made very clear that the National Coordination members did not have any effective and operational control over the alleged Anti-Balaka elements in the field, it also specified that Mr Ngaïssona himself did not.<sup>36</sup> Given that the Operative part of the Confirmation Decision “must be read in context and understood by reference to other relevant portions of the Confirmation Decision,”<sup>37</sup> it is clear that by making this finding, the Chamber did not find that the ‘organisation’ as broadly presented by the Prosecution was under the operational authority of the national Anti-Balaka Coordination, including Mr Ngaïssona.

23. Therefore, in response to the Prosecution’s Submissions,<sup>38</sup> the role of Mr Ngaïssona within the alleged structure cannot be relied upon to prove the existence of an organisation as broadly presented by the Prosecution, *i.e.* including the provinces. Accordingly, expected testimony as to the alleged role of Mr Ngaïssona or that of the coordination members within the alleged structure for the purpose of proving the nature, structure and composition, running and operations of the alleged organisation, should be circumscribed to their alleged role with respect to the alleged group(s) having committed the confirmed crimes. Therefore, any expected testimony or part thereof, such as that of [REDACTED], [REDACTED], [REDACTED] or [REDACTED], in relation to Mr Ngaïssona or the coordination’s alleged role regarding the alleged groups in the provincial fields should be excluded.<sup>39</sup>

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<sup>36</sup> Confirmation Decision, paras 164, 170.

<sup>37</sup> ICC-01/04-02/06-450, para. 40.

<sup>38</sup> Prosecution’s Submissions, para. 8.

<sup>39</sup> *See also* Prosecution’s Submissions, para. 52, alluding to the relevance of the role of the coordination and Mr Ngaïssona for the purpose of proving a policy.

24. Also, since the Pre-Trial Chamber decided not to “address the Prosecution’s submissions regarding the *alleged* crimes committed by the Anti-Balaka” (emphasis added) in the field,<sup>40</sup> the same Chamber cannot have determined, contrary to the Prosecution’s submissions, that “these Anti-Balaka groups were perpetrators of the article 7(1) attack”.<sup>41</sup>
25. Finally, any evidence as to whether or not the different groups in the remote provinces are structured in a way to form part of “the” alleged organized armed group pursuant to article 8 does not meet the minimum indicia of relevance to prove the alleged crime of conscription, enlistment and use of children under the age of fifteen allegedly committed by the Yekatom’s group. Thus, while this alleged crime, as confirmed, indeed span through August 2014, since the aforementioned evidence, as a whole, is too far remote in terms of proving that this alleged crime was committed as part of an organized armed conflict, the date until which it occurred does not matter to the effect of determining whether evidence on the alleged provincial structures might be relevant or probative.<sup>42</sup>

## ii. Policy

26. The Prosecution advances that Mr Ngaïssona’s alleged conduct including the financing of the alleged Anti-Balaka after his appointment as National Coordinator in January 2014 is relevant to proving an organizational policy, since the Pre-Trial Chamber found that the alleged attack lasted until

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<sup>40</sup> Confirmation Decision, para. 165, to be read in the context of para. 164. *See also*, the use of the word “alleged” concerning Yaloké, Gaga and Zawa, at paras 198, 201, 202, 204, 205; concerning Bossemtélé at paras 207, 210 (“crimes allegedly committed by Bossemtélé group”), concerning Boda, paras 214, 217; or concerning Carnot, paras 221, 224 (“alleged leaders of the direct perpetrators in the Anti-Balaka” and “crimes allegedly committed in Carnot”).

<sup>41</sup> Prosecution’s Submissions, para. 52. *See also* Prosecution’s Submissions para. 44, wrongly concluding to the “Chamber’s express attribution of the crimes committed in the locations of the Provincial Incidents to the Anti-Balaka”.

<sup>42</sup> Prosecution’s Submissions, footnote 43.

December 2014.<sup>43</sup> Additionally, the Prosecution argues that the Pre-Trial Chamber found Mr Ngaïssona responsible for the crimes committed in the takeover of the villages in Lobaye which occurred through February 2014, thereby making Mr Ngaïssona's official role in the coordination relevant to these crimes. The Prosecution's submissions should be rejected for the following reasons.

27. *First*, with respect to the charges relating to the takeover of villages in Lobaye, which occurred between 10 January 2014 to 28 February 2014, the Prosecution's submissions fail to take into account that the Pre-Trial Chamber found that the crimes allegedly committed by Mr Yekatom's group in Lobaye were found to be part of the same course of action as the 5 December 2013 attack, despite these crimes being allegedly committed through February 2014. Therefore, the Pre-Trial Chamber imputed in part these crimes to Mr Ngaïssona as a result of his alleged acts that preceded the 5 December attack. During the first status conference, the Prosecution agreed with this interpretation of the Confirmation Decision when it submitted:

So the confirmation decision effectively shifted the focus of Mr Ngaïssona's criminal responsibility or liability to a period which preceded the 5 December attack and then attached also liability to the crimes of Mr Yekatom which followed it. That has the effect of changing the focus of Prosecution witnesses from the period following his designation as the leader of the group to the period of time preceding it.<sup>44</sup>

28. The Defence avers that the Pre-Trial Chamber also found that Mr Yekatom and his group were operating under the Coordination, including Mr Ngaïssona.<sup>45</sup> However, this does not mean that Mr Ngaïssona's role as the National Coordinator is highly probative of the crimes charged as advanced by the Prosecution. His alleged role is probative in so far as it relates to the

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<sup>43</sup> Prosecution's submissions, paras 37-39, 49.

<sup>44</sup> ICC-01/14-01/18-T-012-ENG ET, p. 32.

<sup>45</sup> Confirmation Decision, para. 142.



specific alleged crimes with which he is charged in the villages of the Lobaye Prefecture. Such an interpretation is consistent with the Pre-Trial Chamber finding that despite Mr Yekatom's group allegedly operating under the Coordination, including Mr Ngaïssona, and that there were substantial grounds to believe that Mr Yekatom committed the crime of the enlistment and use of child soldiers, the Prosecution adduced insufficient evidence to sustain the charge of use of child soldiers against Mr Ngaïssona.<sup>46</sup>

29. *Second*, the Prosecution should not be permitted to lead evidence relating to Mr Ngaïssona's conduct, which was expressly found by the Pre-Trial Chamber to not have a nexus to any of the crimes committed in the provinces in order to satisfy the policy element under article 7. To entertain evidence supporting such allegations of such conduct would not contribute to a fair and expeditious trial as required by article 64(2) of the Rome Statute.

30. Despite the Pre-Trial Chamber expressly finding that the evidence indicating that Mr Ngaïssona's alleged financing of the Anti-Balaka, which included the purchasing of weapons and ammunition after his appointment as national general coordinator, was insufficient to show a contribution to the crimes committed in the provinces,<sup>47</sup> the Prosecution nevertheless advances that evidence of this financing can now be used to show the existence of a policy to attack the Muslim civilian population under article 7(3).

31. The Prosecution misinterprets article 7(3) of the Elements of Crimes by stating that the encouragement or promotion of the policy under article 7 need only

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<sup>46</sup> The Prosecution submits that the Defence ignored that the case is joint when it stated that the temporal scope of the charges spans from 5 December 2013 to 28 February 2014. Prosecution's Submissions, para. 38. The Prosecution argues that Mr Yekatom faces charges of war crimes, which extend the temporal scope of the charges until August 2014. Ibid. However, the Prosecution does not specify that there is only one count of war crimes with which Mr Yekatom is charged, which extends beyond the date of February 2014, namely the enlistment and use of child soldiers, which allegedly began in December 2013. Confirmation Decision, page 105.

<sup>47</sup> Confirmation Decision, para. 176.

be directed at the course of conduct that constitutes the attack, and does not need to encourage or promote a given constituent act or crime.<sup>48</sup> This is incorrect. Article 7(3) of the Elements of Crimes stipulates that “‘a policy to commit such attack’ requires that the State or organization actively promote or encourage such an *attack* against a civilian population,”<sup>49</sup> and does not mention “course of conduct” (*emphasis added*). While an attack does constitute a “course of conduct,” it must involve the multiple commission of acts, or in other words, crimes referred to in article 7(1).

32. Therefore, contrary to the Prosecution’s submissions, the Confirmation Decision is clear with respect to its characterization of Mr Ngaïssona’s actions allegedly validating the actions of alleged Anti-Balaka perpetrators as “*post facto*” acts.<sup>50</sup> During the confirmation stage of the proceedings, the Prosecution presented evidence showing that Mr Ngaïssona allegedly validated the attacks occurring in the provinces. The Pre-Trial Chamber found this evidence insufficient to impart any criminal responsibility onto Mr Ngaïssona since any such alleged validation of Anti-Balaka perpetrators happened after the attacks in the locations and sometimes several months after they took place. The Pre-Trial Chamber therefore correctly and clearly characterized these acts as “*post facto* conduct”.<sup>51</sup>

### iii. Prior intent

33. With respect to the Prosecution’s submission that Mr Ngaïssona’s alleged *post facto* conduct to the charges can be used by the Prosecution to prove prior intent, the Defence submits that such evidence should not be led when it has

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<sup>48</sup> Prosecution’s Submissions, para. 49.

<sup>49</sup> Article 7(3) of the Elements

<sup>50</sup> Compare Prosecution’s Submissions, para. 50 with Confirmation Decision, para. 182.

<sup>51</sup> Confirmation Decision, para. 182.

already been found by the Pre-Trial Chamber to be insufficient to satisfy the substantial grounds to believe standard.

34. Consistent with, as developed above, the recommendation to provide a detailed analysis for declining to confirm the charges, the Pre-Trial Chamber in the instant case analysed in detail the evidence supporting the Prosecution's allegations regarding Mr Ngaïssona's conduct and expressly found that Mr Ngaïssona's conduct as the National Coordinator did not give rise to criminal responsibility for the alleged attacks in the provinces and certain incidents closer to Bangui.<sup>52</sup> Thus, the Pre-Trial Chamber's analysis of the evidence regarding Mr Ngaïssona's alleged financing of the Anti-Balaka as the National Coordinator including through the purchasing of weapons and ammunition is binding since the Pre-Trial Chamber found that the Prosecution failed at the confirmation stage to discharge its burden of proving those acts contributed to the crimes charged.<sup>53</sup>

35. Contrary to the Prosecution's submissions, it cannot now reintroduce this evidence to prove Mr Ngaïssona's prior intent.<sup>54</sup> Therefore, the Prosecution's questioning of Witnesses [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED] should not include questions with respect to Mr Ngaïssona's financing the Anti-Balaka coordination in his role as National Coordinator.<sup>55</sup>

36. More generally, the Prosecution argues that Mr Ngaïssona's continued involvement with the Anti-Balaka as the National Coordinator is probative of his intent concerning the crimes charged. With the exception of Mr

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<sup>52</sup> In addition to declining to confirm the charges in the Provinces, the Pre-Trial Chamber declined to confirm charges occurring closer to Bangui, namely Boy-Rabe and Boeing Muslim cemetery. Confirmation Decision, para. 175.

<sup>53</sup> Confirmation Decision, para. 176.

<sup>54</sup> Prosecution's Submissions, para. 56.

<sup>55</sup> [REDACTED].

Ngaïssona's alleged financing of the Anti-Balaka, the Prosecution does not specify what acts and conduct are probative of Mr Ngaïssona's alleged prior intent, thereby hampering the Defence's ability to respond. However, the Defence notes that certain witnesses will be asked to testify about acts and conduct which the Pre-Trial Chamber found was insufficient to establish Mr Ngaïssona's intent for the charged crimes, and thus such questions should not be entertained at the trial stage of the proceedings. The Defence will provide two examples.

37. *First*, the Pre-Trial Chamber found with respect to the [REDACTED] by the National Coordination that such [REDACTED] was "*per se* neutral vis-a-vis the intent and purpose of [Mr] Ngaïssona as to the charged incidents" and that such *post facto* conduct is insufficient to establish the intent of the accused.<sup>56</sup> Despite this finding, the Prosecution includes in its Provisional Witness List that witnesses [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] who are expected to testify on the [REDACTED]. Such questions should not be entertained by the Chamber since they go to facts and circumstances found by the Pre-Trial Chamber to be outside the scope of the charges.

38. *Second*, the Pre-Trial Chamber found that the crimes committed at the Boy-Rabe Base could not be attributed to Mr Ngaïssona, including the [REDACTED] by [REDACTED]. Despite the clear finding of the Pre-trial Chamber that [REDACTED]'s evidence with respect to this incident was insufficient to establish Mr Ngaïssona's criminal responsibility, the Prosecution includes this incident in its summary of [REDACTED]'s

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<sup>56</sup> Confirmation Decision, paras 211, 219, 237.

evidence.<sup>57</sup> Similarly, the Prosecution includes in its summary [REDACTED]'s participation in [REDACTED] despite the Pre-Trial Chamber finding that such participation was insufficient to prove Mr Ngaïssona's intent and endorsement of any of the crimes charged. The Defence submits that testimony on these two aspects of [REDACTED]'s testimony should not be entertained since they go to facts and circumstances found by the Pre-Trial Chamber to be outside the scope of the charges.

## **V. Conclusion**

39. The Prosecution submits that the Chamber cannot assess the relevance and probative value of its evidence in the abstract since it limits the Chamber's ability to assess the evidence in its totality and in view of the evidence presented at trial.<sup>58</sup> It concludes its submissions by urging the Trial Chamber to not prejudge the evidence and limit the scope of the trial on the basis of the reduced number of charges.<sup>59</sup>

40. The Prosecution's arguments are made on the premise that by eliminating certain witnesses from the Prosecution's witness list, reducing the scope of their questioning, or excluding certain documentary evidence on the basis of the reduced charges, the Trial Chamber would be making a determination in the abstract as to the relevance and probative value of the Prosecution's prospective evidence. This premise contains a fatal flaw.

41. It ignores that such a determination would not be done in the abstract, but would be based on the concrete determinations made by the Pre-Trial Chamber to decline to confirm a vast majority of the charges against Mr

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<sup>57</sup> See Prosecution's Provisional Witness List, page 5.

<sup>58</sup> Prosecution's Submissions, para. 19

<sup>59</sup> Prosecution's Submissions, para 57.

Ngaïssona, and alleged his responsibility as that of a principal under article 25(3)(a), which decision was not contested by the Prosecution through requesting leave to appeal. The Pre-Trial Chamber's assessment as to this evidence is binding since it terminated the proceedings with respect to those unconfirmed charges and modes of liability. By requesting the Chamber to not allow the introduction of evidence which was previously rejected by the Pre-Trial Chamber as insufficient to meet the "substantial grounds to believe" evidentiary standard, the Defence is merely requesting the Trial Chamber ensure that the Prosecution respects the outcome of the Confirmation Decision.

Respectfully submitted on 2 November 2020,



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