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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-ÉDOUARD NGAÏSSONA***

Public Redacted Version of ICC-01/14-01/18-704-Conf-Red

**Response by the Common Legal Representatives of Victims of the other crimes to
the First Registry Assessment Report of Applications of Victims to participate at
trial**

Source: Common Legal Representatives of Victims of Other Crimes

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

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I. INTRODUCTION

1. The Common Legal Representatives of the Victims of the Other Crimes (the “Common Legal Representatives”) respectfully request the Trial Chamber to adopt a flexible approach in assessing the applications for participation of Victims at trial, particularly the ones of Victims already authorised to participate at the pre-trial stage of the proceedings.

2. The Common Legal Representatives contend that said approach is certainly appropriate in the present case because of: (i) the nature of the crimes alleged; (ii) the repeated use of the “inclusive” terminology defining the geographical and temporal scope of the alleged crimes by Pre-Trial Chamber II in confirming the charges against both Accused; and (iii) the specific instruction of Pre-Trial Chamber II to the Registry to proceed in a flexible manner in assessing the applications by Victims to participate in the proceedings.

3. In particular, the Common Legal Representatives argue that the adoption of a flexible approach in assessing the applications will safely fall within the clear and logical parameters of the case since the localities, situated in the entire city of Bangui or Boeing or Cattin or along the PK9–Mbaïki axis (but not explicitly mentioned in the operative part of the Decision Confirming the Charges against the Accused are understood to be encompassed by the inclusion of the words “including” or “along”). Moreover, those localities have not been explicitly excluded by Pre-Trial Chamber II in said Decision.

4. Furthermore, the Common Legal Representatives posit that the confinement of Muslim civilians in the PK5 enclave of Bangui should be considered part of the commission of the crime of persecution due to its gravity, considered in conjunction with other acts committed by the Anti-Balaka elements with discriminatory intent.

II. PROCEDURAL BACKGROUND

5. On 21 June 2019, Pre-Trial Chamber II issued the “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position”,¹ authorising 15 Victims to participate in the proceedings, including a/65061/19, a/65082/19, a/65107/19 and a/65137/19.

6. On 13 September 2019, Pre-Trial Chamber II issued the “Decision regarding the Registry’s Outstanding Transmissions of Applications for Victim Participation” authorising 1062 Victims to participate at the pre-trial stage of the proceedings,² including a/66228/19, a/65035/19, a/66138/19, a/66150/19, a/66140/19, a/65138/19, a/66217/19, a/66171/19, a/65742/19 and a/65958/19.

7. On 11 December 2019, Pre-Trial Chamber II issued the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (the “Confirmation Decision”).³

8. On 16 March 2020, the Presidency constituted Trial Chamber V (the “Chamber”) and referred the present case to it.⁴ On 17 March 2020, Judge Schmitt was elected as the Presiding and Single Judge of the Chamber.⁵

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

² See the “Decision regarding the Registry’s Outstanding Transmissions of Applications for Victim Participation (Pre-Trial Chamber II)”, [No. ICC-01/14-01/18-338](#), 13 September 2019, p.13.

³ See the “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), No. ICC-01/14-01/18-403-Conf, 11 December 2019. A public redacted version was issued on 20 December 2019 as [No. ICC-01/14-01/18-403-Red](#). Corrected confidential and corrected public redacted versions were issued on 14 May 2020 as No. ICC-01/14-01/18-403-Conf-Corr and No. ICC-01/14-01/18-403-Red-Corr, respectively (the “Confirmation Decision”).

9. On 19 October 2020, the Registry filed its First Report on Victims' applications for participation at trial (the "VPRS First Report").⁶

10. In accordance with regulation 24 of the Regulations of the Court, the Common Legal Representatives file the present submissions on behalf of the Victims they represent and who have already been authorised to participate in the proceedings at the pre-trial stage.

III. CLASSIFICATION

11. Pursuant to regulation 23*bis*(1) and (2) of the Regulations of the Court, the present submission is classified confidential *ex parte* only available to the Prosecution, the Defence teams and the Common Legal Representatives teams because it refers to the content of documents likewise classified confidential and to documents not available to the VPRS. A confidential redacted version is filed simultaneously. A public redacted version will be filed in due course.

IV. SUBMISSIONS

(i) Issues pertaining to the geographical and temporal scope of the case

12. The Common Legal Representatives address *infra* the geographical and temporal scope of the attack of 5 December 2013 in Bangui, and of the attack along the PK9–Mbaïki (category 1, 2 and 4 identified in the VPRS First Report).

⁴ See the "Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona" (Presidency), [No. ICC-01/14-01/18-451](#), 16 March 2020.

⁵ See the "Decision notifying the election of a Presiding Judge and Single Judge" (Trial Chamber V), [No. ICC-01/14-01/18-454](#), 17 March 2020.

⁶ See the "First Registry Assessment Report on Victim Applications for Participation in Trial Proceedings", [No. ICC-01/14-01/18-688](#), 19 October 2020 (the "VPRS First Report") and its Annex No. ICC-01/14-01/18-688-Conf-Anx. See also the "First Registry Transmission of Group C Applications for Victim Participation in Trial Proceedings", [No. ICC-01/14-01/18-687](#), with Confidential *Ex parte* Annexes and Confidential Annexes 1-15-Red, 19 October 2020.

13. The Common Legal Representatives recall that the *chapeau* element of crimes against humanity requires that specific crimes be committed as part of a *widespread* or *systematic* attack directed against any civilian population. In this regard, Chambers held on numerous occasions that the term “*widespread*” means that the attack is large-scale in nature and targeting a large number of persons. Thus “*the assessment of whether the attack is widespread is neither exclusively quantitative nor geographical, but must be carried out on the basis of all the relevant facts of the case.*”⁷ As for the term “*systematic*”, Chambers consistently held that said term reflects the organised nature of the acts of violence and thus one of the factors to consider is the way Victims were treated “*across a wide geographic area.*”⁸ Consequently, the Common Legal Representatives posit that, in assessing the applications for participation of Victims in the proceedings, the focus should not necessarily be on the administrative boundaries of cities or towns or villages but rather **on the area** objectively affected by the attack directed against the civilian population.

14. The same conclusion is applicable in relation to the common elements of war crimes. In this regard, Chambers evaluated at least two factors in order to verify the existence of an armed conflict, including: (i) the level of organisation of the armed groups involved; and (ii) the intensity of the armed violence.⁹ As for the first requirement, Chambers assessed, *inter alia*, the military (operational) capacity of the armed group to, for example, *control certain territory* and/or have a territorial division into zones of responsibility.¹⁰ As for the second requirement, Chambers considered, *inter alia*, the spread of armed clashes *over the territory*, the group’s ability to *control*

⁷ See the “Judgment” (Trial Chamber VI), [No. ICC-01/04-02/06-2359](#), 8 July 2019, para. 691 (the “Ntaganda Trial Judgment”).

⁸ *Idem*, para. 692, citing the, the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), [No. ICC-01/04-01/07-3436-tENG](#), para. 1113 (the “Katanga Trial Judgment”).

⁹ *Idem*, paras. 703-704.

¹⁰ *Ibidem*, citing the Katanga Trial Judgment, *supra* note 8, paras. 1172-1187 and the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber I), [No. ICC-01/04-01/06-2842](#), paras. 537-538 (the “Lubanga Trial Judgment”).

*territory over a period of time and the effects of the violence on the civilian population, including the extent to which civilians left the relevant area.*¹¹

15. The need to focus on the actual area (not the administrative boundaries) of the commission of the crimes is even more pronounced when it comes to specific elements of the crimes alleged in this case. For example, the crime of directing attacks against the civilian population as a war crime, provided in article 8(2)(e)(i) of the Statute,¹² may encompass attacks that are carried out in an indiscriminate manner by *targeting a whole geographical area as opposed to specific objects or not targeting specific military objects or persons taking a direct part in hostilities.*¹³ Moreover, the crime of forcible transfer and deportation as a crime against humanity, provided in article 7(1)(d) of the Statute,¹⁴ may involve different types of conduct on the part of the perpetrator amounting to “*expulsion or other coercive acts*” so as to force the Victim to *leave the area where he or she is lawfully present.*¹⁵ Indeed, the prohibition against forcible transfer is intended to protect the right of individuals to remain in their homes or communities unhindered since the requirement of “*lawful presence*” does not mean that the Victim must have had legal residence in the area.¹⁶ Lastly, the

¹¹ *Idem*, para. 716, citing the Lubanga Trial Judgment, *supra* note 10, para. 538 and the Katanga Judgment, *supra* note 8, para. 1187.

¹² See article 8(2)(e)(i) of the Elements of Crimes. *Elements*: 1. *The perpetrator directed an attack.* 2. *The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.* 3. *The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.* 4. *The conduct took place in the context of and was associated with an armed conflict not of an international character.* 5. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

¹³ See the Ntaganda Trial Judgment, *supra* note 7, para. 921, comparing the Katanga Trial Judgment, *supra* note 8, para. 802.

¹⁴ See article 7(1)(d) of the Statute of the Elements of Crimes. *Elements*: 1. *The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.* 2. *Such person or persons were lawfully present in the area from which they were so deported or transferred.* 3. *The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.* 4. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.* 5. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*

¹⁵ See the Ntaganda Trial Judgment, *supra* note 7, para. 1047, citing the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), [No. ICC-01/09-01/11-373](#), para. 244.

¹⁶ *Idem*, para. 1069.

crime of displacement as a war crime, provided in article 8(2)(e)(viii) of the Statute,¹⁷ requires that the perpetrator ordered the displacement of a civilian population. The reference to “*a civilian population*”, rather than “*a civilian*” or “*civilians*”, indicates that the displacement needs to cover a certain number of individuals residing *in an area*.¹⁸ In this regard, in the *Ntaganda* case, Trial Chamber VI considered that the fact that the Accused’s act (of ordering his troops to attack civilians belonging to a specific ethnic group who were present in *a town and the surrounding villages* with the purpose of either eliminating them or driving them out) had fulfilled the material element of the crime.¹⁹

16. Furthermore, the crime of persecution as a crime against humanity provided in article 7(1)(h) of the Statute does not require that the underlying acts are committed where the victims of such acts reside.²⁰ Indeed, violent acts²¹ - such as the crime of forcible transfer and deportation - may constitute underlying acts of persecution. Further, the targeted group can be defined in both a positive and a negative manner. It may be the case that the perpetrator either targeted only members of a certain group or individuals because they do not belong to said group.

¹⁷ See article 8(2)(e)(viii) of the Elements of Crimes. *Elements*: 1. The perpetrator ordered a displacement of a civilian population. 2. Such order was not justified by the security of the civilians involved or by military necessity. 3. The perpetrator was in a position to effect such displacement by giving such order. 4. The conduct took place in the context of and was associated with an armed conflict not of an international character. 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

¹⁸ See the *Ntaganda* Trial Judgment, *supra* note 7, para. 1083.

¹⁹ *Idem*, paras. 1087-1088.

²⁰ See article 7(1)(h) of the Statute of the Elements of Crimes. *Elements*: 1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights. 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such. 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law. 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. 5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

²¹ See the *Ntaganda* Trial Judgment, *supra* note 7, para. 994.

In the latter instance, all but one ethnic group within a community would be targeted.²²

17. In the present case, the Victims of the alleged crime of persecution are of Muslim faith and/or individuals perceived as collectively responsible for, complicit with or supportive of the Seleka or having a connection with Muslims, because of family ties, business, or other. Therefore, in evaluating their status as Victims, the Chamber should appraise the particular political, social, and cultural context and take into consideration both the objective factors relevant to the discriminatory ground alleged, as well as the subjective perception of the Victims as belonging to the discriminated group.²³ Indeed, the crime of persecution focuses on the specific acts committed against a specific group, namely acts that severely deprive victims of their fundamental rights.

18. In this regard, the Appeals Chamber of the ICTY, in the case of *Kvočka et al.*, for instance, held that harassment and other psychological abuse may constitute underlying acts of persecution because they affect the mental well-being of a person, which is protected pursuant to article 75(2)(a) of the Additional Protocol I to the Geneva Conventions of 1977. It further recalled that underlying acts of persecution need not be considered a crime in international law.²⁴

19. There is no requirement that a person must be targeted, harassed or otherwise deprived of a fundamental right at their place of residence. Victims may also have been targeted when they have already been displaced to another location where they were lawfully present. As long as the underlying act committed takes place within the temporal and *general* geographical boundaries alleged to have been under the control of the perpetrator and his or her organisation at the relevant time, individuals

²² *Idem*, para. 1009.

²³ *Idem*, para. 1010.

²⁴ See ICTY, *Kvočka et al.*, Case No. IT-98-30/1-A, [Judgment](#) (Appeals Chamber), 28 February 2005, para. 323.

alleging persecution should not be denied the status of victims drawing technical boundaries, such as requiring that the act took place *at* their place of residence. From the fact that acts such as harassment and psychological abuse may qualify as underlying acts of persecution, it logically flows that said acts may be on-going and not limited to single instances. In fact, the main focus of the prohibition of the crime lies in the proscribed conduct as a whole and the ground for discrimination, *i.e.* membership of a targeted group.

20. Furthermore, the Common Legal Representatives observe that Pre-Trial Chamber II purposefully used “**inclusive**” terms in defining the geographical and temporal scope of the case. Said Chamber, already in the Warrant of Arrest for Mr Yekatom, found that:

“By September 2013, Anti-Balaka groups were engaged in hostilities against the Seleka in western CAR, starting in Bossangoa, spreading east to Bouca and then south to Bossemptélé, Bossembélé and Boali. [...] Hostilities culminated in an attack on Bangui on 5 December 2013 [...] The 5 December 2013 Bangui Attack was not immediately successful and sparked a cycle of violent reprisals by the Seleka and Anti-Balaka in various neighbourhoods in Bangui and throughout western CAR against civilians perceived as supporting the other side. [...] When Seleka forces had withdrawn from Bangui and western CAR upon Michel Djotodia’s resignation, the Muslim population was left unprotected and exposed to escalating retributive sectarian violence by Anti-Balaka groups. The campaign involved the targeting of the Muslim civilian population and those perceived to have supported the Seleka, throughout Bangui – including Boeing and Bimbo – and across western CAR provinces, including Ouham (Bossangoa), Mambere-Kadei (Berberati, Carnot, Guen, Yaloke), Lobaye (Boda), Ouham-Pende and Ombella-M’Poko (Bossemptélé, Gaga, Boali), and involved crimes, such as attacks against the civilian population, displacement, forcible transfer or deportation, summary executions, killings, mutilations, torture and cruel treatment, imprisonment or other forms of severe deprivation of liberty, sexual offences, destruction of Muslim property and religious buildings (mosques), routine pillaging of Muslim houses and shops and persecution.”²⁵

²⁵ See the “Warrant of Arrest for Alfred Yekatom” (Pre-Trial Chamber II), as [No. ICC-01/14-01/18-1-Red](#), 17 November 2018, para. 8 (Footnotes removed and emphasis added). See also, the “Warrant of Arrest for Patrice-Edouard Ngaïssona” (Pre-Trial Chamber II), [No. ICC-01/14-02/18-2-Red](#), 13 December 2018, para. 10.

21. As for Mr Yekatom's contribution, the Pre-Trial Chamber also found, *inter alia*, that he "[led] his group in Bangui and adjacent neighbourhoods in their participation in the 5 December 2013 Bangui Attack. Using firearms, grenades and machetes, Yekatom's group first attacked Muslims in Boeing [...]. Thereafter, Yekatom and his group moved to the Cattin crossroads where they attacked Seleka forces and civilians [...]. In response to these attacks, Muslim residents of Cattin and Boeing were forced to flee to other parts of the CAR or neighbouring countries."²⁶ Moreover, "on or about 30 January 2014, Yekatom and his subordinates entered Mbaïki. By that time, the Seleka had left Mbaïki and the number of Muslims had increased due to their flight from Anti-Balaka attacks in other towns and villages in Lobaye Prefecture. [...] Fearing imminent harm, starting from at least 6 February 2014, virtually the entire Mbaïki's Muslim civilian population was forced to flee".²⁷

22. As for Mr Ngaïssona's contribution, Pre-Trial Chamber II found that he enabled the Anti-Balaka to commit crimes by improving the group's operational capacity, providing financial and logistical support (such as ammunition) and appointing or formally recognising "Anti-Balaka ComZones" whose elements committed crimes.²⁸

23. Consequently, in the Confirmation Decision, the Pre-Trial Chamber made the following factual findings:

"Along with their primary and per se legitimate objective to overthrow the Seleka regime and oust them from the CAR, the Anti-Balaka also developed a criminal policy of targeting the Muslim population in western CAR. Based on their religious or ethnic affiliation, they were perceived as collectively responsible for the crimes allegedly committed by the Seleka, complicit with, or supportive of the Seleka. As a result, from September 2013 onwards, the Muslim population became the target of deliberate attacks carried out by Anti-Balaka groups as a form of retributive violence 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,

²⁶ *Idem*, para. 18 (a) (Footnotes removed and emphasis added).

²⁷ *Idem*, para. 18 (f) (Footnotes removed and emphasis added).

²⁸ See the Warrant of Arrest for Mr Ngaïssona, *supra* note 25, para. 20.

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 inhumane acts. [...] [Yekatom] throughout the time relevant to the charges, reported to and coordinated with Ngaïssona. He was in command of an active group of Anti-Balaka which at one point numbered 3,000 members, who were first located in Cattin, Boeing and Bimbo and, later on, in the Lobaye Prefecture along the Bangui-Mbaïki axis".²⁹

24. As a result of its findings, Pre-Trial Chamber II confirmed, *inter alia*, the following charges against both Accused:

- Directing attacks against the civilian population (article 8(2)(e)(i) of the Statute) *in Bangui, including Cattin and the Boeing market, starting on 5 December 2013;*
- Displacement (article 8(2)(e)(viii) of the Statute) for: (a) the dislocation of nearly all Muslims residing in Cattin and Boeing to PK5, a predominantly Muslim neighbourhood *in Bangui, other parts of the CAR or neighbouring countries, starting from 5 December 2013 in the context of the attack on Bangui, including Cattin and Boeing, on 5 December 2013;* and (b) the dislocation of the majority of the Muslim population from their towns and villages between on or about 10 January 2014 and on or about 6 February 2014, *in the context of the Anti-Balaka's advance through and takeover of villages along the PK9-Mbaïki Axis (including Sekia, Ndangala, Bimon, Kapou, Bossongo, Pissa, Mbaïki);*
- Forcible transfer and deportation (article 7(1)(d) of the Statute) for: (a) the dislocation of nearly all Muslims residing in Cattin and Boeing to PK5, a predominantly Muslim neighbourhood *in Bangui, other parts of the CAR or neighbouring countries, starting from 5 December 2013 in the context of the attack on Bangui, including Cattin and Boeing, on 5 December 2013;* and (b) the dislocation of the majority of the Muslim population from their towns and villages between on or about 10 January 2014 and on or about 6 February 2014, *in the context of the Anti-Balaka's advance through and takeover of villages along the PK9-Mbaïki Axis (including Sekia, Ndangala, Bimon, Kapou, Bossongo, Pissa, Mbaïki);*
- Persecution (article 7(1)(h) of the Statute) for the severe deprivation of the fundamental rights of persons *in Bangui, including Cattin and Boeing, the Yamwara School Base, and the villages along the PK9-Mbaïki Axis, by targeting them on the basis of political, ethnic and/or religious grounds.*

²⁹ See the Confirmation Decision, *supra* note 3, paras. 64-65 (Footnotes removed and emphasis added).

25. Hence, the Common Legal Representatives submit that the intentional use of the “inclusive” terms in the Confirmation Decision (such as “*Bangui, other parts of the CAR or neighbouring countries, starting from 5 December 2013 in the context of the attack on Bangui, including Cattin and Boeing*” and “*in the context of the Anti-Balaka’s advance through and takeover of villages along the PK9-Mbaïki Axis*”) clearly indicates that the Pre-Trial Chamber never intended to exhaustively quote all the locations where the abovementioned crimes were allegedly committed or otherwise limit the geographical scope of the case to the administrative boundaries of Boeing or Cattin only, or to the villages exactly on the PK9–Mbaïki axis only. Nowhere in the Confirmation Decision, did the Pre-Trial Chamber explicitly rule out the commission of the charged crimes (ensuing personal harm suffered by the Victims) in places situated in other locations.

26. The same reasoning is true for the temporal scope of the case since the Pre-Trial Chamber stated unambiguously that the relevant crimes were allegedly committed *between September 2013 and December 2014*.

27. Indeed, in cases of mass crimes, it may be very impractical to provide a high degree of specificity in relation to the names of all specific locations and precise dates. Thus, in the jurisprudence of the Court, it is not uncommon to describe the geographical scope of the charges by enumerating only the names of certain larger localities and then using inclusive terms such as “*including*” or “*including but not limited to*” when referring to others.³⁰ In fact, the Appeals Chamber held that the use of words such as “*including*” and “*elsewhere*” indicate that the lists of localities mentioned in a judicial decision are not meant to be exhaustive but should be

³⁰ See the “Second Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceeding” (Pre-Trial Chamber II), [No. ICC-01/04-02/06-251](#), 7 February 2014, para. 29 and the “Decision on the updated document containing the charges” (Trial Chamber VI), [No. ICC-01/04-02/06-450](#), 6 February 2015, para. 82.

understood to encompass other places where the alleged crimes were also committed (especially when those locations were clearly mentioned by witnesses).³¹

28. In this regard, in the *Ntaganda* case, Trial Chamber VI held that the use of the terms “*in or around*” is intended to encompass crimes committed in the surroundings of a certain location in question, noting that the precise limits of the neighbouring villages may not be clearly ascertainable. Said Chamber explained that inclusive language generally covers the geographic areas between the main locations in question and other villages within that geographic area when those specific locations are either identified in the Confirmation Decision or pleaded in the Document Containing the Charges and not ruled upon in the former.³²

29. It is thus submitted that such “*territorial proximity*” has to be taken into account when assessing the applications submitted by Victims. Especially when the alleged commission of crimes may also have begun in towns or villages in the region of a main city and then spread into the city itself or, conversely, acts that started in the city and then spread to its surrounding regions³³ and affected Victims in either location.

30. In their applications, Victims indicate having suffered harms from crimes committed in the whole Bangui town, *inter alia* along the *avenue de indépendance* axis - where the Anti-Balaka arrived early the morning of 5 December 2013 -, in Sica 1, Camp Fidèle Obrou, 200 Villas, 36 Villas, Boye Rabe, Fouh and its neighbourhood (including Combattants et Miskine), Gobongo and its neighbourhood (including Sinistré et Galabadja), Kpetene, Sara, Kina, Malimaka, PK10, PK11 and PK 12.

³¹ See the “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012 (Appeals Chamber)”, [No. ICC-01/04-01/06-3129 A A2 A3](#), 3 March 2015, paras. 220-223.

³² See the “Decision on the updated document containing the charges, *supra* note 30, para. 74.

³³ See the “Decision on Principles Applicable to Victims’ Applications for Participation, to Legal Representation of Victims, and to the Manner of Victim Participation in the Proceedings” (Single Judge, Pre-Trial Chamber I), [No. ICC-01/12-01/18-289-Red-tENG-Corr](#), 20 March 2019, paras. 54-55.

31. In this regard it is worth recalling that [REDACTED].³⁴ [REDACTED].³⁵ [REDACTED]³⁶[REDACTED].³⁷ Because this evidence was before Pre-Trial Chamber II, it can be assumed that it did not intend to exclude the locations [REDACTED].

32. Therefore, the Common Legal Representatives submit that it is precisely for the above mentioned reasons that Pre-Trial Chamber II instructed the Registry to adopt a rather flexible approach in assessing the applications of Victims to participate in the proceedings.

33. In particular, said Chamber indicated that:

[...] [W]ith a view to ensuring the expeditiousness of the proceedings and in the interests of the victims, the Chamber instructs the Registry to adopt a flexible approach in assessing victim applications with regard to the temporal and territorial scope of the present case at this stage of the proceedings. This means that the Registry should accept applications that are internally coherent, clearly relate to the events described in the Warrants of Arrest and/or, where appropriate, the information in other victim applications, and clearly establish that the alleged perpetrators were part of the Anti-Balaka. This includes flexibility with respect to the precise dates of the alleged acts. Noting in particular the time that has elapsed since the events and the personal circumstances of the victims, the Chamber finds that the provision of information on the overall context of the alleged acts is sufficient for the purposes of the current proceedings. Similarly, minor discrepancies in terms of dates or locations should not lead to the exclusion of applications. The Chamber further considers that an application must establish that the alleged perpetrators were part of the Anti-Balaka group but, contrary to the Defence's submission, it is not necessary to demonstrate that they were subordinate to Ngaïssona or Yekatom at this stage of the proceedings. [...] [In addition] Considering that the Warrants of Arrest state that 'Yekatom led members of his group in Bangui and adjacent neighbourhoods in their participation in the 5 December 2013 Bangui Attack' [...] the Chamber is of the view that the Warrants of Arrest do not limit the territorial scope of the Bangui area to the locations

³⁴ [REDACTED]. See CAR-OTP-2041-0741-R01 at para. 68 and the Confirmation Decision, *supra* note 3, para. 63 and footnote 133. See also [REDACTED].

³⁵ [REDACTED]. See CAR-OTP-2100-2569-R01 at para. 7 and the Confirmation Decision, *supra* note 3, para. 77 and footnote 171. [REDACTED]. See CAR-OTP-2056-0447-R01 at para. 41 and the Confirmation Decision, *supra* note 3, para. 77 footnote 172. [REDACTED].

³⁶ [REDACTED]. See also, the Confirmation Decision, *supra* note 3, para. 65 and footnote 145.

³⁷ [REDACTED]. See CAR-OTP-2069-0035-R01, para. 37 and the Confirmation Decision, *supra* note 3, para. 131 and footnote 308. [REDACTED]. See CAR-OTP-2063-0369-R01 at para. 33 and the Confirmation Decision, *supra* note 3, para. 131 and footnote 308. [REDACTED]. [REDACTED].

explicitly mentioned in the context of this attack. Therefore, all applications related to areas commonly considered to be part of Bangui or those neighbouring Bangui should be accepted at this stage of the proceedings as long as the conditions set out [above] are fulfilled. The Chamber further instructs the Registry to apply the same approach to other locations [...]".³⁸

34. In this regard, the Chamber has already ruled that, unless otherwise indicated, the existing procedures, *inter alia*, on processing Victims' applications, adopted by Pre-Trial Chamber II shall remain in place at the trial stage of the proceedings.³⁹

35. Moreover, in relation to the assessment of Victims' applications, the Common Legal Representatives underline the recent approach by Trial Chamber X in the *Al Hassan* case indicating that changing the procedures at the trial stage is not desirable as this course of events would result in a disparity between applicants who applied at the confirmation of charges stage, and those who apply for the purposes of trial.⁴⁰

36. Similarly, Trial Chamber VIII in the *Al Mahdi* case had endorsed the application of a flexible approach, even with respect to applicants who failed to indicate the specific timeframe in which they suffered harm(s), because their application indicated the destruction of the relevant buildings as a reference point.⁴¹ Said Chamber stated that "*it is sufficient that an applicant demonstrates, for example, that the alleged crimes could have objectively contributed to the harm suffered*".⁴²

³⁸ See the "Decision regarding the Registry's First Assessment Report on Applications for Victim Participation, the Registry's First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims' procedural position", *supra* note 1, paras. 24-26 (Emphasis added).

³⁹ See the "Order Scheduling First Status Conference" (Trial Chamber V), [No. ICC-01/14-01/18-459](#), 19 March 2020, para. 8.

⁴⁰ See the "Decision on the procedure for the admission of victims to participate in proceedings for the purposes of trial" (Trial Chamber X), [No. ICC-01/12-01/18-661](#), 12 March 2020, para. 24 .

⁴¹ See the "Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims'" (Trial Chamber VIII), [No. ICC-01/12-01/15-97-Red](#), 8 June 2016, paras. 31 and 32.

⁴² *Idem*, para. 22.

37. As a result, the Common Legal Representatives argue that the approach to be adopted by the Chamber should not be any different and should not potentially disadvantage Victims participating in these proceedings. The adoption of a flexible approach in assessing the applications as argued by the Common Legal Representatives will safely fall within the clear and logical parameters of the present case since the localities, situated in the city of Bangui as a whole or Boeing or Cattin or in localities along the PK9–Mbaïki axis (but not explicitly mentioned in the operative part of the Confirmation Decision) must be understood to be encompassed by the words “*including*” or “*along*”, respectively, especially since none of these localities has been explicitly ruled out by the Pre-Trial Chamber in the Confirmation Decision.⁴³

38. Moreover, in relation to the Bangui area, the Common Legal Representatives submit that the formulation of the finding of Pre-Trial Chamber II in confirming the charges “*in the context of the attack in Bangui, including Cattin and Boeing on 5 December 2013*” means that the entire Bangui (town) area was affected and the specification “*including Cattin and Boeing*” was necessary because these two areas are in fact at the outskirts of Bangui town. This approach is confirmed by the fact that the Pre-Trial Chamber simply referred to Bossangoa and Mbaïki (with no specification of the areas within the town (*quartiers*)) for the attack carried out there.

39. In relation to the PK9-Mbaïki axis, the Common Legal Representatives, recalling the statements of the witnesses referred to *supra*,⁴⁴ support the VPRS’s proposal to understand the term “Mbaïki” as encompassing the entire *sous-prefecture*.

40. In relation to the temporal scope of the case, the Common Legal Representatives submit that, before and following the attacks, the Muslims - or individuals perceived as collectively responsible for, complicit with or supportive of

⁴³ See the “Order instructing the Prosecution to prepare an updated document containing the charges” (Trial Chamber VI), [No. ICC-01/04-02/06-390](#), 30 October 2014, para. 6.

⁴⁴ See *supra*, paras. 30-31 and footnotes 34-37.

the Seleka or having a connection with Muslims - were obliged to leave their houses/properties fearing for their lives. In accordance with the Victims' accounts, it took sometimes weeks and other times months before they could reach a safe place. Therefore, the Common Legal Representatives contend that in the context of the crimes of persecution, forcible transfer/deportation and displacement in particular, the temporal scope of the case extends for several months during which underlying acts were committed either protractedly or at different times falling within the timeframe and/or movement/temporal residence of the persons concerned and targeted.

41. In confirming the charges, Pre-Trial Chamber II indicated that the crimes allegedly committed by both Accused were "*all committed as part of a widespread attack conducted by the Anti-Balaka [...] between September 2013 and December 2014*".⁴⁵ Accordingly, applications should be assessed against these parameters. This can ultimately only result in a flexible approach as to the locations concerned.

(ii) Issue pertaining to the crime of persecution allegedly committed in the PK5 enclave of Bangui

42. The Common Legal Representatives argue that the fact that Victims may have suffered harm(s) in locations no longer within the scope of the charges which obliged them to flee does not preclude them from being recognised as Victims in the case. The Common Legal Representatives therefore submit that as long as the Victims can demonstrate *prima facie* that they have suffered from any type of harm(s) as a result of any of the crimes charged, they should be admitted to participate in these proceedings. This approach would also accord with that adopted in the *Al Mahdi* case.⁴⁶ As mentioned *supra*, in the context of the crime of persecution, the Chamber's

⁴⁵ See the Confirmation Decision, *supra* note 3, pp. 107 and 109.

⁴⁶ See *supra*, note 41, para. 22.

examination of facts must focus on the specific acts that severely deprived the targeted group of individuals of their fundamental rights.⁴⁷

43. In this regard, the Common Legal Representatives further recall that Pre-Trial Chamber II indicated that Mr Yekatom instructed his elements “*to go to PK5 and find the Muslims and the Seleka*”.⁴⁸ Said Chamber also recognised that Muslims were obliged to flee from their places of residence for fear of persecution and that Muslims were evacuated from Mbaïki and taken to PK5, Chad or Cameroon.⁴⁹

44. As noted in the VPRS First Report, Victims who sought refuge in the PK5 enclave of Bangui suffered, *inter alia*, severe deprivation of liberty.⁵⁰ Life in the enclave was very hard not only for security reasons but also because it was difficult to find food and supplies.⁵¹ Such severe deprivation of liberty is an underlying act of the crime of persecution due to its gravity. While not every denial of a human right is serious enough to constitute persecution as crime against humanity, acts or omissions need to be of equal gravity to the crimes listed as crime against humanity whether considered in isolation or in conjunction with other acts.⁵² Yet, such act or omission does not itself have to be a separate crime under international law in order to qualify as an underlying act of the crime of persecution⁵³ as discussed *supra*.⁵⁴ With respect to the *mens rea*, all that is required is to establish that the underlying act was deliberately carried out with discriminatory intent.⁵⁵ Therefore, creating an unbearable situation of total insecurity with no hope of further survival or life for civilians by limiting the aid to the enclaves where they had gathered, subsequently

⁴⁷ See *supra* para. 16.

⁴⁸ See the Confirmation Decision, *supra* note 3, para. 85 and footnote 205, referring to the statements of [REDACTED].

⁴⁹ *Idem*, para. 134 and footnote 313, referring to the statements [REDACTED].

⁵⁰ See the VPRS First Report, *supra* note 6, paras. 36-37. [REDACTED].

⁵¹ [REDACTED].

⁵² See ICTY, *Popović et al*, [Judgment](#) (Appeals Chamber), Case No. IT-05-88-A, 30 January 2015, para. 761 (the “Popović Judgment”).

⁵³ *Idem*, para. 738.

⁵⁴ See *supra* para. 18 and footnote 24.

⁵⁵ See the Popović Judgment, *supra* note 52, para. 738.

conducting military attacks and, eventually, terrorising them in order to ultimately force them out of the area, constitute acts of persecution.⁵⁶

45. In conclusion, the Common Legal Representatives posit that the confinement of Muslim civilians in the PK5 enclave of Bangui should be considered part of the commission of the crime of persecution due to its gravity considered in conjunction with other acts committed by the Anti-Balaka elements with discriminatory intent. Thus, Victims who sought refuge because of other crimes committed elsewhere, but who then were subject of persecutory acts committed against Muslims in the PK5 enclave, objectively meet the criteria for admission to participate in these proceedings because the crime was committed against them when they were lawfully present in this *quartier* of Bangui.

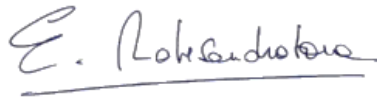
⁵⁶ *Idem*, paras. 43-45. See also, para. 737 in respect to the underlings act of “terrorising civilians” and the fact that spreading terror can be inferred from the circumstances – including the nature, manner, timing, and duration of the underlying acts. See also, ICTY, *Krstić*, [Judgement](#) (Trial Chamber), Case No. IT-98-33-T, 2 August 2001, paras. 533-538.

V. CONCLUSION

46. For the foregoing reasons, the Common Legal Representatives respectfully request the Trial Chamber to adopt a flexible approach in assessing the applications of Victims to participate at trial.



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Common Legal Representatives
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Dated this 26th day of November 2020

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)