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International Criminal Court

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Date: **8 October 2019**

PRE-TRIAL CHAMBER II

Before: **Judge Antoine Kesia-Mbe Mindua, Presiding Judge**
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD NGAÏSSONA*

Public with Confidential Annex A

Public redacted version of
"Corrected version of 'Prosecution Response to the Defence's Confirmation Submissions', 3 October 2019, ICC-01/14-01/18-376-Conf",
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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom
Me Mylène Dimitri
Mr Peter Robinson

Counsel for Patrice-Edouard Ngaïssona
Mr Geert-Jan Alexander Knoops

Legal Representatives of Victims
Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") responds to the issues raised by the Defence of Patrice-Edouard NGAISSONA ("**NGAISSONA**") and Alfred YEKATOM ("**YEKATOM**") during the Confirmation Hearing, pursuant to instructions of Pre-Trial Chamber II ("Chamber"). The Response is organised per Defence team and addresses the salient issues raised, in turn.

2. The Response intends to assist the Chamber's assessment and evaluation of the evidence submitted and cited in the Document Containing the Charges ("DCC"). However, given the limited scope of the proceedings and the Chamber's directive, the Prosecution does not reference all of the evidence before the Chamber. The Prosecution is mindful that the confirmation process is not a "mini-trial", and that the Chamber may reach sufficient findings based on uncorroborated evidence, given that the burden is met on concrete and tangible evidence demonstrating a clear line of reasoning underpinning the material facts. Additionally, as the credibility of witnesses is "necessarily presumptive" at this stage, the Chamber should proceed with great caution in seeking to resolve any apparent evidentiary inconsistencies.

II. DEFENCE ARGUMENT: NGAISSONA WAS NOT INVOLVED IN CREATING THE ANTI-BALAKA NOR DID HE PARTICIPATE IN THE COMMON PLAN

A. COCORA was under NGAISSONA's patronage

a. *Defence argument*

3. **NGAISSONA**'s argument that COCORA and COAC were not the only self-defence groups organising a response against the Seleka's advance, and that **NGAISSONA** was not involved in the creation of COCORA (being away from the Central African Republic ("CAR") in December 2012), does not undermine the viability of the DCC, and should be rejected. Similarly, **NGAISSONA**'s criticism of footnote 32 of the DCC as lacking substantiation for **NGAISSONA**'s alleged involvement in COCORA is unavailing.

b. *Additional submissions*

4. In addition to the allegations in the DCC, [REDACTED] confirms **NGAISSONA**'s link to COCORA. Contemporaneous media reports issued throughout 2013 and 2014 also include references to **NGAISSONA**'s involvement in the distribution of machetes to COCORA (and COAC) youth. Likewise, analytical reports of Non-Governmental Organisations ("NGOs") such as the Enough Project, confirm this link.

B. There is a link between NGAISSONA and François BOZIZE

a. *Defence argument*

5. The Defence's arguments regarding the relationship between **NGAISSONA** and François BOZIZE ("BOZIZE") should be rejected. Even assuming *arguendo* that [REDACTED] do not establish a *close* relationship between the two, such that **NGAISSONA** was a part of BOZIZE's inner circle, a *close* relationship is not dispositive of his participation in either the ***Strategic Common Plan***, or his criminal responsibility for the charged crimes.

b. *Additional submissions*

6. Moreover, the weight of the evidence before the Chamber readily refutes the Defence submissions. Additional to the DCC, **NGAISSONA**'s closeness and loyalty to BOZIZE is easily drawn from the following facts:

- **NGAISSONA** was a deputy of the *4e arrondissement*, in BANGUI (comprising BOY-RABE) and then of the NANA-BAKASSA Sous-Prefecture of BOZIZE's Kwa Na Kwa ("KNK") party;
- **NGAISSONA** publicly supported BOZIZE's regime. For example, on 6 January 2013, he called on the population to support BOZIZE's work in Libreville. On 14 January 2013, **NGAISSONA** referred to BOZIZE as the 'messiah' of CAR, reiterating his unconditional support;
- BOZIZE appointed **NGAISSONA** as Minister of Youth and Sports on 2 February 2013. The Prosecution's submissions outlined the importance of the support of the youth in CAR and, by logical extension, **NGAISSONA**'s importance to the BOZIZE government;

- As Youth Minister, **NGAISSONA** expressed his continued support: for example, his 15 March 2013 speech demonstrated his gratitude for BOZIZE's initiatives on behalf of the youth to ensure their better future. **NGAISSONA** confirmed:

> *"Cette jeunesse salue et comprend votre vision pour l'avenir, soutient vos actions, votre sagesse, votre sens élévé de responsabilité et d'homme d'Etat. C'est pourquoi elle n'a jamais menagé ses efforts pour se mobiliser lorsqu'il s'agit de défendre la patrie en danger. Notre jeunesse se voudra désormais dynamique et entreprenante, prête à s'employer pour défendre notre pays aux côtés de votre Excellence*."

- **NGAISSONA** remained loyal to BOZIZE after the 24 March 2013 Seleka *coup* ("*Coup"*), joining him in CAMEROON [REDACTED].

C. NGAISSONA participated in a common plan with the other co-perpetrators in CAMEROON

a. *Defence argument*

7. **NGAISSONA**'s argument that there is no tangible proof that he joined BOZIZE in CAMEROON to plan his return to power is rebutted by the credible evidence. Similarly, his assertion that he did not participate in meetings with BOZIZE, but that if he did, regaining power in CAR was not discussed, is wholly unsubstantiated. The representations of Counsel do not comprise evidence in these proceedings. **NGAISSONA**'s criticisms of the sufficiency of the evidence of [REDACTED] are equally unavailing.

b. *Additional submissions*

8. That **NGAISSONA** fled the *Coup* to YAOUNDE is not contestable. So is the fact that BOZIZE and others loyal to him also sought refuge there. Significantly, it is not contested that **NGAISSONA** participated in meetings.

9. In addition to the evidence cited in the DCC showing that **NGAISSONA** participated in several meetings with BOZIZE and members of his inner circle to discuss a response to the Seleka offensive [REDACTED], **NGAISSONA**'s financial records confirm his presence in YAOUNDE and in DOUALA during the relevant period. [REDACTED], [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED].

10. Notably, [REDACTED] and [REDACTED] corroborate [REDACTED] accounts of the YAOUNDE and DOUALA meetings. They confirm **NGAISSONA**'s involvement in the meetings, aimed at returning BOZIZE to power. This is further corroborated by a United Nations analytical document and the CAR Public Prosecutor's introductory brief, explaining that military fugitives and other figures who took refuge in Cameroon and in DRC led actions to destabilise CAR.

11. The Appeals Chamber confirms that a common plan can be proven inferentially from the circumstances, including the *subsequent* concerted action of the co-perpetrators. The (uncontested) fact that a coordinated Anti-Balaka attack on BANGUI occurred on 5 December 2013 [REDACTED], and that **NGAISSONA** was later installed and designated as the Anti-Balaka's General Coordinator on 14 January 2014 in a "National Coordination" of which MOKOM was also a key part (as the National Operations Coordinator), substantiate the inference that **NGAISSONA** was involved in the ***Strategic Common Plan*** from earlier on, as alleged.

D. The CAMEROON, FRANCE, ZONGO, KALANGOI groups coordinated with each other

a. *Defence argument*

12. The Defence argues that Call Data Records ("CDRs") show only limited contact between **NGAISSONA** and [REDACTED] while **NGAISSONA** was in CAMEROON, to exclude the latter's involvement in a common plan. Once again, even if credited, the argument is not remotely dispositive, either on the issue of their contact or on their membership in a common plan. *First,* involvement in a common plan is not dependent on the number of telephone contacts between persons. Indeed, a common plan may exist with no evidence of *direct* contact whatsoever. *Second,* **NGAISSONA**'s arguments do not rule out evidence of other forms and means of indirect communications used by the co-perpetrators in this case. [REDACTED].

13. Similarly, **NGAISSONA**'s attempt to disconnect himself from [REDACTED] is unavailing. They neither dispel the existence of the ***Strategic Common Plan***, nor undercut **NGAISSONA**'s responsibility for the crimes carried in its implementation through mutual attribution.

14. Likewise, the Defence arguments concerning **NGAISSONA**'s involvement with the FRANCE group and FROCCA go nowhere. **NGAISSONA**'s claim that he could not have been in FRANCE at the beginning of August 2013 because his visa had expired in March 2013 is fallacious, and in no way dispositive of his (a) *actual* presence, and (b) involvement and role in the FROCCA – which would not require physical presence.

b. *Additional submissions*

15. Apart from the referenced evidence in the DCC regarding contacts between **NGAISSONA** [REDACTED], the [REDACTED] communication among **NGAISSONA**, [REDACTED] is confirmed by other evidence. For instance, [REDACTED] explains that in October 2013, **NGAISSONA** told him that he (NGAISSONA) was the political coordinator of a movement [REDACTED].

16. The relationship between **NGAISSONA** and [REDACTED] before 14 January 2014, and between **NGAISSONA** and [REDACTED], is further substantiated:

- [REDACTED] and several other witnesses attested to the close relationship between **NGAISSONA** [REDACTED]. [REDACTED]; [REDACTED];
- [REDACTED] confirms that **NGAISSONA** [REDACTED] were part of FROCCA, [REDACTED];
- **NGAISSONA** [REDACTED] returned to BANGUI on 14 January 2014 [REDACTED];
- Witnesses and CDRs confirm **NGAISSONA** and [REDACTED] telephone contacts;
- On several occasions before December 2013, [REDACTED] stated or implied that he was waiting to receive orders: [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED];
- [REDACTED], ([REDACTED]), [REDACTED];
- [REDACTED] ([REDACTED]). [REDACTED].

17. After 14 January 2014, the relationship [REDACTED] continued:

- [REDACTED];
- [REDACTED];
- [REDACTED]. [REDACTED];

- [REDACTED]. [REDACTED]. [REDACTED];
- [REDACTED];

18. Regarding his presence in FRANCE during the founding of FROCCA, **NGAISSONA**'s representations mislead. The evidence not only shows that **NGAISSONA** *could* have been in FRANCE in this period, but that he was. *First*, in asserting the impossibility of his presence in FRANCE on the absence of a visa on his regular passport [REDACTED] and the March 2013 expiration of a visa issued on his diplomatic passport ([REDACTED]), **NGAISSONA** failed to alert the Chamber to a *second* diplomatic passport in his possession ([REDACTED]). *Second*, the evidence is that French authorities confirmed the issuance of a temporary residence permit to **NGAISSONA** ("*carte de séjour provisoire*") valid from 26 April 2013 to 25 April 2014 (i.e., when FROCCA was formed in August 2013). This *carte de séjour* allowed him to enter and reside in FRANCE - which he obviously knew, when making his submissions. *Third*, during the taking of his statement before the CAR authorities on 10 June 2014, **NGAISSONA**'s lawyer [REDACTED], confirmed that **NGAISSONA** was in FRANCE in July 2013 (thus, after the expiration of the visa). He would have known this as well, when making his representations before this Chamber. *Fourth*, [REDACTED], i.e., the period that FROCCA was created in FRANCE. *Fifth*, in that same period, on 13 August 2013 – **NGAISSONA** [REDACTED].

19. **NGAISSONA**'s criticism of [REDACTED] evidence regarding FROCCA (in which he spells the acronym as "FOCA") is vacuous. [REDACTED] his evidence further corroborates that of [REDACTED]. Finally, **NGAISSONA**'s misleading contentions about his presence in FRANCE when FROCCA was created in August 2013 because of an expired visa is further undercut by his travel from and to FRANCE via MOROCCO in December 2013 – also during the expiry of the said visa. The Prosecution considers that the evidence before the Chamber readily reveals the specious and misleading arguments **NGAISSONA** advances in this respect.

III. DEFENCE ARGUMENT: NGAISSONA WAS A 'PEACE COORDINATOR' AND DID NOT ARM, PROVIDE MONEY TO, OR TRAIN THE ANTI-BALAKA

A. NGAISSONA made essential contributions to the common plan

a. *Defence argument*

20. The Defence argues that **NGAISSONA** carried out actions consistent with his role as a so-called 'Peace Coordinator' for which he should not be held criminally liable. Moreover, the Defence challenges **NGAISSONA**'s contributions in respect of providing weapons, money or training to the Anti-Balaka.

b. *Additional submissions - legal argument*

21. **NGAISSONA**, as the evidence shows, was in league with the co-perpetrators and intended the crimes carried out pursuant to the ***Strategic Common Plan*** of which he was a member and essentially contributed. The Defence's arguments in no way diminish or affect the modes of liability under which **NGAISSONA** is charged. Whether **NGAISSONA** is addressed as 'General Coordinator' or 'Peace Coordinator' is immaterial. What is material is the nature and extent of contributions and whether without them, "the crimes would not have been committed or would have been committed in a significantly different way". The evidence submitted shows substantial grounds to believe that **NGAISSONA**'s contributions individually and cumulatively were essential and meet the requisite threshold. These contributions, both positive and by omission establish **NGAISSONA**'s essential role in the common plan, regardless of whether he wished or portrayed himself as a man of peace — which he was not. In any event, his contributions clearly meet the requisite threshold for his responsibility under articles 25(3)(c) and (d) in the alternative. As such, his submissions on this issue provide no basis for the Chamber to decline to confirm the charges.

22. For similar reasons, **NGAISSONA**'s challenge of a number of his specific contributions fails. The Prosecution refers to the evidence referenced in the DCC as concerns the Defence's challenge of allegation that **NGAISSONA** provided weapons to the Anti-Balaka on the basis that they fought with only basic weapons or those seized weapons from the Seleka. However, in addition, the Defence's selective submissions on

the evidence presented regarding the Anti-Balaka's arming is again misleading. While some Anti-Balaka elements lacked sophisticated weapons, such anecdotal information, does not warrant the Chamber's disregard of clear evidence showing that **NGAISSONA** provided the group access to weapons — sophisticated or not — as a contribution to the common plan. Further, the witness cited by the Defence described the weapons available to his particular group in stating, "[w]*e only had 17 bullets for hunting rifles, one AK47, and one automatic weapon not functioning properly. The Seleka were heavily armed so we retreated and went to OUHAM-BAC*". **NGAISSONA**, together with the National Coordination, addressed this need, providing money for weapons and ammunition. This supplemented (not superseded) the weapons made available through other means, including through seizures, attacks on weapons depots, weapons gained from FACA members who bought their own, and those gained from defeated Seleka. Thus, rather than showing that **NGAISSONA** did not supply weapons, the cited witness demonstrates the importance and impact of the contributions made through the National Coordination and **NGAISSONA**'s personal contributions to the Anti-Balaka's military capacity.

23. The Prosecution also sees no need to expand on the evidence referenced in the DCC concerning the Defence's contention that **NGAISSONA**'s motives in providing financial support to the Anti-Balaka are better explained by his claimed desire to dissuade elements from engaging in looting and violence. Similarly, the Defence's submissions that Prosecution's evidence fails to connect **NGAISSONA** with the training of the Anti-Balaka is not dispositive. As such, the Prosecution relies on the evidence referenced in the DCC on these matters.

24. As noted, as a direct co-perpetrator, **NGAISSONA** may be held accountable for the crimes through mutual attribution. Even if credited, his arguments do not relieve him of liability under article 25(3)(a). Nor do they dispel the existence of the ***Strategic Common Plan*** or refute **NGAISSONA**'s essential role in it, as the evidence otherwise establishes. Thus, it is immaterial whether, for instance, he took part in training specifically or in weapon deliveries, where there are numerous other culpable contributions otherwise established by the evidence.

B. NGAISSONA's speeches against foreign intervention amounted to anti-Muslimism rhetoric

a. *Defence argument*

25. **NGAISSONA** submits that his speeches against foreign intervention did not comprise anti-Muslimism rhetoric, given that the Seleka were primarily foreign Muslim mercenaries. As such, the Defence argues that the speeches should be understood as being aimed at Seleka fighters, and interpreted as legitimate calls for peace. The Defence's assertions that (1) **NGAISSONA**'s speeches were taken out of context; (2) that he never equated foreigners with Central African Muslims; and (3) that his 10 January 2013 march was a peace march, should be rejected on the weight of the credible evidence.

b. *Additional submissions*

26. The evidence referenced in the DCC concerning **NGAISSONA**'s speeches, their content, meaning, and context is clear, and disposes of the Defence's contentions. The Prosecution's submissions similarly refute the Defence's unsubstantiated claims.

27. Context is important to understanding **NGAISSONA**'s speeches and his references (or those made on his behalf) to "foreigners" and "*ennemis de la nation*". However, evaluating his speeches also requires taking into account the following:

28. *First*, CAR nationals *were* among the ranks of the Seleka, and this fact was unequivocally ignored and dismissed by **NGAISSONA** who claimed: "*Ce ne sont pas les Centrafricains qui ont fait ces choses-lá*". This was the first step in distinguishing even the Central African Muslim population from "real Central Africans".

29. *Second*, **NGAISSONA**'s speeches were not isolated or so intended. For the CAR population in late 2012/early 2013, they derived their meaning from, and were interpreted together with, similar rhetoric flooding the airways, including expressed by BOZIZE. It is important to note that the language used by [REDACTED] and [REDACTED] on behalf of COAC and COCORA (groups with close links to **NGAISSONA**) formed the basis of a formal inquiry by "*the Mixed Investigation Commission… in particular for 'inciting hatred'*".

30. *Third*, despite **NGAISSONA**'s references to peace, his speeches were divisive in practice. He called on Christians to attend his "peace" march to the exclusion of Muslims, leaving no doubt about who was considered 'peaceful'. In the 4 January 2013 speech read by Mr ZAMA on **NGAISSONA**'s behalf ("*nous lançons cet appel au nom de Patrice Edouard **NGAISSONA**"*), references to Islam are derogatory and promote fear mongering (i.e., "*certaines personnes veulent utiliser l'islamisme pour detruire le pays*"), while it is the Christians who are called to participate: "*Nous demandons à nos compatriots, à toutes les églises de ne pas se mettre en marge de cette grande marche. Il faut que des appels soient lancés dans les églises…*".

C. NGAISSONA's speeches had the effect of mobilising the youth

a. *Defence argument*

31. **NGAISSONA**'s submissions that (1) he did not mobilise the youth through "his designation as Minister of Youth, Sports, Arts and Culture"; (2) his calls to action were directed to all Central Africans; and (3) the evidence does not substantiate the participation of COAC and COCORA youth in the 5 December 2013 BANGUI attack, do not defeat or diminish his criminal liability for the charged crimes under any mode.

b. *Additional submissions*

32. The DCC, as well as the Prosecution's submissions, discuss **NGAISSONA**'s influence over the youth and the various ways in which he exercised it. These subsidiary facts demonstrate a continuity of actors and policies, which carried through the formation and development of the Anti-Balaka. However, they are not 'material' facts on which the confirmation of charges depends or requiring findings by the Chamber. Thus, **NGAISSONA**'s submissions, even if credited — and they should not be based on the evidence — are not dispositive. That said, the evidence before the Chamber amply demonstrates the continuity of persons and policies that thread their way through to the Anti-Balaka, with **NGAISSONA** among those at their centre.

33. **NGAISSONA** himself acknowledged his influence over the youth. In March 2013, he addressed then President BOZIZE in a public speech:

> "*Following your magnificent re-election to the highest office of the State, the young people of CENTRAL AFRICA, through me, wish to thank you for having accepted*

their invitation …The young people of Central Africa wish to reiterate to you all their gratitude for the highly significant efforts made under your stewardship to find ways to ensure social well-being and a better future for them. The major initiatives undertaken to this effect are numerous: the creation, within the Ministry of Youth, Sports, Arts and Culture, of a general department for the promotion of youth [and] the organisation of this within a national umbrella structure – the National Council for Youth (CNJ)…".

34. **NGAISSONA**'s call of the youth to action is clear in his various speeches. As noted, in March 2013 he stated:

"*President of the Republic, it is here that the Central African youth represent more than half of… our population…. [F]rom now on, our young people would like to be dynamic and enterprising, ready to devote themselves to defending our country alongside Your Excellency*."

35. The evidence shows that checkpoints aimed at identifying Seleka and their supporters were often the sites of crimes, committed as part of the policy of violently targeting the Muslim civilian population. These crimes included exacting illegal tolls, extortion, illegal arrests, and abduction. Specifically, in BANGUI's 4th and 8th *arrondissement* (where COAC and COCORA controlled roadblocks), Muslim civilians were targeted due to their perceived alliance with the Seleka and some were "disappeared" – never seen again.

36. The role of the COAC and COCORA youth in attacks in BANGUI is supported by other evidence, including the Report of OHCHR's Fact Finding Mission to the Central African Republic, which noted the presence of *COROCA militias roaming in the city of Bangui with machetes with a view to attacking rebels and their supporters*.

37. [REDACTED] also substantiates the link between youth mobilised through COAC and COCORA and the Anti-Balaka, observing that:

"*Many Youth Coordinators later became Anti-balaka members and some even ComZones. For example, there was [REDACTED], the Youth Coordinator and [REDACTED], who joined the COCORA. [REDACTED] (a.k.a '[REDACTED]) who became Anti-Balaka ComZones for [REDACTED]. He is one of [REDACTED] elements*."

38. Finally, on 14 August 2013, contemporaneous media articles reported FROCCA's recruitment of CAR youth taking refuge in CAMEROON, run by members of BOZIZE's Presidential Guard, including [REDACTED].

D. NGAISSONA accepted the position as National General Coordinator unconditionally

a. *Defence argument*

39. **NGAISSONA**'s claim that he only accepted the position as National General Coordinator in January 2014 "*on the condition that the violence would cease*"; that "*[h]is role was limited to conveying the so-called Anti-Balaka demands to the government or the international organisations*", and that "***NGAISSONA** was only focusing on preventing the return of violence*", is self-serving and unsubstantiated. Moreover, Counsel's representations do not constitute evidence in this process.

b. *Additional submissions*

40. By contrast, the DCC references evidence demonstrating that **NGAISSONA**'s position at the head of the Anti-Balaka was not in service of a non-violent return to peace in CAR, but was rather directed towards the implementation of the ***Strategic Common Plan***. Alongside his co-perpetrators, **NGAISSONA** relied on, and exploited the violence of Anti-Balaka self-defence groups to reclaim power in CAR. The DCC also cites evidence in support of **NGAISSONA**'s integral role "*Pre-January 2014*" explaining why he was designated the Anti-Balaka's National General Coordinator on his return to CAR. The Prosecution's opening submissions cited [REDACTED] evidence confirming that **NGAISSONA** enjoyed popular support. In particular, [REDACTED] told OTP Investigators that at the January 2014 meeting announcing **NGAISSONA**'s formal title: "*[A]ll the chiefs were present… they said that they have chosen Mr **NGAISSONA** to be the general coordinator. <u>There was no vote</u>*". Corroboration of this is found in the Anti-Balaka's 3 March 2014 "*Communique de Press No 7*", which states:

> "*Monsieur Patrice-Edouard **NGAISSONA** a été désigné Coordonnateur Général des Combattants Antibalaka à l'issue d'une grande réunion ayant regroupé tous les principaux responsables politiques et militaires tenu le 14 January 2014, par souci d'encadrement et de leadership politique dudit mouvement. Ce n'est donc pas un*

seul membre du mouvement qui pourra, par des raison égoïstes, remettre en cause une décision largement partagée par l'ensemble des combattants."

41. As National General Coordinator, **NGAISSONA** represented the Anti-Balaka at meetings with the transition government. The Defence asserts that **NGAISSONA** "*accepted to speak in the names of those groups who had come to ask him to be their voice. To be the voice to represent them before the government*". [REDACTED]. [REDACTED].

42. [REDACTED]. [REDACTED]:

[REDACTED].

43. [REDACTED], [REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

44. Further, the evidence establishing (1) the pre-existing support of Anti-Balaka ComZones for **NGAISSONA** demonstrated on his January 2014 return; (2) the steps he took to claim/reclaim political power in CAR for himself and other Anti-Balaka members; (3) and his and his co-perpetrators' use of the Anti-Balaka capacity to carry out crimes, in exerting political pressure on the transition government to secure positions or make other demands, is evidence from which the Chamber can reasonably infer the existence of the ***Strategic Common Plan***. Indeed, as mentioned before, the Appeals Chamber confirms that evidence post-dating the existence of common plan can be used to infer the involvement of the suspects therein at a prior date.

E. The Anti-Balaka Coordination structure was in place before the July 2014 Brazzaville Summit

a. *Defence argument*

45. **NGAISSONA**'s arguments concerning the Anti-Balaka's structure are incongruous, and should be rejected. **NGAISSONA** submits that the Coordination did

not become effective until July 2014, after the Brazzaville Summit, stating: "[*w]hile the coordination may have been created in January, it was not even functioning at that time as the situation was too tense*". The Defence argues that **NGAISSONA** did not even take up his title until "*a General Assembly on 17 June 2014 when the movement was well on its way"*, and that up until June/July 2014 **NGAISSONA** did not "*even have precise knowledge of whom these individuals were and certainly did not exercise any control over them*". The weight of the credible evidence contradicts this.

b. *Additional submissions*

46. That the Coordination structure did not come into effect until July 2014 – is wholly unsustainable. Moreover, the DCC cites seven insider witnesses and an Anti-Balaka authored a *Communique de Presse* for the proposition that **NGAISSONA** was designated National General Coordinator on his January 2014 return.

47. The evidence also establishes that the Coordination *was* functioning effectively, and that **NGAISSONA** knew and actively communicated with ComZones in the field. In February 2014, **NGAISSONA** claimed to be in contact "*avec ses représantants 'dans chaque commune'*"; and document CAR-OTP-2025-0372 entitled "*Projet D'Aide D'Urgence au Regroupement Des Combattants Anti-Balaka*" and dated February 2014, provides evidence of the Anti-Balaka organisation and coordination at that time, being a detailed breakdown of areas under the National Coordination structure, with groups sorted by territory; the names of ComZones; and the number of elements.

48. In an April 2014 radio interview, **NGAISSONA** spoke about the effectiveness of his role, saying "*Les anti-balaka que je coordonne sont un seul et même mouvement qui est réparti sur toute l'étendue du territoire. Quand je donne l'ordre à ces enfants, je pense que c'est immédiatement suivi d'effet*". **NGAISSONA** also explained to journalists that he was personally known to Anti-Balaka elements, and this allowed him to exercise effective influence over them:

> "*C'est le dialogue qui peut essayer de pacifier cette situation. Au niveau de Bola [BODA], le gouvernement avait commis l'erreur d'amener quelqu'un qui n'est pas connu pour aller parler à ces enfants. Et du coup, cela les a énervé, parce que ce sont ces gens qui continuent de manger au nom de la souffrance des anti-balaka.*

Q : Si vous, vous y allez, les résultats seront différents. C'est cela que vous voulez dire ? *Nettement différents*".

49. Further, **NGAISSONA**'s admission, that he was capable of materially influencing the actions of Anti-Balaka groups, goes towards his criminal responsibility, and confirms the essential nature of his contributions to the group. Indeed, the decisive consideration for the Chamber in respect of **NGAISSONA**'s contributions is whether they were such that without them, "the crime would not have been committed or would have been committed in a significantly different way". In **NGAISSONA**'s own words, with his input, the results could have been "*nettement différents*".

IV. DEFENCE ARGUMENT: NGAISSONA HAD NO ACTUAL AUTHORITY, CONTROL OR INFLUENCE OVER THE ANTI-BALAKA

A. Preliminary remark: modes of liability charged

50. The Chamber should reject **NGAISSONA**'s lengthy submissions contesting his criminal responsibility on the basis that the evidence fails to establish substantial grounds to believe that he "*had material ability to prevent and or punish any group as required under international criminal law to establish command and control*". The weight of the submitted evidence requires the confirmation of charges as pleaded.

51. **NGAISSONA**'s arguments challenging his command and control over the Anti-Balaka misconstrue the modes of liability and/or their application as charged. As an alleged direct co-perpetrator, article 25(3)(a) does not require that he command or control the individuals carrying out the ***Strategic Common Plan*** or the direct perpetrators of the resultant crimes. Rather, criminal responsibility under this mode attaches on proof that **NGAISSONA** made a knowing, intentional and essential contribution to the Common Plan. While his control over the direct perpetrators or co-perpetrators in the implementation of the common plan may be one of several factors, it is not at all dispositive, as **NGAISSONA**'s submissions suggest. Here, **NGAISSONA**'s influence and authority over the Anti-Balaka self-defence groups is a *factor* going to proving the nature of **NGAISSONA**'s contributions, and his material ability to prevent, frustrate, or alter the way in which the crimes were committed. They are not the sole proof or manner of his many culpable contributions.

B. The Anti-Balaka were sufficiently organised such that a person could control them

a. *Defence argument*

52. **NGAISSONA**'s claim that he was not in a position to control the Anti-Balaka because "[*t]here was not an organisation or any structurised[sic] group of individuals which could have been controlled*", is circular and should be rejected. Similarly, the Chamber should dismiss his argument that these groups arose spontaneously as largely irrelevant. The claim does not "contradict the idea of an organisation policy", and the *existence* or *persistence* of an organisation or policy is manifestly not *dependent* on the manner in which it arose. **NGAISSONA**'s resort to the opinions of NGO reports and various witnesses who describe the existence of "many groups", not always aware of one another, and without a single, unified coordination, is equally unavailing. Even if apt — and it is not — the point does not materially affect the weight of the evidence.

b. *Additional submissions*

53. The evidence referenced in the DCC establishes that, as of September 2013, the Anti-Balaka were organised and structured under a *de facto* Coordination of which **NGAISSONA** was a part. Anti-Balaka groups initially operated under this structure before its formalisation in January 2014 by, *inter alia,* **NGAISSONA** himself. Contrary to **NGAISSONA**'s submissions, the referenced evidence shows that the structure of the provincial ComZones as intended by **NGAISSONA** mirrored the structure of the National Coordination.

54. The existence of certain isolated Anti-Balaka groups is not inconsistent with the Prosecution's case. The DCC defines "Anti-Balaka" as including sub-groups not necessarily "formally organised or constituted". That said, **NGAISSONA** is charged only with crimes committed by Anti-Balaka groups affirmatively linked to the *de facto* Coordination and the National Coordination. The evidence establishes clear and concrete connections between the local Anti-Balaka leaders and the members of the *de facto* and National coordinations, including **NGAISSONA**, [REDACTED]. They are evidenced by, *inter alia*, **NGAISSONA**'s acknowledgement and appointment of local leaders, his instructions and directions to them, meetings and telephone contacts between them and members of the *de facto* and National coordinations, including before, during, and after the commission of the charged crimes.

55. Moreover, **NGAISSONA** misquotes information in NGO reports, or has taken them out of context, to support its contentions. For instance, of the three findings from the NGO reports quoted by **NGAISSONA** in claiming that Anti-Balaka groups were not organised, two concern the period *prior* to September 2013. **NGAISSONA** cites paragraph 283 of the Final report of the UN International Commission of Inquiry on the Central African Republic, which concerns early 2013. However, he omits paragraph 286, which supports the DCC's submission that the Anti-Balaka were sufficiently organised *as of* September 2013. Similarly, **NGAISSONA**'s reference to section 2.1 of the IPIS report ignores a finding at an adjacent paragraph that the Anti-Balaka became more organised after being joined by the FACA soldiers.

56. The coordinated nature of the seminal attack on BANGUI, [REDACTED] [REDACTED], reinforces the DCC concerning the organisation of the Anti-Balaka during and post 5 December 2013.

57. Finally, most of the 18 witnesses on whom **NGAISSONA** relies to assert the existence of uncontrollable Anti-Balaka groups, also provide evidence on the National structure through which Anti-Balaka groups were coordinated.

C. NGAISSONA knew, and had a relationship with the ComZones

a. *Defence argument*

58. **NGAISSONA**'s submission that he had no knowledge of the ComZones operating under the auspices of the Anti-Balaka and "*believed all individuals coming to him and claiming to be Anti-Balaka*" with "*no idea who these individuals at that time were*", is unsubstantiated (**NGAISSONA** has offered no statement or testimony in these proceedings). Counsel's representations are not *evidence*. Moreover, in this instance they are manifestly untrue and without any legal impact.

b. *Additional submissions*

59. *First*, the DCC cites a large body of evidence, including CDRs, witness statements, and Anti-Balaka internal documents demonstrating that **NGAISSONA** not only knew which ComZones were operating in each area, but had personal relationships and contacts with them. In addition to his close relationship with members of BOZIZE's

inner-circle, who later obtained key-positions in the Anti-Balaka, [REDACTED]. There is also evidence of meetings attended by a majority of ComZones at **NGAISSONA**'s BOY-RABE home, including in January 2014.

60. The strength of the relationships that **NGAISSONA** built with the Anti-Balaka ComZones is furthermore shown by **NGAISSONA**'s decision to integrate them in December 2014 into his political party, the *Parti Centrafricain pour l'unité et le developpement* ("PCUD").

61. **NGAISSONA**'s knowledge of, and close relationship with, high level ComZones, *known* to be criminal is clear. [REDACTED]; [REDACTED]; [REDACTED]. [REDACTED]. [REDACTED]. I[REDACTED].

62. [REDACTED]. [REDACTED].

D. NGAISSONA appointed ComZones

a. *Defence argument*

63. The Defence's assertion that **NGAISSONA** had no power to appoint ComZones, but was limited to *proclaiming* those already in place is itself sufficient to found his culpable contribution to the Common Plan. That said, his contentions are inaccurate and misleading.

64. **NGAISSONA**'s could and did appoint and replace Zone Commanders (in addition to higher-level members of the National Coordination). [REDACTED]:

[REDACTED].

b. *Additional submissions*

65. [REDACTED], [REDACTED]. [REDACTED].

66. As the DCC contends, and **NGAISSONA** does not dispute, he exercised authority as the General Coordinator *recognising* ('proclaiming'), pre-existing Anti-Balaka leaders within the structure of the National Coordination. His formal acceptance of the various leaders, encouraged and legitimised them within the Anti-Balaka group.

Providing them formal titles and roles in the National Coordination had the practical benefit of ensuring that the groups and their leaders were documented, contactable, and could be more effectively coordinated.

c. *Legal argument*

67. This level of assistance satisfies article 25(3)(c). The Appeals Chamber has held that assistance may be practical, logistical, or emotional, including by way of "encouragement and moral support". An accused's "physical presence at meetings", and "tacit[] approv[al]" of the impugned or illicit activities is sufficient.

68. This power to appoint (and in so doing, encourage and promote the actions of the appointees) combined with N**GAISSONA**'s failure to exercise his material power to replace ComZones involved in the commission of crimes also establishes article 25(3)(a), (c) or (d) omission liability. His "*intentional failure to take any meaningful action within his ability to render assistance to and/or protect Muslim civilians imperilled by the Anti-Balaka, despite a legal duty to do so under CAR criminal law*" is culpable.

E. NGAISSONA gave orders that were complied with

a. *Defence argument*

69. **NGAISSONA** disputes the sufficiency of the evidence establishing that he was able to give orders which were complied with. His Defence (1) contests **NGAISSONA**'s ability to summon ComZones to attend meetings as from January 2014 during which orders would have been issued; and (2) asserts that he did not give orders regarding military operations which would have been complied with. The Defence theory is that **NGAISSONA** was an "incompetent chief", at times scared of armed Anti-Balaka elements. Again, the Defence's claims are not substantiated by any evidence, including any statement or testimony provided by **NGAISSONA** to rebut the presumption of credibility of Prosecution evidence at this stage. Counsel's representations are not *evidence*.

b. *Additional submissions*

70. In any event, **NGAISSONA**'s ability to give orders to the Anti-Balaka elements is addressed properly in the DCC. The Prosecution's opening submissions also quoted a number of witnesses who spoke of **NGAISSONA**'s orders. Specifically, [REDACTED] evidence establishes that no significant operation could be carried out "*without **NGAISSONA**'s knowledge and approval*"; [REDACTED].

71. The DCC and the evidence referenced in the Prosecution's submissions also show that **NGAISSONA**'s orders were complied with. His own statement establishes this: "*Quand je donne l'ordre à ces enfants, je pense que c'est immédiatement suivi d'effet*". Moreover, [REDACTED] evidence is clear: in reference to **NGAISSONA**, he states, "*[w]hen he said something, everybody had to execute*". Following **NGAISSONA**'s April 2014 order to cease hostilities, [REDACTED] also described that "*after this order, things changed: people listened, theft and pillaging started subsiding*", demonstrating not only compliance, but the effectiveness of his authority.

72. Far from being incompetent and scared of having armed Anti-Balaka in his home, the evidence shows that **NGAISSONA** was shrewd, cunning and fully in-league with the Anti-Balaka movement from its inception.

73. [REDACTED] statement provides a description of **NGAISSONA**'s comportment flanked by his "Anti-Balaka entourage" [REDACTED]. He explains:

[REDACTED].

[REDACTED].

F. NGAISSONA had the power to discipline

a. *Defence argument*

74. The Defence's submission that **NGAISSONA** had no control over the Anti-Balaka or material ability prevent and punish in relation to the application of article 25(3)(c), fundamentally misunderstands the basis of his responsibility. [REDACTED].

b. *Legal argument*

75. There is no requirement that **NGAISSONA** to have commanded or controlled the Anti-Balaka to satisfy the elements of article 25(3)(c), as discussed above.

76. Indeed, no charged mode of liability for **NGAISSONA** requires him to have exercised command and control over the group. As such, the Defence's further submission that "*[t]here are no substantial grounds to believe that Mr **NGAISSONA** controlled the Anti-Balaka through military police or other measures, nor that he was able to discipline those individuals with any appropriate measures*", rather than undermine the Prosecution's case, supports it. It effectively underscores his criminal culpability for having set the ***Strategic Common Plan*** in motion to begin with.

c. *Additional submissions*

77. [REDACTED], [REDACTED] [REDACTED]. [REDACTED]. [REDACTED].

78. [REDACTED].

G. The Anti-Balaka crimes were not committed by uncontrollable "fake" elements

a. *Defence argument*

79. The Defence's argument that Anti-Balaka crimes cannot be imputed to **NGAISSONA** as many crimes were committed by 'fakes', should be rejected. The Defence's assertion that: "*Many individuals presented themselves as Anti-Balaka groups in order to be able to repress the former regime… were uncontrollable elements who infiltrated the movement but were not the movement*." For this, the Defence relies upon the statement of [REDACTED], who explains: "*there were three types of individuals claiming to be Anti-Balaka which is illustrative for the absence of organisation*": those who truly came from the province to fight for the country were the first type of so-called Anti-Balaka; those who would use the name of the movement to kill, carry out armed robbery and violence; and those individuals who had been released from prison and were out in the streets who would also claim to be ANTI-BALAKA.

b. *Additional submissions*

80. Both the DCC and the Prosecution's oral submissions addressed the false claims of so-called fake Anti-Balaka, as well as the occasions where **NGAISSONA** would dismiss crimes, claiming their commission by "fakes". As demonstrated, **NGAISSONA** often made this claim to deflect responsibility for Anti-Balaka crimes that he knew were occurring. From January 2014 until June 2014, NGAISSONA signed or authorised several press *communiqués*, publicly acknowledging exactions and abuses occurring throughout the country. These press releases acknowledged that '*les derapages sont constates dans las rangs des Anti-Balaka*'; that 'crimes are committed by certain Anti-Balaka elements'; or that '*des comportements contre-productifs sont encore relevés dans les rangs des anti-balaka*'.

81. **NGAISSONA**'s wholesale denial of Anti-Balaka responsibility for crimes to retain the Anti-Balaka image as one of "national heroes" encouraged their continued commission of crimes, as the evidence submitted shows.

H. NGAISSONA had the power to order the erection of roadblocks, or the killing or assaulting of Muslims

82. Again, the Defence's argument concerning **NGAISSONA**'s claimed inability to order roadblocks is not dispositive of his criminal responsibility for the crimes as charged. In any event, it does not materially affect the significant collection of evidence demonstrating otherwise, particularly in the LOBAYE Prefecture, BODA, and BANGUI. The evidence submitted showing **NGAISSONA**'s orders to remove roadblocks was presented to demonstrate his authority in this respect, and to underscore that, having that power, he failed to exercise it until after the Brazzaville Summit.

83. In challenging the evidentiary significance of **NGAISSONA**'s order of a truce during Ramadan, the Defence misconstrues the evidence and misapprehends its relationship to the charged modes of liability. **NGAISSONA** is not charged under article 25(3)(b) nor under article 28. Articles 25(3)(a), (c) and (d) do not require any showing that **NGAISSONA** ordered the killing or assaulting of anyone. **NGAISSONA**'s ability to issue an order to the Anti-Balaka to cease hostilities comprises proof of his material ability to affect the commission of the crimes charged, as well as his failure to do so at an earlier opportunity. However, this is not dispositive to his responsibility, but a factor.

84. All three modes of liability require **NGAISSONA** knowledge and intent in respect of the charged crimes, which these two examples underscore: (1) he was obviously cognisant of the targeting of Muslims; and (2) aware of the existence of roadblocks erected by the Anti-Balaka. Both are relevant to his criminal responsibility. However neither is dispositive, but a factor in the Chamber assessment thereof. Thus, **NGAISSONA**'s request to dismiss all related charges on this basis necessarily fails.

V. DEFENCE ARGUMENT REGARDING THE CALL DATA RECORDS

a. *Defence argument*

85. The Defence challenges the reliability and the accuracy of the CDRs because (i) the raw data can easily be manipulated and contain a margin of error; (ii) the Call Sequence Tables (CST) annexed to the DCC (Annex J.1) would contain duplicates; and (iii) the CDRs obtained by the Prosecution would not indicate the direction of the call (incoming or outgoing).

86. The Defence further challenges the relevance of the CDRs on the basis that (i) the CDRs do not provide the content of the communications and are therefore of low evidentiary value; (ii) the relevance of the CDRs is limited since individuals other than the owner could have made the calls on which the Prosecution relies; and (iii) the number of communications between **NGAISSONA** and local Anti-Balaka leaders in BOSSANGOA, BOSSEMPTELE, BODA, YALOKE and the PK9-MBAIKI axis is limited, and some of these communications are short. Consequently, the CDRs do not show **NGAISSONA**'s control over these specific leaders nor his *mens rea* for the charged crimes, as alleged by the Prosecution.

87. Finally, the Defence challenged the attribution to **NGAISSONA** of phone numbers [REDACTED], [REDACTED], and [REDACTED].

b. *Prosecution's response*

On the reliability of the Call Data Records

88. Regarding the reliability of CDR evidence, the Defence's argument is purely speculative. No concrete evidence, or expert opinion, is offered to challenge the integrity of CDR. [REDACTED]. [REDACTED]. [REDACTED]. Therefore, and in

accordance with the ICC jurisprudence, the Chamber should assess the CDRs as authentic and *prima facie* reliable.

89. In respect of the possible duplication of entries within the CDRs, the Prosecution agrees that duplicates have been identified in the raw data but that, as stated at page 4 of the CST, the Office's Investigative Analysis Section ("IAS") has excluded all the ones that were obvious. [REDACTED] [REDACTED], [REDACTED]. [REDACTED].

90. Regarding the directions of the calls, the Defence is disingenuous: contrary to the Defence's assertion, it did not 'admit' that the direction of the calls could not be detected, but only stated that this information was not included in the CST. The raw data disclosed to the Defence and referenced, for each communication, in the CST (column "source"), specify the incoming and outgoing number.

On the relevance of the Call Data Records

91. The Defence's observation that CDRs do not provide content has no impact on their evidential value. They are not provided for that purpose, but instead demonstrate contact between identified and attributed phone numbers on specific dates, times, and often, locations. This evidence supports reasonable inferences showing the familiarity of collectors, their locations, and their intent or knowledge concerning certain events or circumstances. For example, a communication right before an attack supports the reasonable inference of an *opportunity* to *plan* or otherwise *affect* its commission. Conversely, a contact had afterwards may reasonably demonstrate that a means was available to report or receive information about the attack – in other words, an *opportunity* to know about it or of the surrounding circumstances.

92. The Defence's submission concerning **NGAISSONA**'s contacts with local Anti-Balaka leaders is misleading. The evidence contradicts **NGAISSONA**'s contention that he would have been in contact with only a single Anti-Balaka leader of the BOSSANGOA Anti-Balaka leadership. CDRs reveal several contacts between 17 January 2014 and 21 November 2014 with [REDACTED]. Irrespective of limited frequency or duration, these communications show **NGAISSONA**'s familiarity with, and ability to directly contact, local Anti-Balaka leaders (*i.e.* the direct perpetrators of the crimes). Moreover, the contacts were had *while* Muslims were still enclaved in

BOSSANGOA under Anti-Balaka threat and their forcible transfer/displacement was on-going. Thus, they are probative of **NGAISSONA**'s inertia and failure to intervene to end the situation.

93. The Defence's contention that the CDRs do not *prove* that **NGAISSONA** was the person using his phone for each of the specific communications, as relied upon by the Prosecution, is unconvincing. The Chamber is entitled to draw reasonable inferences arising from the evidence using common sense and ordinary human experience. Moreover, the probative value of the CDRs must be assessed in light of the evidence as a whole, which establishes a clear connection between **NGAISSONA** and the individuals with whom his attributed phone numbers were in communication. [REDACTED] that **NGAISSONA** would sometimes loose his phones or that his younger brothers sometimes stole them, is at best anecdotal. Unless **NGAISSONA**'s younger brothers also coordinated the Anti-Balaka and invited these same contacted individuals to his meetings in BANGUI, the Defence position lacks any plausibility. Moreover, there is absolutely no evidence that **NGAISSONA** *was not* the user of the attributed phone number before the Chamber – and [REDACTED] evidence does not contradict this.

*On the attribution of phone numbers to **NGAISSONA***

94. The Defence's challenge of the attribution of number [REDACTED] to **NGAISSONA** is based on its founding on a single document. However, that fact alone does not diminish its evidentiary value, as a Chamber may rely on uncorroborated evidence where it is reliable. Such is the case. [REDACTED]. [REDACTED], [REDACTED]. As concerns number [REDACTED], [REDACTED], is *prima facie* reliable, supports the attribution to **NGAISSONA**. Regarding number [REDACTED], [REDACTED] similarly confirm its attribution.

VI. DEFENCE ARGUMENT: YEKATOM

95. The Prosecution will address the **YEKATOM** Defence's challenges in the order and manner raised.

A. Displacing Civilians – article 8(2)(e)(viii)

96. **YEKATOM**'s challenges to counts 4 and 5 concerning the war crime of *displacing civilians* should be dismissed.

a. *The order to displace need not be explicit and may be inferred*

97. Contrary to the Defence position, an order need not be explicit or specifically directed to displace. Its existence can be inferred, including from the use of violence or other coercive conduct against the targeted population. Ordering any act or omission intending displacement as a consequence, or knowing that it would occur in the ordinary course of events, is sufficient to incur criminal responsibility.

98. Here, **YEKATOM** led and ordered attacks on Muslim civilians. This included shooting Muslims in the BOEING Market; the destruction of the BOEING Mosque; the torture and murder of perceived Muslim sympathisers; and the destruction of Muslim homes and mosques "so they will go back to their country". The evidence submitted thus contains substantial grounds showing **YEKATOM**'s intent to achieve the displacement of the Muslim civilian population through these and other orders.

b. *All article 25 modes and article 28 may apply*

99. The Court's statutory framework is clear that a Suspect need not personally issue a displacement order. It is enough that such order is issued by a *perpetrator* and the suspect contributes to the crime through other modes of liability. That responsibility is not confined to the mode of liability of 'ordering' under article 25(3)(b). Instead, it extends to any mode under article 25 and article 28. Thus, **YEKATOM** is appropriately charged under several modes of liability for the unlawful displacement of Muslim civilians in Bangui and along the PK9-Mbaiki axis.

B. Imprisonment or other severe deprivation of physical liberty – article 7(1)(e)

100. **YEKATOM**'s challenge to count 14, concerning the crime against humanity of imprisonment and other severe deprivation of physical liberty, should be dismissed.

a. *Gravity need not be the same as other crimes against humanity*

101. Contrary to **YEKATOM**'s submissions, there is no requirement that the gravity of the conduct equal other crimes against humanity, which must be assessed through the

lenses of "violation of fundamental rules of international law." It is only required that "[s]uch deprivation of physical liberty is in violation of a fundamental rule of international law, *i.e.* the person must have been deprived of his or her liberty without due process of law (…)." International law prohibits any arbitrary imprisonment. Accordingly, the *Burundi* article 15 Decision provides:

> "*[t]he brevity of the detention alone cannot be brought forward as an argument to deny the severity of the deprivation of physical liberty … article 7(1)(e) of the Statute does not require the imprisonment or deprivation of liberty to be of a prolonged period of time, contrary to what is provided for in article 7(2)(i) of the Statute for the crime of enforced disappearance.*"

102. By analogy and contrary to **YEKATOM**'s submissions, article 7(1)(e) requires no minimum number of victims or threshold of mistreatment in detention.

b. *The circumstances of the detention were seriously grave*

103. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED]. [REDACTED] [REDACTED].

104. [REDACTED]. [REDACTED]. [REDACTED] [REDACTED].

C. Other inhumane acts – article 7(1)(k)

105. **YEKATOM**'s challenge to Count 11, the crime against humanity of "other inhumane acts," should be dismissed.

a. *Other inhumane acts and torture are charged alternatively and cumulatively*

106. Construing the DCC as a whole as required, and in particular reading Count 11, together with paragraphs 625-627, the crime of "other inhumane acts" is clearly charged in the alternative and cumulatively with the crime of torture. The crime of "other inhumane acts" is not fully subsumed by the elements of torture. Thus, such charging is necessary and appropriate to capture **YEKATOM**'s full culpability in respect of discrete acts that may not constitute torture, but otherwise comprise inhumane acts. As the evidence submitted satisfies more than one mode or crime, the Chamber should confirm *all* applicable legal characterisations.

b. *Other inhumane acts and torture are not impermissibly cumulative*

107. In any case, other inhumane acts may be charged cumulatively with torture because it is materially distinct — it requires proof of a fact not required by the other. Specifically, other inhumane acts require the infliction of great suffering or serious injury by means of an inhumane act, whereas torture is different in that it requires the perpetrator inflict severe physical or mental pain or suffering and that the victim was in the custody or under the control of the perpetrator. One does not fully subsume the other. For instance, the forced removal of victims' clothes, their being interrogated at gunpoint, or made to witness or hear the torture of another, may not necessarily amount to torture, but could reasonably constitute other inhumane acts. As noted, absent confirmation on a cumulative basis, **YEKATOM**'s full criminal conduct might not otherwise be captured.

108. Given the stage of the proceedings, dismissing the charges of other inhumane acts not because of the insufficiency of evidence but because they may be cumulative, would not be in the interest of justice. This would also conflict with the established practice of the Court's Pre-Trial Chambers. As with multiple modes of liability, the Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which charges may be retained based upon their sufficiency. This Chamber should not constrain the Trial Chamber, but should rather give it deference since, informed by a full trial, it will be better placed to resolve questions of concurrence of offences. Because the Prosecution is not bound to adduce all of the same evidence at trial as submitted at confirmation, the Pre-Trial Chamber should confirm all modes of liability presented in the Schedule of Charges meeting the applicable burden of proof at this stage. The Chamber should bear in mind that evidence adduced at confirmation is neither 'trial evidence' nor fixed for such purposes, as a *dossier* might be. Rather, it is merely *indicative* of the prospective trial evidence and should be evaluated as such – hence the 'substantive grounds to believe' standard.

D. Child soldiers – article 8(2)(e)(vii)

109. The DCC properly pleads the crime of enlisting and using children in hostilities. *First*, the DCC provides the material facts underpinning the charges with sufficient detail, in light of the nature of the case and crimes. **YEKATOM** misreads the Prosecution's case theory. The crime is not limited to [REDACTED] victims, and is of a

sheer scale to engage the *Lubanga* pleading benchmarks. *Second*, further details on the children are contained in the cited evidence.

a. *The DCC sufficiently pleads the enlistment and use of child soldiers in hostilities*

110. **YEKATOM**'s challenge to the sufficiency of the DCC concerning the war crime of enlisting children under 15 years of age and their use in hostilities should be dismissed.

111. The DCC identifies the material facts with sufficient clarity and detail required by article 67(1)(a) in view of the nature and scope of the case and the characteristics of these crimes. As such, it specifically identifies the various locations and bases under **YEKATOM**'s control where children under the age of 15 were stationed during the relevant time-frame.

112. Clearly, the materiality of a given fact and specificity required depend on various factors, including the form(s) of individual criminal responsibility alleged and the nature and scope of the crimes charged, which may make a high degree of specificity in such matters as the identities of victims or the dates of commission of the crimes impracticable. Notably, these crimes are continuous in nature and the **YEKATOM** Group moved around different locations. It follows that chambers of this and other Courts have accepted broader temporal and geographical parameters.

113. The case, as pled, is pattern-based in line with the *Lubanga* case. Contrary to **YEKATOM**, the number of victims is neither pled definitively nor can this reasonably be gleaned from the DCC, which alleges that among the [REDACTED] children in **YEKATOM**'s group, *at least [REDACTED]* were under the age of 15. Given this, that the scale of the crime is large, and the Court's benchmark as exemplified in the *Lubanga* case does not require a high degree of detail in these circumstances, the DCC is amply sufficient to sustain the charged crime.

b. *The referenced evidence provides sufficient detail*

114. The DCC references evidence of the identities and other particulars of the children who are the subject of the charges. This includes a list of [REDACTED] child

soldiers enlisted in **YEKATOM**'s Group, [REDACTED]. At least [REDACTED] of *these* children were under the age of 15.

E. Attacks against buildings dedicated to religion (article 8(2)(e)(iv)) and destruction of the adversary's property (article 8(2)(e)(xii))

115. **YEKATOM**'s challenges to count 6 and 7, concerning charges of attacks against buildings dedicated to religion and destruction of the adversary's property, should be dismissed.

a. *The Mosque is protected as a building dedicated to religion*

116. The BOEING Mosque was *prima facie* a place of worship for Muslims and protected as such. **YEKATOM** cites no case law or authority even suggesting that the temporary use of the Mosque as a sanctuary for those victims fleeing attack can and did diminish or erode that protected status.

117. The temporary use of the Mosque as a matter of humanitarian necessity, cannot alter the primary function and qualification of the building. To hold otherwise would undermine the very purpose of the protection afforded under the Statute. Article 8(2)(e)(iv) makes plain that the Mosque would only lose protection if it were a military objective. It was not, and **YEKATOM** did not dispute this in his submissions.

118. **YEKATOM** also did not dispute that the Mosque was targeted as the object of the attack. As evidence shows, by 20 December 2013 **YEKATOM** ordered its destruction, which his group carried out using rockets and grenades, and by setting the building alight.

b. *Adversary need not be a combatant*

119. The BOEING Mosque qualifies as an adversary's property in the particular context of the case. *First*, The Anti-Balaka defined the *enemy* (adversary) as 'Muslims' conflating them with the Seleka – a party to the conflict. Indeed, **YEKATOM** did so himself in respect of his group, as his orders and statements demonstrate.

120. *Second,* an "adversary" need not be a "combatant", and can include civilians aligned or perceived to have aligned with a party to the conflict.' Unlike the crime in article 8(2)(e)(ix), which restricts culpability to wounding or killing a "combatant adversary", article

8(2)(e)(xii) broadly proscribes the destruction or seizure of the property of an "adversary". It follows that the property of 'combatants adversaries' (*i.e.*, persons participating in the hostilities) and that of civilians (aligned with or hold allegiance to a party to the conflict adverse or hostile to the perpetrator) are protected. In construing the similar provisions of article 8(2)(b)(xiii), which broadly concerns the destruction or seizure of an "adversary's" property, this Court has held that the provision applies equally to the property of civilians. The same holding should apply here.

F. YEKATOM's arguments on the credibility of Prosecution evidence

121. The confirmation process necessarily limits Chamber's ability to assess the credibility of evidence because it does not envision a full airing of testimony and evidence. Though **YEKATOM** recognises these limitations, he nonetheless invites the Chamber's full assessment of the credibility of evidence to support his contention that Counts 6, 7, 26, and 27 should not be confirmed. His arguments should be summarily rejected.

122. The Court's jurisprudence establishes that the evaluation of the credibility of witnesses at the confirmation stage is "necessarily presumptive." **YEKATOM**'s generalised argument that the Prosecution's evidence lacks credibility because it relies on numerous "suspects" fails to rebut this presumption. On its face, the reliance on "suspects" does not suggest their evidence lacks credibility. On the contrary, their personal knowledge and even involvement in crimes tends to *enhance* their basis of knowledge and the credibility of their evidence. Equally unavailing is **YEKATOM**'s argument that variances in the accounts of three witnesses concerning the destruction of BOEING Mosque should result in Counts 6 and 7 not being confirmed.

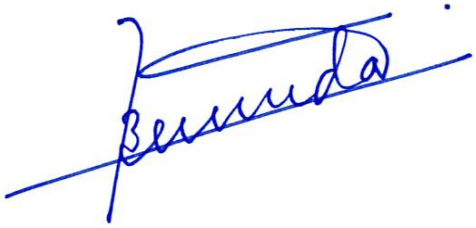
123. These three witnesses all agree that the Anti-Balaka destroyed the BOEING Mosque in December 2013 and [REDACTED] admits taking part in the crime. Although their accounts vary, reason alone suggests that something as time-consuming as destroying an entire building would be witnessed by different individuals, at different times, from different perspectives. **YEKATOM**'s insistence that the variances in the witnesses' accounts undermine their credibility does not withstand scrutiny. In any case, the full airing and evaluation of their evidence is exactly why a trial is warranted.

124. **YEKATOM**'s additional contention that Counts 26 and 27, concerning the murder of Djido SALEH, lack sufficient evidentiary support should be dismissed. The assertion that the Prosecution relies primarily on hearsay evidence to substantiate these counts, fails to take into account the Suspect's admission in relation to this incident, which alone provides substantial grounds to believe he bears criminal responsibility.

125. As noted, **YEKATOM** knew about the involvement of his elements in this murder. [REDACTED] explains that **YEKATOM** [REDACTED] told him "the killing was an accident". **YEKATOM** also took part in a meeting regarding SALEH's murder on 2 March 2014, during which he stated that he knew who is responsible for the murder and *had sanctioned* them. This evidence demonstrates that elements of **YEKATOM**'s Group were among the perpetrators of Djido SALEH's murder and, minimally, the Suspect's knowledge of this fact and of his responsibility to act in relation to their participation in it. Further to this, the evidence shows that SALEH's murder was a direct and a sufficiently foreseeable consequence of the implementation of the ***Operational Common Plan*** by **YEKATOM**'s Group to target Muslim civilians, even assuming an accessorial involvement in the crime.

VII. CONCLUSION

126. For the above-mentioned reasons, **NGAISSONA** and **YEKATOM**'s submissions should be dismissed, and the Chamber should confirm the charges against **NGAISSONA** and **YEKATOM**, under each substantiated mode of liability set out in the DCC, and commit this case for trial.



Fatou Bensouda, Prosecutor

Dated this 8th of October 2019
At The Hague, The Netherlands