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**Date: 30 October 2020**

**TRIAL CHAMBER V**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

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

**Public redacted version of**

**Decision on Motions on the Scope of the Charges and the Scope of the Evidence  
at Trial**

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

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**TRIAL CHAMBER V** of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 25(3)(a), 64(2) and 67(1)(a) and (b) of the Rome Statute (the ‘Statute’) and Regulation 52 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial’.

## **I. Procedural history**

1. On 11 December 2019, Pre-Trial Chamber II (the ‘PTC II’) issued the ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’ (the ‘Confirmation Decision’), committing the two accused for trial on the charges as confirmed.<sup>1</sup> Two aspects of the Confirmation Decision are particularly relevant for the present decision. First, PTC II found substantial grounds to believe that Mr Yekatom was criminally responsible under the following modes of liability: ‘committing the [alleged] crimes jointly with another or through another under article 25(3)(a) of the Statute’, or ‘ordering the commission of the [alleged] crimes under article 25(3)(b) of the Statute’.<sup>2</sup> Second, in relation to Mr Ngaïssona, PTC II declined to confirm part of the charges, relating to crimes allegedly committed in several locations across the western Central African Republic (the ‘CAR’).<sup>3</sup>
2. On 22 June 2020, the Yekatom Defence filed a motion requesting the Chamber to dismiss the mode of liability of co-perpetration confirmed against Mr Yekatom and to proceed to try him solely under the mode of liability of ordering (the ‘Yekatom Defence Request’).<sup>4</sup>

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<sup>1</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr (corrected version and corrected public redacted version notified on 14 May 2020, ICC-01/14-01/18-403-Red-Corr).

<sup>2</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, p. 103; *see also* paras 99, 125, 140, 155.

<sup>3</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 157-163, 164, 175, 183-239, p. 107.

<sup>4</sup> Motion to Dismiss Co-Perpetration Mode of Liability, ICC-01/14-01/18-565-Conf (public redacted version notified the same day, ICC-01/14-01/18-565-Red), paras 1, 48.

3. On 26 June 2020, the Ngaïssona Defence submitted observations on the Office of the Prosecutor's (the 'Prosecution') Preliminary Witness List,<sup>5</sup> advancing that it failed to reflect the fact that, following the confirmation of charges proceedings, the scope of the charges against Mr Ngaïssona had been considerably reduced (the 'Ngaïssona Defence Observations').<sup>6</sup>
4. On 3 July 2020, the Chamber received the responses of the Prosecution<sup>7</sup> and the Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of Victims of Other Crimes (jointly, the 'CLRV')<sup>8</sup> to the Yekatom Defence Request.
5. On 9 July 2020, in the context of the first status conference (the 'Status Conference'), the Chamber ordered the parties and participants to raise any remaining issues in relation to the charges, arising from 'mere uncertainties as to the interpretation of the confirmation decision', by 31 August 2020. The Chamber stressed that it wished to settle any issues related to the scope of the charges before the start of the trial and that after 31 August 2020 it would not hear any more motions on this matter.<sup>9</sup>
6. On 31 August 2020, the Prosecution filed its submissions on the scope of the charges (the 'Prosecution Submission'), advancing that the Confirmation Decision provided adequate notice of the charges to both accused and

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<sup>5</sup> Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528, 15 June 2020, ICC-01/14-01/18-553 (with confidential Annex A and confidential *ex parte* Annex B, only available to the Prosecution) (the 'Prosecution Submission of a Preliminary Witness List').

<sup>6</sup> Defence Observations on "Prosecution's Submission in Compliance of the Single Judge's "Order to provide a Preliminary Witness List", ICC-01/14-01/18-528", ICC-01/14-01/18-573-Conf (public redacted version notified on 16 July 2020, ICC-01/14-01/18-573-Red), para. 2.

<sup>7</sup> Prosecution response to Mr Yekatom's "Motion to Dismiss Co-Perpetration Mode of Liability" (ICC-01/14-01/18-565-Red), ICC-01/14-01/18-576-Conf (public redacted version notified on 6 July 2020, ICC-01/14-01/18-576-Red) (the 'Prosecution Response to the Yekatom Defence Request').

<sup>8</sup> Version corrigée de « la Réponse conjointe des Représentants Légaux Communs des Victimes à la « Motion to Dismiss Co-Perpetration Mode of Liability » de la Défense de M. Alfred Rhombot Yekatom (ICC-01/14-01/18-565-Conf) » 3 juillet 2020, ICC-01/14-01/18-577-Conf, ICC-01/14-01/18-577-Conf-Corr (corrected version and corrected public redacted version notified on 7 July 2020, ICC-01/14-01/18-577-Corr-Red) (the 'CLRV Response to the Yekatom Defence Request').

<sup>9</sup> Transcript of hearing, ICC-01/14-01/18-T-012-ENG, p. 62, line 22 to p. 63, line 22.

submitting, in response to the Ngaïssona Defence Observations, that the ‘scope of the charges’ should not be conflated with the ‘scope of the evidence’.<sup>10</sup>

7. On 11 September 2020, the Ngaïssona Defence responded to the Prosecution Submission (the ‘Ngaïssona Defence Response’).<sup>11</sup>
8. On 14 September 2020, the Prosecution requested the Chamber to summarily dismiss the Ngaïssona Defence Response (the ‘Prosecution Request for Summary Dismissal’).<sup>12</sup>
9. On 25 September 2020, the Chamber received the Ngaïssona Defence’s response to the Prosecution Request for Summary Dismissal.<sup>13</sup>

## II. Analysis

10. At the outset, the Chamber highlights that this decision does not impact on the scope of the charges as confirmed by PTC II. The purpose of the present decision is to resolve issues raised by the parties as to the interpretation of the Confirmation Decision.<sup>14</sup> The Chamber recalls in this regard that the Court’s statutory framework affords distinct powers to pre-trial and trial chambers and it is within the exclusive purview of the pre-trial chambers to set the scope of the charges.<sup>15</sup> Therefore, in addressing the issues raised by the parties, the Chamber will defer to the findings made by PTC II.<sup>16</sup>
11. The Chamber will first address the Yekatom Defence Request to dismiss the mode of liability of co-perpetration and responses thereto. Thereafter, it will address the Ngaïssona Defence Observations, the Prosecution Submission and

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<sup>10</sup> Prosecution’s Submissions on the ‘Scope of the Charges’, ICC-01/14-01/18-640, paras 2, 5 *et seq.*

<sup>11</sup> Defence Response to “Prosecution’s Submissions on the ‘Scope of the Charges’, ICC-01/14-01/18-640”, ICC-01/14-01/18-650-Conf.

<sup>12</sup> Prosecution’s Request for Summary Dismissal of the Ngaïssona Defence’s Response to the Prosecution’s Submissions on the Scope of the Charges (ICC-01/14-01/18-650-Conf), ICC-01/14-01/18-654-Conf.

<sup>13</sup> Defence Response to “Prosecution’s Request for Summary Dismissal of the Ngaïssona Defence’s Response to the Prosecution’s Submissions on the Scope of the Charges (ICC-01/14-01/18-650-Conf)”, ICC-01/14-01/18-667-Conf.

<sup>14</sup> See transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 63, lines 12-22.

<sup>15</sup> Decision on the Prosecution’s Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom’s Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542, para. 15.

<sup>16</sup> See transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 63, lines 12-16.

related filings regarding the scope of the charges and the scope of the evidence at trial.

## **A. The Yekatom Defence Request**

### *1. Submissions of the parties and participants*

12. The Yekatom Defence submits that the Confirmation Decision fails to provide adequate notice of (i) the constituent elements of co-perpetration and (ii) the facts that establish those elements.<sup>17</sup> More specifically, the Yekatom Defence advances that PTC II disregarded the Court's consistent line of jurisprudence on the objective elements of co-perpetration and cast doubt on the notion of 'common plan', but failed to provide its own definition of co-perpetration.<sup>18</sup> Further, it argues that PTC II made no factual findings regarding: (i) the contours of the common plan; (ii) the identity of the alleged co-perpetrators; and (iii) the contribution of Mr Yekatom.<sup>19</sup> The Yekatom Defence submits that Mr Yekatom is 'unable to defend [himself] against such an undefined mode of liability' and advances that the only remedy for PTC II's failure to provide adequate notice is to dismiss this mode of liability.<sup>20</sup>
13. The Prosecution submits that the Yekatom Defence Request should be rejected because the Confirmation Decision sets out (i) the precise modes of liability with which Mr Yekatom is charged, as well as (ii) the underlying facts.<sup>21</sup> More specifically, the Prosecution argues that the Yekatom Defence conflates a mode of liability set out in the Statute – co-perpetration – with a rehearsal of the Court's jurisprudence when interpreting said mode of liability.<sup>22</sup> Further, it submits that PTC II entered factual findings with respect to the elements of co-perpetration to the extent necessary and that the Yekatom Defence misinterprets or ignores the plain text of the Confirmation Decision.<sup>23</sup> Nonetheless, considering the importance of the issue, the Prosecution

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<sup>17</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, para. 1.

<sup>18</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, paras 24, 27.

<sup>19</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, paras 24-25, 30, 33, 35.

<sup>20</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, paras 26, 28, 32, 39, 44-46, 48.

<sup>21</sup> Prosecution Response to the Yekatom Defence Request, ICC-01/14-01/18-576-Red, paras 1, 5, 7, 12, 31.

<sup>22</sup> Prosecution Response to the Yekatom Defence Request, ICC-01/14-01/18-576-Red, paras 2, 8.

<sup>23</sup> Prosecution Response to the Yekatom Defence Request, ICC-01/14-01/18-576-Red, paras 13-28.

(i) requests the Chamber to confirm that Mr Yekatom stands charged, at a minimum, with direct co-perpetration and indirect perpetration, under Article 25(3)(a) of the Statute, and (ii) invites the Chamber to state its interpretation of the confirmed modes of liability.<sup>24</sup>

14. The CLRV submit, in essence, that: (i) the Yekatom Defence Request lacks a legal basis and that Mr Yekatom should have sought leave to appeal the Confirmation Decision if he wished to challenge it; (ii) the Chamber does not have the power to amend the charges and dismiss a mode of liability, which falls exclusively within the powers of the pre-trial chamber; and (iii) the Yekatom Defence's reading of the Confirmation Decision is fragmented and ignores factual findings made by PTC II which establish the constituent elements of co-perpetration.<sup>25</sup> Accordingly, the CLRV request the Chamber to dismiss the Yekatom Defence Request.<sup>26</sup>

## *2. The Chamber's determination*

15. The Chamber notes that the Yekatom Defence raises two main issues in relation to the Confirmation Decision, arguing that it fails to provide adequate notice of (i) the constituent elements of the mode of liability of co-perpetration, more specifically the objective elements, and (ii) the facts that establish those elements.<sup>27</sup>
16. The Chamber recalls that, under Article 67(1)(a) of the Statute, the accused has the right to be informed promptly and in detail of the 'nature, cause and content' of the charges. This entitles the accused to receive notice of:
  - a. the facts and circumstances underpinning the charges, including the time and place of the alleged crimes; and

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<sup>24</sup> Prosecution Response to the Yekatom Defence Request, ICC-01/14-01/18-576-Red, paras 3, 29-31.

<sup>25</sup> CLRV Response to the Yekatom Defence Request, ICC-01/14-01/18-577-Corr-Red, paras 7-48.

<sup>26</sup> CLRV Response to the Yekatom Defence Request, ICC-01/14-01/18-577-Corr-Red, para. 49.

<sup>27</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, para. 1.

- b. the legal characterisation of the facts to accord with the crimes under the jurisdiction of the Court and the precise mode(s) of liability under Articles 25 and 28 of the Statute.<sup>28</sup>
17. In order for the accused to receive adequate notice of the modes of liability alleged against him/her, according to Regulation 52(c) of the Regulations, those modes of liability must be precisely identified. In other words, it is not sufficient for the charges to refer to Articles 25 or 28 as a whole, but the exact sub-provision and specific mode of liability must be identified (for example, commission of a crime as an individual under Article 25(3)(a) of the Statute, or soliciting under Article 25(3)(b) of the Statute).<sup>29</sup>
18. The Chamber considers that, for the purpose of providing notice, as far as the legal characterisation of the facts is concerned, it is not necessary for the charges to further set out the constituent legal elements underlying the alleged mode(s) of liability.<sup>30</sup> This is even more so where the constituent legal elements are well established in the jurisprudence of the Court.<sup>31</sup> Thereby, the Chamber

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<sup>28</sup> Article 74(2) of the Statute; Regulation 52 of the Regulations; Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, 27 March 2013, ICC-01/04-01/07-3363 (OA13), para. 100; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the updated document containing the charges, 6 February 2015, ICC-01/04-02/06-450, para. 37; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842 (the ‘Lubanga Trial Judgment’), para. 2; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG (the ‘Katanga Decision on Summary of the Charges’), paras 10, 19; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on the date of the confirmation of charges hearing and proceedings leading thereto, 14 December 2012, ICC-02/11-01/11-325, paras 25, 29; ECtHR, *Penev v. Bulgaria*, Application no. 20494/04, Judgment, 7 January 2010, paras 33-34, 42; *Pélissier and Sassi v. France*, Application no. 25444/94, Judgment, 25 March 1999, paras 51-52.

<sup>29</sup> See further, in respect of Article 7(1) of the ICTY Statute, ICTY, Appeals Chamber, *The Prosecutor v. Miroslav Kvočka*, Judgement, 28 February 2005, IT-98-30/1-A, paras 41-42.

<sup>30</sup> See further Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Conf (A A2 A3 A4 A5) (public redacted version notified the same day, ICC-01/05-01/13-2275-Red) (the ‘Bemba et al. Appeals Judgment’), para. 186, whereby the Appeals Chamber considered the submissions made by one of the accused seeking guidance from the trial chamber on the constituent elements of the modes of liability to relate to ‘obtaining clarity’ as to those constituent elements, but not objections to lack of notice of the modes of liability.

<sup>31</sup> See further para. 26 and n. 42 below.



considers that the accused receives sufficient notice when the precise mode of liability with which he/she is charged is identified.

19. However, when it comes to the underlying facts and circumstances supporting those modes of liability, in order to meet the requirements of Article 67(1)(a) of the Statute, the charges must identify with sufficient clarity and detail the factual allegations which support each of the constituent legal elements.<sup>32</sup> The Chamber recalls the Appeals Chamber's pronouncement that, where an accused is not alleged to have directly carried out the incriminated conduct and is charged for crimes committed on the basis of a common plan, he/she must be provided with detailed information regarding: (i) his/her alleged conduct that gives rise to criminal responsibility, including the contours of the common plan and its implementation as well as the accused's contribution; (ii) the related mental element; and (iii) the identities of any alleged co-perpetrators.<sup>33</sup>
20. The Chamber will now turn to address the two main submissions made by the Yekatom Defence.

*i. Alleged lack of notice of the legal elements of co-perpetration*

21. The Chamber recalls that the Yekatom Defence argues that the Confirmation Decision does not provide adequate notice because PTC II departed from the Court's jurisprudence on the constituent elements of co-perpetration and failed to set out its own definition of co-perpetration and its elements. It contends that, as a result, Mr Yekatom is unable to defend himself against 'such an undefined mode of liability'.<sup>34</sup>
22. The Chamber notes that, with this prong of his submission, Mr Yekatom raises an objection of lack of notice as to the legal characterisation of the facts relating

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<sup>32</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Conf (A5) (public redacted version notified the same day, ICC-01/04-01/06-3121-Red) (the '*Lubanga* Appeals Judgment'), paras 121-123; Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205 (OA15 OA16), para. 90, n. 163.

<sup>33</sup> *Lubanga* Appeals Judgment, ICC-01/04-01/06-3121-Red, paras 3, 123.

<sup>34</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, paras 1, 24, 27-28, 32.

to the modes of liability confirmed against him. The Chamber is unpersuaded by the arguments made by the Yekatom Defence and finds, for the reasons that follow, that he has been sufficiently informed of the modes of liability with which he is charged.

23. As recalled above, PTC II found that there were substantial grounds to believe that Mr Yekatom is criminally responsible for ‘committing the [alleged] crimes jointly with another or through another under article 25(3)(a) of the Statute’, or ‘ordering the commission of the [alleged] crimes under article 25(3)(b) of the Statute’.<sup>35</sup> The phrase ‘jointly with another or through another’ in Article 25(3)(a) of the Statute captures two distinct modes of liability, known in the jurisprudence of the Court as: (i) co-perpetration (commission of a crime ‘jointly with another’ person); and (ii) indirect perpetration (commission of a crime ‘through another person, regardless of whether that other person is criminally responsible’).<sup>36</sup> It also captures a particular form of co-perpetration known in the jurisprudence of the Court as ‘indirect co-perpetration’.<sup>37</sup> Further, the reference to ‘ordering’ captures one of the three accessory modes of liability contained in Article 25(3)(b) of the Statute.<sup>38</sup>
24. Therefore, the Confirmation Decision identifies with precision three modes of liability with which Mr Yekatom is charged: (i) co-perpetration, with its variation, indirect co-perpetration; (ii) indirect perpetration; and (iii) ordering. As far as notice of the legal characterisation of the facts is concerned, no further details are required for the accused to be informed of the modes of liability alleged against him. The fact that PTC II has not set out the constituent elements of these modes of liability does not amount to lack of notice of the legal characterisation of the facts.

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<sup>35</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, p. 103, paras 99, 125, 140, 155.

<sup>36</sup> See e.g., Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Conf (public redacted version notified the same day, ICC-01/05-01/13-1989-Red) (the ‘*Bemba et al.* Trial Judgment’), para. 56. The Chamber notes that the Yekatom Defence acknowledges this, see Yekatom Defence Request, ICC-01/14-01/18-565-Red, para. 21.

<sup>37</sup> Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06-2359 (the ‘*Ntaganda* Trial Judgment’), para. 772; Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red, para. 38.

<sup>38</sup> *Bemba et al.* Trial Judgment, ICC-01/05-01/13-1989-Red, para. 73.

25. The Chamber recalls further that, in any case, it is not bound by PTC II's interpretation of the law.<sup>39</sup> The Chamber is only bound by the 'facts and circumstances' described in the Confirmation Decision.<sup>40</sup>
26. Having said that, the Chamber notes the Prosecution's request to the Chamber to state its interpretation of the confirmed modes of liability before the start of the trial.<sup>41</sup> The Chamber is also mindful that it is important for the preparation of the Defence, in the specific circumstances of this case, to have clarity on the Chamber's understanding of the constituent elements of the confirmed modes of liability. Thereby, the Chamber highlights that it sees no reason to depart from the existing jurisprudence of the Court and notes, in particular, the jurisprudence of the Appeals Chamber, regarding the objective elements of co-perpetration.<sup>42</sup> In light of the submissions, the Chamber does not consider it necessary to make further pronouncements with regard to the subjective elements of co-perpetration or the elements of the remaining modes of liability.

*ii. Alleged lack of notice of the facts establishing co-perpetration*

27. The Chamber recalls that the Yekatom Defence submits that the Confirmation Decision fails to provide notice of the facts establishing the objective elements of co-perpetration, namely: (i) the common plan; (ii) the alleged co-perpetrators; and (iii) the contribution of Mr Yekatom.<sup>43</sup> The Chamber considers that the Yekatom Defence has mischaracterised the Confirmation Decision and finds that Mr Yekatom has been provided with sufficient notice of the facts establishing the objective elements of co-perpetration, as demonstrated below.

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<sup>39</sup> See Article 21(2) of the Statute, which provides that '[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions' (emphasis added).

<sup>40</sup> Article 74(2) of the Statute; Regulation 55(1) of the Regulations; Decision on the Prosecution's Application for Notice to be given pursuant to Regulation 55(2) on Mr Yekatom's Individual Criminal Responsibility, 2 June 2020, ICC-01/14-01/18-542, para. 9 and corresponding references; *Katanga* Decision on Summary of the Charges, ICC-01/04-01/07-1547-tENG, paras 21-25; Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Applicable Procedure following the Prosecutor's Filing of Her Request for Corrections and Amendments of the Decision to Confirm the Charges, 21 February 2020, ICC-01/12-01/18-608-Conf-tENG (public redacted version notified the same day, ICC-01/12-01/18-608-Red-tENG), paras 45-47.

<sup>41</sup> Prosecution Response to the Yekatom Defence Request, ICC-01/14-01/18-576-Red, para. 30.

<sup>42</sup> *Lubanga* Appeals Judgment, ICC-01/04-01/06-3121-Red, paras 7, 445, 469, 473; *Ntaganda* Trial Judgment, ICC-01/04-02/06-2359, paras 773-774, 779-780; *Bemba et al.* Trial Judgment, ICC-01/05-01/13-1989-Red, paras 64-65, 68-69; *Lubanga* Trial Judgment, ICC-01/04-01/06-2842, paras 980-981, 999.

<sup>43</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, paras 1, 24-25, 30, 33, 35.

28. The Confirmation Decision states that, after the Seleka took control of Bangui, on 24 March 2013, François Bozizé went to Yaoundé, in Cameroon, where he was joined by Mr Ngaïssona [REDACTED]. There, François Bozizé, Mr Ngaïssona [REDACTED] and others met on different occasions to plan François Bozizé's return to power.<sup>44</sup> Mr Ngaïssona [REDACTED] allegedly contacted Anti-Balaka members in the field to advance the fight against Michel Djotodia's regime.<sup>45</sup> After unsuccessfully trying to mobilise the military [REDACTED], Mr Ngaïssona [REDACTED] allegedly relied on people [REDACTED] to organise the Anti-Balaka movement in order to fight the Seleka.<sup>46</sup> [REDACTED] organised and prepared different Anti-Balaka groups for attacks, including for the alleged 5 December 2013 Anti-Balaka attack on Bangui (the '5 December 2013 Attack').<sup>47</sup>
29. Approximately one month after the Seleka took control of Bangui, Mr Yekatom allegedly fled to Zongo where, together with Freddy Ouandjilo and Habib Beina, he met regularly [REDACTED].<sup>48</sup> After approximately one month in Zongo, he crossed into the Lobaye Prefecture, in the CAR, but stayed in touch [REDACTED] and agreed to participate in the alleged 5 December 2013 Attack.<sup>49</sup>
30. The Confirmation Decision states that around August 2013, Mr Yekatom, together with Freddy Ouandjio and Habib Beina, was already organising, training and equipping Anti-Balaka elements with the purpose of 'kill[ing] Muslims and Selekas'.<sup>50</sup> Moreover, in preparation for the alleged 5 December 2013 Attack, Mr Yekatom instructed his elements to 'kill Selekas and Muslims, even Central African Republic Selekas', 'attack the Muslims and break their houses', 'go to PK5 and find the Muslims and Seleka', and 'destroy the Muslims [*sic*] houses so they will go back to their country'.<sup>51</sup> During the attack,

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<sup>44</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 79; *see also* para. 62.

<sup>45</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 80.

<sup>46</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 81.

<sup>47</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 81.

<sup>48</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 83.

<sup>49</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, para. 83.

<sup>50</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 84-85.

<sup>51</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 85-86.

Mr Yekatom instructed Anti-Balaka elements to ‘shoot at the Muslims’.<sup>52</sup> Together with Freddy Ouandjio and Habib Beina, Mr Yekatom was in the front of the group and shooting.<sup>53</sup>

31. Following the alleged 5 December 2013 Attack, Mr Yekatom and his Anti-Balaka group established a base at the Yamwara School and, from on or around 10 January 2014, took over a number of villages in the Lobaye Prefecture.<sup>54</sup> The Confirmation Decision states that Mr Yekatom’s Anti-Balaka group continued the same pattern of crimes as during the alleged 5 December 2013 Attack.<sup>55</sup> PTC II found that ‘the actions of the Anti-Balaka [in the Lobaye Prefecture] constituted a continuation of its targeting of the Muslim population in retribution for the crimes and abuses committed by the Seleka, based on their religious or ethnic affiliation’.<sup>56</sup>
32. In light of the above, the Chamber finds that Mr Yekatom has been sufficiently informed of the contours of the common plan and the identities of his alleged co-perpetrators.<sup>57</sup> The Chamber recalls that the common plan need not be express or previously arranged, but may be implied, may materialise extemporaneously and its existence may be inferred from subsequent concerted action of the co-perpetrators.<sup>58</sup>
33. Turning to Mr Yekatom’s contribution, the Chamber notes the Yekatom Defence’s submission that the ‘four generic contributions listed at the end of the Confirmation Decision cannot be considered sufficient notice of essential contributions’.<sup>59</sup> The Chamber finds no merit in this submission. It is clear from the operative part of the Confirmation Decision – which contains numerous

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<sup>52</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 87.

<sup>53</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 87.

<sup>54</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 113, 129, 139.

<sup>55</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 139.

<sup>56</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 139.

<sup>57</sup> The Chamber notes that, while the accused is entitled to be provided with the identities of his alleged co-perpetrators, it is not necessary that *all* the alleged co-perpetrators are identified. Rather, their identities must be stated ‘to the extent possible’ and known to the Prosecution; *see* Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the content of the updated document containing the charges, 28 December 2012, ICC-01/09-01/11-522, para. 35.

<sup>58</sup> *Lubanga Appeals Judgment*, ICC-01/04-01/06-3121-Red, para. 445; *Bemba et al. Trial Judgment*, ICC-01/05-01/13-1989-Red, para. 66; *Ntaganda Trial Judgment*, ICC-01/04-02/06-2359, para. 775.

<sup>59</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, para. 35.

cross-references to other parts of the decision – that PTC II’s findings in the operative part ought to be read in light of, and together with, the rest of the Confirmation Decision.

34. According to the Confirmation Decision, Mr Yekatom: (i) [REDACTED] was involved in the preparation of the alleged 5 December 2013 Attack;<sup>60</sup> (ii) organised, trained and equipped Anti-Balaka elements with weapons;<sup>61</sup> (iii) instructed his elements to ‘kill Selekas and Muslims’ and attack and destroy Muslim houses;<sup>62</sup> (iv) ‘chose 1,000 of his bravest fighters’ and led them in the alleged 5 December 2013 Attack;<sup>63</sup> (v) personally ordered Anti-Balaka elements to attack the Boeing mosque and was present during its destruction;<sup>64</sup> (vi) was in charge of the Yamwara School base;<sup>65</sup> (vii) [REDACTED];<sup>66</sup> (viii) [REDACTED];<sup>67</sup> (ix) was present in the areas under his control along the PK9 – Mbaïki axis during the relevant time period and was in control of the established checkpoints there;<sup>68</sup> (x) used children, including children under 15 years of age, to assist him at the camp bases;<sup>69</sup> (xi) gave orders for children to be stationed at barriers and checkpoints;<sup>70</sup> and (xii) gave orders for children to actively participate in hostilities, including in the alleged 5 December 2013 Attack.<sup>71</sup>
35. In light of the above, the Chamber finds that Mr Yekatom has been informed of his alleged contribution.
36. Lastly, the Chamber notes the Yekatom Defence’s submission that the common plan, Mr Yekatom’s essential contribution and the identities of his alleged co-perpetrators need to have been stated for each incident.<sup>72</sup> The Chamber is not

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<sup>60</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, paras 83-85, 98, p. 103.

<sup>61</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 84, 113, p. 103.

<sup>62</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 85, 86, 87, 98, p. 103.

<sup>63</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 86, 87, 98, p. 103.

<sup>64</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 91, 98, p. 103.

<sup>65</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 113.

<sup>66</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, paras 115, 124.

<sup>67</sup> Confirmation Decision, ICC-01/14-01/18-403-Conf-Corr, paras 117, 124.

<sup>68</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 135, 139.

<sup>69</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 154, p. 103.

<sup>70</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 154, p. 103.

<sup>71</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 154, p. 103.

<sup>72</sup> Yekatom Defence Request, ICC-01/14-01/18-565-Red, para. 34.

persuaded by this argument. First, it recalls that PTC II found that Mr Yekatom's Anti-Balaka group continued the pattern of targeting of the Muslim population established in relation to the alleged 5 December 2013 Attack also in incidents subsequent to that attack.<sup>73</sup> Second, the Chamber recalls the Appeals Chamber's pronouncement that the co-perpetrators are not required to make an intentional contribution to each of the specific crimes committed on the basis of the common plan.<sup>74</sup> Therefore, the charges equally need not set out the accused's alleged contribution in relation to each alleged crime or incident.

37. In light of all of the above, the Chamber finds that Mr Yekatom has been informed of (i) the legal characterisation of the facts with regard to the modes of liability with which he is charged, and (ii) the facts that establish the objective elements of the mode of liability of co-perpetration. Accordingly, the Chamber rejects the Yekatom Defence Request.

## **B. The Ngaïssona Defence Observations and the Prosecution Submission**

### *1. Preliminary issues*

38. First, the Chamber notes that it has received a significant number of submissions from both the Ngaïssona Defence<sup>75</sup> and the Prosecution<sup>76</sup> regarding the scope of the evidence to be introduced by the Prosecution at trial and its relationship to the scope of the charges (more specifically, the non-confirmed charges). Throughout these observations, the parties have not always clearly or timely articulated their submissions. For example, the Ngaïssona Defence Observations do not seek a particular relief from the Chamber, but simply argue

<sup>73</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 139.

<sup>74</sup> *Bemba et al.* Appeals Judgment, ICC-01/05-01/13-2275-Red, para. 16.

<sup>75</sup> Defence Submissions pursuant to Trial Chamber V's "Order Scheduling First Status Conference" (ICC-01/14-01/18-459), 8 April 2020, ICC-01/14-01/18-473-Conf (with one confidential *ex parte* annex; public redacted version notified on 5 June 2020, ICC-01/14-01/18-473-Red) (the 'Ngaïssona Defence Submissions in advance of the Status Conference'), paras 13, 16; Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red; transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 35, line 2 to p. 38, line 22; Ngaïssona Defence Response, ICC-01/14-01/18-650-Conf.

<sup>76</sup> Prosecution's Response to the NGAÏSSONA "Defence Submissions pursuant to Trial Chamber V's "Order Scheduling First Status Conference" (ICC-01/14-01/18-473-Conf), 20 April 2020, ICC-01/14-01/18-488-Conf (public redacted version notified on 21 April 2020, ICC-01/14-01/18-488-Red) (the 'Prosecution Response to Ngaïssona Defence Submissions in advance of the Status Conference'), paras 12-19; Prosecution Submission of a Preliminary Witness List, ICC-01/14-01/18-553, paras 8-12; transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 40, line 7 to p. 41, line 14; Prosecution Submission, ICC-01/14-01/18-640.

that the Prosecution's list of witnesses 'must reflect' the reduced 'factual and temporal scope' of the case against Mr Ngaïssona.<sup>77</sup> The Ngaïssona Defence articulated a specific request to the Chamber to reduce the number of Prosecution witnesses only during the Status Conference (the 'Ngaïssona Defence Request').<sup>78</sup>

39. The Chamber recalls that the parties and participants are expected to clearly articulate their requests to the Chamber and to consolidate arguments pertaining to the same issue in one submission, in order to streamline the proceedings and to facilitate the work of the other participants and the Chamber.<sup>79</sup>
40. Second, the Chamber notes that the Prosecution Submission does not raise any new issues, but responds to the Ngaïssona Defence Observations.<sup>80</sup> The Chamber considers it thus to amount to a response within the meaning of Regulation 24(1) of the Regulations. The Chamber observes that, as such, the Prosecution Submission was filed past the applicable time limit.<sup>81</sup> Nonetheless, noting the importance of the matter and the deadline set by the Chamber for the parties to make submissions on the scope of the charges, the Chamber will exceptionally accept the Prosecution's delayed submission and all responses thereto.<sup>82</sup>
41. The Chamber now turns to address the parties' submissions on the merits.

## *2. Submissions of the parties and participants*

42. The Ngaïssona Defence submits that the Prosecution's witness list fails to reflect the fact that, following the confirmation of charges proceedings, the scope of the charges against Mr Ngaïssona has been considerably reduced.<sup>83</sup> It submits in this regard that: (i) the Prosecution cannot rely on evidence which

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<sup>77</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, para. 2.

<sup>78</sup> Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 35, lines 4-7, p. 37, lines 17-19.

<sup>79</sup> Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, ICC-01/14-01/18-685, para. 39.

<sup>80</sup> See Prosecution Submission, ICC-01/14-01/18-640, paras 5, 30, 35-45, 53.

<sup>81</sup> The Ngaïssona Defence Observations were notified on 26 June 2020 and the Prosecution Submission was filed on 31 August 2020.

<sup>82</sup> See Ngaïssona Defence Response, ICC-01/14-01/18-650-Conf.

<sup>83</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 2, 16; *see also* Ngaïssona Defence Submissions in advance of the Status Conference, ICC-01/14-01/18-473-Red, para. 16.



touches upon unconfirmed incidents to support the alleged contextual elements of the crimes charged, as this would fall outside the geographical and temporal scope of the confirmed charges;<sup>84</sup> (ii) PTC II's findings regarding the contextual elements are not sufficiently detailed and clear as far as the non-confirmed incidents are concerned to fall within the facts and circumstances of the case;<sup>85</sup> and (iii) the Prosecution cannot introduce evidence which goes to the acts and conduct of Mr Ngaïssona which are subsequent to the confirmed incidents – to establish, for example, his prior intent or the existence of an organisation within the meaning of Article 7(2)(a) of the Statute – as such acts fall outside the temporal scope of the charges.<sup>86</sup> It therefore requests the Chamber to *proprio motu* reduce the number of witnesses on the Prosecution's witness list.<sup>87</sup>

43. The Prosecution submits that the Ngaïssona Defence conflates the scope of the charges with the scope of the evidence at trial.<sup>88</sup> It advances, in essence, that: (i) the non-confirmed incidents remain relevant for the contextual elements of the charged crimes;<sup>89</sup> (ii) Mr Ngaïssona's acts and conduct subsequent to the charged crimes are relevant to his prior intent;<sup>90</sup> and (iii) the evidence which goes to proof of the contextual elements and modes of liability is highly relevant to the 'facts and circumstances' of the case.<sup>91</sup> Accordingly, the Prosecution requests the Chamber to refrain from prejudging the relevance and probative value of the prospective evidence and from limiting its scope at trial.<sup>92</sup>

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<sup>84</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 3, 31-32, 34, 38; Ngaïssona Defence Submissions in advance of the Status Conference, ICC-01/14-01/18-473-Red, para. 13.

<sup>85</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 34-35; Ngaïssona Defence Response, ICC-01/14-01/18-650-Conf, para. 12.

<sup>86</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 3, 18-19, 24-25, 39; Ngaïssona Defence Response, ICC-01/14-01/18-650-Conf, para. 33.

<sup>87</sup> Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 35, lines 4-7, p. 37, lines 17-19.

<sup>88</sup> Prosecution Submission, ICC-01/14-01/18-640, para. 5; *see also* Prosecution Response to Ngaïssona Defence Submissions in advance of the Status Conference, ICC-01/14-01/18-488-Red, paras 12-13.

<sup>89</sup> Prosecution Submission, ICC-01/14-01/18-640, paras 40-41, 43-49; *see also* Prosecution Response to Ngaïssona Defence Submissions in advance of the Status Conference, ICC-01/14-01/18-488-Red, paras 14-15.

<sup>90</sup> Prosecution Submission, ICC-01/14-01/18-640, para. 54; Prosecution Response to Ngaïssona Defence Submissions in advance of the Status Conference, ICC-01/14-01/18-488-Red, paras 13, 16-18.

<sup>91</sup> Prosecution Submission, ICC-01/14-01/18-640, paras 30, 32, 34, 37, 58.

<sup>92</sup> Prosecution Submission, ICC-01/14-01/18-640, para. 57.

### 3. *The Chamber's determination*

44. The Chamber is not persuaded by the arguments advanced by the Ngaïssona Defence and decides, for the reasons that follow, to reject the Ngaïssona Defence Request.
45. First, the Chamber finds no merit in the Ngaïssona Defence's submission that the Prosecution cannot rely on evidence which pertains to the non-confirmed incidents in order to support the contextual elements of the charged crimes.<sup>93</sup> The Chamber observes, as demonstrated below, that several non-confirmed incidents fall within the 'facts and circumstances' of the case.
46. The Chamber recalls that PTC II declined to confirm the charges against Mr Ngaïssona in relation to the following locations: the Boeing Muslim cemetery, the Boy-Rabe base in Bangui, Yaloké, Gaga, Zawa, Bossemtélé, Boda, Carnot, Berbérati and Guen. In this regard, PTC II found that the Prosecution had not proven to the required standard that Mr Ngaïssona was responsible for the crimes allegedly committed by the Anti-Balaka at these locations.<sup>94</sup> However, the Chamber notes that Anti-Balaka attacks against the Seleka and against the Muslim civilian population at several of these locations formed the basis of PTC II's findings in relation to the contextual elements of the confirmed charges.
47. PTC II found that '[f]rom September 2013 onwards, the Anti-Balaka engaged in attacks against the Seleka in and around Bossangoa and Bouca (Ouham Prefecture), Beloko, Bohong and Bouar (Nana-Mambéré Prefecture), as well as Bossembélé and Gaga (Ombella-M'Poko)'.<sup>95</sup> Also from September 2013 onwards, the Anti-Balaka allegedly attacked the Muslim population 'throughout Bangui, including Boeing and Bimbo, and across western CAR Prefectures, including Ouham (Bossangoa), Mambere-Kadei (Berbérati, Carnot, Guen), Lobaye (Boda), Ouham-Pende (Bossemtélé) and Ombella-M'Poko (Yaloké,

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<sup>93</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 3, 31-32, 34, 38; Ngaïssona Defence Submissions in advance of the Status Conference, ICC-01/14-01/18-473-Red, para. 13.

<sup>94</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, paras 170, 175, 183-239.

<sup>95</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 63.

Gaga, Zawa, Boali)'.<sup>96</sup> PTC II found that 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.<sup>97</sup> It is on the basis of these facts, among others, that PTC II concluded that there were substantial grounds to believe that from September 2013 until December 2014: (i) the Anti-Balaka carried out a widespread attack, within the meaning of Article 7(1) of the Statute, against the Muslim civilian population in the western CAR;<sup>98</sup> and (ii) an armed conflict not of an international character, within the meaning of Article 8(2)(d) and (f) of the Statute, was ongoing in the territory of the CAR between the Seleka and the Anti-Balaka.<sup>99</sup>

48. In light of the above, the Chamber considers that, while Mr Ngaïssona is not charged with crimes allegedly committed by the Anti-Balaka in Yaloké, Gaga, Zawa, Bossempélé, Boda, Carnot, Berbérati and Guen (the 'Provincial Incidents'), the facts relating to these locations, as recalled above, pertain to the contextual elements of the charged crimes and form part of the 'facts and circumstances' of the case.
49. The Chamber considers that the Ngaïssona Defence conflates the alleged crimes committed by the Anti-Balaka in the context of the Provincial Incidents with Mr Ngaïssona's responsibility for these crimes. The fact that PTC II did not find substantial grounds to believe that Mr Ngaïssona was responsible for those crimes does not mean that the Provincial Incidents were excluded from the 'facts and circumstances' of the case supporting the contextual elements of the charged crimes.
50. Second, the Chamber is not persuaded by the Ngaïssona Defence's argument that the Confirmation Decision lacks the appropriate level of specificity with

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<sup>96</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 64.

<sup>97</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 64.

<sup>98</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 70.

<sup>99</sup> Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, para. 72.

regard to the Provincial Incidents.<sup>100</sup> The Chamber highlights that the facts supporting the contextual elements of the charged crimes do not need to be set out with the same level of detail as the facts supporting the charged crimes themselves.<sup>101</sup> Further, the Chamber notes that the relevant operative part of the Confirmation Decision makes explicit reference to the Document Containing the Charges (the ‘DCC’),<sup>102</sup> which provides further details in this regard. The Chamber considers that, in the specific circumstances of this case and to the extent that the facts alleged in the DCC were confirmed by PTC II, the Confirmation Decision must be read against the relevant parts of the DCC. Therefore, the Chamber finds that Mr Ngaïssona has been sufficiently informed of the facts and circumstances relating to the Provincial Incidents for the purposes of the contextual elements of the charged crimes.

51. Third, the Chamber finds no merit in the Ngaïssona Defence’s submission that the Prosecution cannot rely on evidence which goes to Mr Ngaïssona’s acts and conduct and which relates to facts that fall outside the temporal scope of the charges.<sup>103</sup> The Chamber recalls in this regard that evidence going to facts which fall outside of the temporal scope of the charges may be relied upon to prove facts and circumstances described in the charges, whether for the purpose of establishing the contextual elements of the charged crimes or the modes of liability.<sup>104</sup>
52. For all these reasons, the Chamber rejects the Ngaïssona Defence Request.
53. Nonetheless, the Chamber reminds the Prosecution that its presentation of evidence must reflect the fact that the charges brought against Mr Ngaïssona in

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<sup>100</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 34-35; Ngaïssona Defence Response, ICC-01/14-01/18-650-Conf, para. 12.

<sup>101</sup> The Chamber notes in this regard the Appeals Chamber’s pronouncement in *The Prosecutor v. Jean-Pierre Bemba Gombo* that ‘the contextual element[s] [...] operate[] at a higher level of abstraction’; see Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’, 8 June 2018, ICC-01/05-01/08-3636-Conf (A) (public redacted version notified the same day, ICC-01/05-01/08-3636-Red), paras 116-117.

<sup>102</sup> See Confirmation Decision, ICC-01/14-01/18-403-Red-Corr, pp. 105, 106.

<sup>103</sup> Ngaïssona Defence Observations, ICC-01/14-01/18-573-Red, paras 3, 18-19, 24-25, 39; Ngaïssona Defence Response, ICC-01/14-01/18-650-Conf, para. 33.

<sup>104</sup> See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, transcript of hearing, 24 January 2018, ICC-02/04-01/15-T-147-Red2-ENG, p. 7, lines 3-12.

relation to the Provincial Incidents were not confirmed. Therefore, the Provincial Incidents may only be used for the purposes of establishing the contextual elements of the charged crimes. The Prosecution is encouraged to focus its evidence presentation accordingly. The Chamber also recalls its previous findings relating to the Prosecution's presentation of evidence.<sup>105</sup>

54. Finally, the Chamber notes that the parties have not yet filed public redacted versions of the following documents: (i) the Ngaïssona Defence Response (ICC-01/14-01/18-650-Conf); (ii) the Prosecution Request for Summary Dismissal (ICC-01/14-01/18-654-Conf); and (iii) the Ngaïssona Defence's response thereof (ICC-01/14-01/18-667-Conf). Therefore, the Chamber instructs the Ngaïssona Defence and the Prosecution to file public redacted versions of their respective submissions within two weeks of notification of the present decision.

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<sup>105</sup> Transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 30, line 24 to p. 31, line 3; Initial Directions on the Conduct of the Proceedings, 26 August 2020, ICC-01/14-01/18-631, paras 22-23; Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules, 16 October 2020, ICC-01/14-01/18-685, para. 38.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**REJECTS** the Yekatom Defence Request;

**REJECTS** the Prosecution Request for Summary Dismissal;

**REJECTS** the Ngaïssona Defence Request; and

**ORDERS** the Ngaïssona Defence to file public redacted versions of documents ICC-01/14-01/18-650-Conf and ICC-01/14-01/18-667-Conf, and the Prosecution to file a public redacted version of document ICC-01/14-01/18-654-Conf, within two weeks of notification of the present decision.

Done in both English and French, the English version being authoritative.

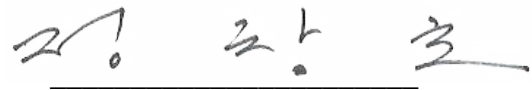


**Judge Bertram Schmitt**

**Presiding Judge**



**Judge Péter Kovács**



**Judge Chang-ho Chung**

Dated 30 October 2020

At The Hague, The Netherlands