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Date: **28 May 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
THE PROSECUTOR v. ALFRED ROMBHOT YEKATOM AND PATRICE-EDOUARD NGAÏSSONA

Public

Public Redacted Version of "Joint Defence Observations relating to the "Registry's First Assessment Report on Applications for Victims' Participation in Pre-Trial Proceedings" (ICC-01/14-01/18-198)", 24 May 2019, ICC-01/14-01/18-208-Conf

Source: **Defence of Patrice-Edouard Ngaïssona and Defence of Alfred Rombhot Yekatom**

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

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I. Introduction

1. The Registry seeks clarification from the parties and the Chamber regarding three issues arising from its assessment of fifteen (15) victim applications. For these applications, the Registry was not able to make a clear determination due to "*the lack of clarity whether or not the personal harm reported by the applicants resulted from an incident falling within the temporal or geographic parameters of the Case*".[1]

2. The Defence hereby presents its views as to the three issues raised by the Registry and requests, consequently, the dismissal of all or part of the fifteen (15) victim applications being assessed.

3. Given the current impossibility for the Defence to access certain pieces of information relevant to the applications in question, the Defence reserves the right to submit further observations on these fifteen (15) victim applications once the Prosecution's disclosure obligations are completed and certain redactions are lifted.

II. Confidentiality

4. Pursuant to Regulation 23bis (2) of the Regulations of the Court, these submissions are filed as confidential as they contain confidential information. A public redacted version of the present submissions will be filed shortly.

III. Procedural history

5. On 11 November 2018, the Chamber issued a warrant of arrest against Alfred Rombhot Yekatom ("Warrant of Arrest of Mr Yekatom"),[2] who was surrendered to the Court by the authorities of the Central African Republic on 17 November 2018.

6. On 7 December 2018, the Chamber issued a warrant of arrest against Patrice- Edouard Ngaïssona ("Warrant of Arrest of Mr Ngaïssona"),[3] who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.

[1] ICC-01/14-01/18-198, para. 13.
[2] ICC-01/14-01/18-1-Conf-Exp. A public redacted version is also available: ICC-01/14-01/18-1-Red.

7. On 5 March 2019, in its "*Decision Establishing the Principles Applicable to Victims' Applications for Participation*" ("Victim Application Decision"), the Chamber instructed the Defence to submit any observations they may have on the Group C applications for participation of victims within 10 days of receiving them.[4]

8. In its "Registry's First Assessment Report on Applications for Victims' Participation in Pre-Trial Proceedings" dated 14 May 2019 ("Registry's Assessment"),[5] the Registry transmitted 15 Group C applications to the Chamber and parties, *i.e.*, applications for which the Registry was not in a position to make a clear determination.

IV. Submissions

A. The general principle of *nullum crimen sine lege* favours a narrow interpretation of the Warrant of Arrest in the context of victim applications for participation

9. The Defence submits that the material, temporal and geographical scope of the case as set out in the Warrants of Arrest of Messrs Ngaïssona and Yekatom ("Warrants of Arrest") must be interpreted narrowly for the purpose of processing victim applications at this stage. In the absence of a Document Containing the Charges, the Warrant of Arrest is authoritative for the determination of the conduct or course of conduct which forms the basis of the alleged crimes for which Mr Ngaïssona and Mr Yekatom were surrendered.

10. A broad or expansive approach to the alleged crimes and their material, temporal and geographical scope would contravene the principle of legal certainty (*nullum crimen, nulla poena sine lege*). This principle is enshrined in Article 22 of the Rome Statute, which provides *inter alia* that the "*definition of a crime shall be strictly construed and shall not be extended by analogy*" and that "*in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.*" The temporal and geographic elements of an arrest warrant (and eventually, a

[3] ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available: ICC-01/14-02/18-2-Red.
[4] ICC-01/14-01/18-141, p. 23.
[5] ICC-01/14-01/18-198.

document containing the charges) are specifically aimed at restricting litigation in order to prevent arbitrary proceedings.

11. Compliance with strictly circumscribed charges and the principle of *nullum crimen sine lege* is crucial for preserving the rights of the suspects. For instance, in the *Bemba* Appeals Judgment, the Appeals Chamber considered that charges as formulated both in the Confirmation Decision and in the Amended Document Containing the Charges were too broad to amount to a meaningful "description" of the charges against Mr Bemba in terms of article 74 (2) of the Statute. The Appeals Chamber recalled that:

> regulation 52 (b) of the Regulations of the Court stipulates that documents containing the charges must set out a "[a] statement of the facts, including the *time and place of the alleged crimes*, *which provides a sufficient legal and factual basis to bring the person or persons to trial.* Simply listing the categories of crimes with which a person is to be charged or stating, *in broad general terms*, the temporal and geographical parameters of the charge is not sufficient to comply with the requirements of regulation 52 (b) of the Regulations of the Court and does not allow for a meaningful application of article 74 (2) of the Statute. [Emphasis added.][6]

12. Although this finding related to regulation 52 of the Regulations of the Court, this reasoning should also apply in the context of the Chamber's assessment of victim applications. Since a certain degree of specificity is required in the description of the crimes contained in the Warrants of Arrest, a victim application should be granted only if the temporal and geographical description of events contained in his or her application match the temporal and geographical scope of the case as specifically set out in the Warrants of Arrest, which should be construed narrowly.

13. The Registry seeks clarification as to whether the "*5 December 2013 Bangui Attack*" and following alleged events which occurred in the "*Bangui area*" are strictly limited to the specific locations mentioned in the warrants of arrest against Mr Yekatom and Mr Ngaïssona, *i.e.*, Boeing, Cattin crossroads and Yamwara school in Boeing, or whether it could be interpreted to also include certain neighborhoods within Bangui town, as listed in the confidential Annex to the Registry's Assessment.[7]

14. More specifically, the Registry's hesitation seems to find its origin in a reference in

[6] ICC-01/05-01/08-3636-Red, para. 110.
[7] Registry's Assessment, para. 16 and Annex.

the Warrant of Arrest of Mr Ngaïssona to "*Bangui and adjacent neighbourhoods*" in the context of the "*5 December 2013 Bangui Attack*".[8] The Chamber makes indeed a first general introductory comment before specifically describing, in a chronological order, the alleged actions taken by the group at different concrete locations. [REDACTED].[9] This reference to "*Bangui and its adjacent neighbourhoods*", which is at the beginning of the description of the alleged Bangui attack in the Warrant of Arrest of Mr Ngaïssona, cannot be interpreted as to suggest that the said Bangui attack, in the context of the Warrant of Arrest, would have extended to all areas of Bangui and beyond, as no direct supporting evidence is provided in this respect. Therefore, the standard of proof is not met. A more reasonable interpretation of this reference is that this alleged group would have been formed with elements from Bangui and adjacent neighbourhoods. The Chamber is very specific in the description of the alleged crimes committed and cites specific locations where those alleged crimes would have been committed, along with supporting evidence. This supports the argument that only those locations are deemed part of the alleged counts.

15. The Registry's question as to the reference in the Warrant of Arrest of Mr Ngaïssona to alleged crimes committed in "*various neighbourhoods in and around southwest of Bangui*" as from 20 December 2013,[10] although unrelated, either temporally or geographically, to the facts described in the 15 victims' applications under review, should also follow this interpretation. It is clear based on (i) [REDACTED] in the Warrant of Arrest of Mr Ngaïssona and (ii) certain disclosed items of evidence cited in support thereof, that there would be reasonable grounds to believe that only those particular acts[11] would amount to the alleged crimes Mr Yekatom and Mr Ngaïssona are suspected to have committed.

16. Therefore, in light of the above development, the Defence submits that all victims' applications which place the alleged harm suffered in areas of Bangui other than those specifically cited in the Warrant of Arrest should be rejected.

17. Thus, the Defence requests the dismissal of the following applications: a/65014/19; a/65031/19; a/65060/19; a/65061/19; a/65062/19; a/65082/19; a/65090/19;

[8] Warrant of Arrest of Mr Ngaïssona, p. 11, para. a.
[9] CAR-OTP-2041-0741 at 0750-0751, paras 66-71.
[10] Warrant of Arrest of Mr Ngaïssona, p. 13, para. c.
[11] The Chamber refers to "the acts described above".

a/65107/19; a/65121/19; a/65131/19; a/65135/19; a/65137/19; a/65171/19 and a/65183/19.

18. In relation to the location of the alleged crimes, the Registry should distinguish applications that pertain solely to Mr Ngaïssona and applications pertaining solely to Mr Yekatom. For instance, application a/65137/19 contains allegations of crimes committed [REDACTED], which are not part of Mr Yekatom's Warrant of Arrest.

19. As for accountability, many victims' applications do not identify the specific group or individuals responsible for the alleged crimes. The mere mention of "anti-Balaka" or "bandits" is too vague to encompass elements who would have allegedly been subordinates of Mr Ngaïssona or Mr Yekatom. Consequently, all victims' applications that do not mention with sufficient specificity members of the anti-Balaka that are purportedly subordinates of Mr Yekatom and/or Mr Ngaïssona, as alleged in the Warrants of Arrest should be dismissed.

20. Thus, the Defence requests the dismissal of the following applications: a/65007/19; a/65014/19; a/65031/19; a/65060/19; a/65061/19; a/65062/19; a/65082/19; a/65090/19; and a/65107/19.

21. Similarly, no conclusion in relation to the alleged enlistment and/or use of children under the age of 15 can be 'inferred' from the Warrants of Arrest, and certainly not that such enlistment and/or use was committed "*in all crime sites mentioned in the Warrant of arrest*".[12] The Chamber refers to specific locations where boys under the age of 15 would have been stationed and cites specific items of evidence to support its statements.[13] The Chamber, *a contrario*, does not give any details nor does it cite any evidence in relation to potential enlistment and use of boys under the age of 15 elsewhere. Therefore, unless the relevant applicant, under the age of 15 at the time of the events, alleges to have been stationed in those specific locations and alleges that those locations were controlled by Mr Yekatom, albeit having been enlisted in other locations, the application should be rejected.

22. Therefore, unless the items of evidence used by the Chamber in support of the statement that "*boys under the aged of 15 were stationed at the Yamwara School and*

[12] Registry's Assessment, para. 18.
[13] Warrant of Arrest of Mr Ngaïssona, p. 18, para. c.

other bases and checkpoints controlled by Yekatom, including in Sekia and Pissa" support the allegation that [REDACTED], which the Defence cannot verify as most items of evidence cited in reference have yet to be disclosed, the three applications concerned, *i.e.*, a/65121/19, a/65131/19 and a/65183/19 should be rejected.

23. More importantly, three of the victims allegedly claim having been [REDACTED] during the events. However, neither [REDACTED], are part of the crimes charged in the Warrants of Arrest. Therefore, the Defence submits that all victims' applications alleging [REDACTED], as the alleged crime committed, should be rejected.

24. Thus, the Defence requests the dismissal of the following applications: a/65014/19; a/65031/19; and a/65090/19.

B. Given that a link must be established between the harm suffered and the alleged incidents, the lack of clarity of certain charges as formulated in the Warrants of Arrest justifies the rejection of the applications relating to those same charges

25. The jurisprudence of the Court has consistently held that to qualify as a victim, an applicant must *prima facie* establish that (i) he/she has personally suffered harm, whether direct or indirect and (ii) the harm suffered is a result of an incident falling within the temporal, geographic and material scope of the case as described in the document having authority at the relevant phase of the proceedings.[14]

26. The Chamber has emphasized that "*[o]nly applications that are complete and fall within the temporal, geographical and material parameters of the present case are to be transmitted to the Chamber*".[15]

27. The jurisprudence of the Court has defined a "case" (albeit in the context of article 17 (1) (a) of the Statute) by (i) the suspect under investigation and (ii) the conduct that gives rise to criminal liability under the Statute. "*The "conduct" that defines the "case", [...] is both that of the suspect and that described in the incidents under investigation which is imputed to the suspect*".[16]

[14] *See* ICC-01/04-02/06-211, para. 67; ICC-02/04-01/15-384, para. 12. *See also* ICC Chamber's Manual, p. 25; ICC-01/04-02/06-602, paras 16-17.
[15] Victim Application Decision, para. 30.
[16] ICC-01/11-01/11-547-Red, para. 1; OTP Policy paper on case selection and prioritisation (2016), p.3, online: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

28. As held by the Single Judge in the *Bemba* case, "*a link between the incident described by the victim applicant and the present case must be established*".[17] As has been determined by the Appeals Chamber, "*whilst the ordinary meaning of rule 85, does not per se limit the notion of victims to the victims of the crimes charged, the effect of article 68(3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89(1) of the Rules, is limited to those victims who are linked to the charges*".[18]

29. Therefore, no such link can exist or be established by the Registry or by the Chamber in the absence of clarity as to the material, temporal and geographical scope of the alleged counts contained in the Warrants of Arrest.

30. In the *Ongwen* case, in assessing the Defence's challenge to a victim's application which according to the Defence did not include any mention or link to Mr Ongwen and/or the Sinia Brigade, the Chamber found that "*[w]hile the applicant does allege victimisation by members of the LRA, her claim does not fall within the factual parameters described just above. For this reason, the application must be rejected*".[19]

31. In the case at hand, the Registry reports that "*[f]or some incidents, the end date of the time frame of alleged crimes is not clearly indicated in the event-specific description*" (footnote omitted).[20] The Registry further reports that this makes it difficult to make a determination for applicants who claim to have suffered harm as a result of a crime committed "*any time after the commencement dates cited in the Warrants of arrest*".[21]

32. The Defence submits that in light of the above reasoning, in the absence of clarity as to the end date of the temporal scope of certain alleged incidents, victim applicants claiming to have suffered harm from incidents which occurred a long time after the starting date of the alleged crime specifically mentioned in the Warrants of Arrest simply should not be accepted at this stage of the proceedings.

33. Thus, to use the example given by the Registry to illustrate its request for

[17] ICC-01/05-01/08-320, para 61; also, see Ntaganda, ICC-01/04-02/06-211, para. 25.
[18] Appeals Chamber, ICC-01/04-01/06-1432, para. 58, cited in ICC-01/05-01/08-320, para. 62.
[19] ICC-02/04-01/15-384, para. 11.
[20] Registry's Assessment, para. 18.
[21] Registry's Assessment, para. 18.

clarification,[22] the person claiming that she suffered harm as a result of an incident dated 28 February 2014 in Mbaiki should not be allowed to participate in the proceedings as a victim of alleged crimes committed "*on or about 30 January 2014*" when allegedly "*Yekatom and his subordinates entered Mbaiki*".[23] It can indeed not be inferred from such a reference that it would include incidents allegedly committed on 28 February 2014, at a time when the evidence relied upon by the Chamber shows that "*the entire Mbaiki Muslim civilian population had fled to Chad or other parts of CAR".*[24] The same reasoning applies to the reference in the Warrant of Arrest of Mr Ngaïssona to "*as from 6 December 2013*" regarding events in Bossangoa.[25]

34. For the reasons above, the Defence submits that application [REDACTED] should be rejected.

C. The link between the alleged harm and the incidents must be assessed in light of the charges as formulated at the time of assessment in the Warrant of Arrest

35. In the aforementioned *Ongwen* decision, the Chamber had found that although the notice of intended charges was wider in factual scope with respect to the charge of persecution, the charges of persecution in the document containing the charges was more restricted. Therefore, the Chamber rejected the applications on the basis that they "*do not, or no longer, fall within the scope of the case*".[26] This confirms that victims can be eligible to participate at one point but can be barred from participating at an earlier or later stage, should the charges be circumscribed in a different way. Concretely, this means that the victims' applications must be assessed against the counts or the charges as formulated at the time of processing.

36. The parameters of the 'conduct' alleged in the proceedings before the Court are those set out in the document that is statutorily envisaged to define the factual allegations against the person at the phase of the proceedings in question. In the present case, it continues to be the Warrants of Arrest.

[22] Registry's Assessment, para. 19.
[23] Warrant of Arrest of Mr Ngaïssona, pp. 17-18, para. b.
[24] *Ibid.*
[25] Warrant of Arrest of Mr Ngaïssona, p. 14, para. a.
[26] ICC-02/04-01/15-384, para. 12.

37. Victims can always re-apply to participate in the proceedings at a later stage, for instance, if and once the charges relating to certain incidents are more specifically circumscribed or extended to additional specific incidents. This was confirmed in the *Ongwen* case, where the Single Judge noted that "*with respect to the applicants whose applications were rejected that, under rule 89(2) of the Rules, "[a] victim whose application has been rejected may file a new application later in the proceedings*".[27]

D. The present case must be distinguished from other cases where the Chamber has shown flexibility in accepting victims' applications that lacked specificity

38. In the *Al Hassan* case, the Registry raised some similar issues as in the instant case, *i.e.*, that it was unable to make a clear determination on certain applications regarding the temporal and material scope of the crimes. In its related Decision, the Single Judge held that the "*victims must provide sufficient information that, taken as a whole, supports the conclusion that the application for participation does fall within the time frame of the case at bar*".[28] The Judge applied a low standard namely, that even a mere reference to the occupation of Timbuktu, or a reference to "2012", to be sufficient for the application to be considered as within the time frame of the case.[29] It also reminded the "*established precedent according to which the omission of information need not automatically result in the rejection of an application for participation*".[30]

39. However, the case at hand is distinguishable in so far as it is not the victims' applications themselves which are vague (although some may be) but rather, that certain counts as formulated in the Warrants of Arrest lack clarity, making therefore such a flexible approach taken by the Single Judge in the *Al Hassan* case the assessment of the applications not applicable in the present case.

RELIEF SOUGHT

[27] ICC-02/04-01/15-384, para. 17.
[28] ICC-01/12-01/18-146-tENG.
[29] ICC-01/12-01/18-146-tENG, para 23.
[30] ICC-01/12-01/18-146-tENG, para. 20, citing *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, "Decision on victims' participation status", 7 January 2016, ICC-02/11-01/15-379, para. 45.

1. The Defence respectfully requests the Chamber to:

   - **REJECT** the Group C applications as listed above.

Respectfully submitted,

Mr Knoops

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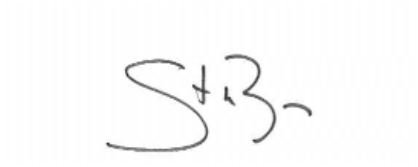

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