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**International
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Court**

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Date: **30 August 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
NGAISSONA***

Public

**Defence Observations relating to the “Registry’s Fifth Assessment Report on
Applications for Victims’ Participation in
Pre-Trial Proceedings”, ICC-01/14-01/18-281**

Source: Defence of Patrice-Edouard Ngaiissona
Defence of Alfred Rombhot Yekatom

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

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I. Introduction

1. The Registry seeks clarification from the parties and the Chamber regarding two issues arising from its assessment of eight (8) victim applications.¹ For these applications, the Registry was not able to make a clear determination “*whether or not the personal harm reported by the applicants resulted from an incident falling within the parameters of the Case*”.²
2. The Ngaïssona Defence and the Yekatom Defence (“the Defence”) hereby presents its views as to both issues raised by the Registry and requests consequently, the dismissal of part of the eight (8) victim applications being assessed.

II. Procedural history

3. On 11 November 2018, the Chamber issued a warrant of arrest against Alfred Rombhot Yekatom (“Warrant of Arrest of Mr Yekatom”),³ who was surrendered to the Court by the authorities of the Central African Republic on 17 November 2018.
4. On 7 December 2018, the Chamber issued a warrant of arrest against Patrice- Edouard Ngaïssona (“Warrant of Arrest of Mr Ngaïssona”),⁴ who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.
5. 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.⁵
6. In its “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” dated 14 May 2019 (“Registry’s Assessment”),⁶ the Victims Participation and Reparations Section (“VPRS”) transmitted 15 Group C applications to the Chamber and parties, *i.e.*, applications for which VPRS was not in a position to

¹ ICC-01/14-01/18-281.

² ICC-01/14-01/18-281, para. 17.

³ ICC-01/14-01/18-1-Conf-Exp. A public redacted version is also available: ICC-01/14-01/18-1-Red.

⁴ ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available: ICC-01/14-02/18-2-Red.

⁵ ICC-01/14-01/18-141, p. 23.

⁶ ICC-01/14-01/18-198.

make a clear determination.

7. On 24 May 2019, the Defence filed the “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)” (the “Joint Defence Observations”).
8. On 21 June 2019, the Chamber issued the “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position” (“First Decision”).⁷
9. On 19 August 2019, the Registry filed the “Registry’s Second Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings” (the “Registry’s Second Transmission of Group C Applications”)⁸ and the “Registry’s Fifth Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings” (the “Registry’s Fifth Assessment Report”),⁹ whereby 8 Group C applications were transmitted.
10. On 29 August 2019, the Prosecution filed its “Prosecution’s Observations on the Registry’s “Fifth Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings”, ICC-01/14-01/18-281”.¹⁰

III. Applicable Law

11. Pursuant to article 22(1) of the Rome Statute (“Statute”):

A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.¹¹

12. Article 22(2) of the Statute further states:

⁷ Pre-Trial Chamber II, “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position”, 21 June 2019, ICC01/14-01/18-227-Red.

⁸ ICC-01/14-01/18-280.

⁹ ICC-01/14-01/18-281.

¹⁰ ICC-01/14-01/18-302-Conf.

¹¹ “Summary of the Proceedings of the Preparatory Committee During the Period 25 March – 12 April 1996”, 8 May 1996, A/AC-249/1, p. 9: “There was general agreement that the crimes within the jurisdiction of the court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality.”

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

13. The Defence hereby incorporates by reference its Joint Defence Observations, and in particular, its legal developments relating to the principle of legality.¹²

14. Moreover, Article 74(2) of the Statute states:

The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. [...]. (emphasis added)

15. Finally, Regulation 52 of the Regulations of the Court ('RoC') provides that the Document Containing the Charges must include

[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, including relevant facts for the exercise of jurisdiction by the Court.

IV. Submissions

16. If, as recalled by the Chamber, "Warrants of Arrest are not determinative as to the scope of the confirmation hearing or a possible trial if the charges are confirmed"¹³, the Document Containing the Charges is.¹⁴ Pursuant to Article 61(7) of the Statute, the Chamber will either confirm or decline to confirm the charges as contained in the Document Containing the Charges.

17. The Document Containing the Charges having been filed by the Prosecution on the last day of the time limit which had been fixed for both its submission and the submission of the Registry's Group C applications, *i.e.*, on 19 July 2019, the Registry was not able to make any determination as to the victims' applications it received and processed on the basis of the Document Containing the Charges.

18. However, meanwhile, the Document Containing the Charges has been notified and is now authoritative for the purpose of determining the material, temporal and

¹² Joint Defence Observations, paras 10-14.

¹³ ICC-01/14-01/18-227-Conf, 21 June 2019, para. 30.

¹⁴ ICC-01/14-01/18-282-Conf.

geographical scope of the case.

19. Regarding six (6) applications,¹⁵ the Registry seeks clarification as to whether “the locations cited by the victim applicants in the Annex conform to the scope of the Case”.¹⁶ These applications relate to alleged acts having been allegedly committed in areas on the road between Bangui and Mbaiki between January and April 2014.
20. The Registry’s specific concern in relation to these applications is that “the Chamber did not find that the evidence presented by the Prosecutor at this stage established grounds to believe that Mr Yekatom’s group committed acts amounting to persecution and pillaging in the aforementioned areas”.¹⁷
21. The Defence agrees with the Registry’s analysis of the Warrants of Arrest of Messrs Ngaïssona and Yekatom and, having reviewed the Document Containing the Charges, which is now authoritative in this regard, submits that the evidence presented by the Prosecution in the Document Containing the Charges does not establish that Mr Yekatom’s group committed the acts as described in the victims’ applications, let alone that those acts are chargeable crimes within the jurisdiction of this court. While describing (i) how allegedly Mr Yekatom’s group gained control over the villages along the PK9 – Mbaiki axis between 11 and 30 January 2014 and (ii) the specific crimes allegedly committed in that area between 11 January through the end of February 2014,¹⁸ the Document Containing the Charges does not include within such crimes any of the alleged acts described in the victims’ applications.
22. Indeed, for the relevant area and period, the Prosecution requests the confirmation of the following listed crimes: (i) the displacement of Muslim civilians in villages on the PK9 – Mbaiki axis within Central African Republic and mainly to Chad, (ii) the killing of the Mbaiki Second Deputy Mayor, and (iii) persecution in reference to the crimes described in (i) and (ii).¹⁹ However, none of the acts alleged by the applicants, save for part of the events described in application a/65433/19, can be considered as being part of the alleged crimes charged in the Document Containing the Charges. Therefore, in light of the above development, the Defence submits that all victims’

¹⁵ a/65150/19, a/65152/19, a/65153/19, a/65167/19, a/65433/19 and a/65173/19.

¹⁶ ICC-01/14-01/18-281, paras 19-22.

¹⁷ ICC-01/14-01/18-281, para. 21.

¹⁸ Document Containing the Charges, para. 336.

¹⁹ Document Containing the Charges, pages 227-229.

applications which describe an alleged harm suffered in connection to an act that is not specifically cited as a charged crime in the Document Containing the Charges should be rejected.

23. Article 7(1) of the Statute distinguishes between several acts as constituting crimes against humanity. Similarly, Article 8(2) of the Statute distinguishes between several acts as constituting war crimes. Therefore, it should not be permissible to charge an alleged conduct other than as the specific crime designed under these provisions.
24. Moreover, the alleged acts described in the victims' applications could not merely be deemed to match the material scope of the case by broadly being considered as amounting to persecution, which is one of the alleged crimes charged for this period and this area. Indeed, it is clear from the Document Containing the Charges that, while the crime of persecution is being charged for the relevant period and area (count 28), it is only and specifically so in connection with the crimes and acts described in counts 24-27, namely (i) the alleged displacement of Muslim civilians in villages on the PK9 – Mbaiki axis within Central African Republic and mainly to Chad, and (ii) the alleged killing of the Mbaiki Second Deputy Mayor.²⁰ The Document Containing the Charges makes a specific reference to these crimes when addressing the count of persecution, which should not be extensively interpreted as englobing, for instance, the crime of pillaging, as alleged by the aforementioned victim applicants. Since, once again, none of the victim applicants, save for a/65433/19, describe acts that could, even remotely, be linked to the crimes described by the Prosecution in counts 24-27, this argument, if it were to be made, could not stand.
25. Regarding the application a/65173/19, not only the material description of event contained in the application does not match the material scope of the case as developed above, but the date of the alleged event, *i.e.* April 2014, falls outside the temporal scope of the case as circumscribed by the Prosecution, *i.e.*, from 11 January until end of February 2014. The Defence submits that when the Document Containing the Charges specifies an end date, which is the case for the alleged incidents having allegedly occurred on the PK9 – Mbaiki axis as from 11 January until end of February 2014, that end date should be applied for determining whether an incident described

²⁰ See Document Containing the Charges, paras 346-347, specifically cross-referencing to paras 335-345 in footnote 726.

by a victim applicant falls within the temporal scope of the case. The end date in the instant case being end of February 2014, the victim application reporting an incident having allegedly occurred in April 2014 should not be considered as a minor discrepancy in terms of date and should therefore be rejected.

26. Thus, the Defence requests the dismissal of the following applications: a/65150/19, a/65152/19, a/65153/19, a/65167/19, and a/65173/19.

27. Regarding applications a/65241/19 and a/65987/19, and more particularly the determination as to whether the alleged crimes reported in these applications fall within the temporal scope of the crime of enlistment and use of children under the age of 15, the Defence respectfully requests the Chamber to postpone such a determination until after the confirmation of charges decision is issued.

28. While the Defence takes note of the Chamber's view that "no specific end dates should be applied to alleged criminal conduct lacking [...] a temporal parameter in the Warrants of Arrest",²¹ the Defence submits that it would be contrary to Article 67(1)(a) of the Statute and Regulation 52 of the Regulations of the Court ('RoC') to allow the Prosecution to use open-ended language in its Document Containing the Charges, thereby failing to satisfy the required level of specificity for charges, resulting, as a consequence, in the possibility for the Prosecution to expand the scope of the charges to include yet unknown allegations relating to events having taken place outside the period of the charges.²²

29. The Defence recalls the Chamber's findings, in the Warrant of Arrest issued against Mr Ngaïssona, that "the evidence indicates that some of the crimes [...] appear to extend beyond the relevant time period for the contextual elements of crimes against humanity and war crimes [...], namely December 2014", and that, should the Prosecution wish to do so, it "may present further evidence demonstrating that crimes continuing after December 2014 still fall within that context".²³ Yet, the Document Containing the Charges fails to include further evidence demonstrating that the

²¹ Victim Application Decision, para. 29.

²² See Bemba, ICC-01/05-01/08-3636-Red, paras. 109-110 stating that "[s]imply 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."

²³ ICC-01/14-01/18-89-Red, footnote 213.

alleged crime of enlistment and use of children under the age of 15 would have continued after December 2014.

30. Therefore, a determination on this matter, prior to any decision as to the vagueness of the charges contained in the Document Containing the Charges, would be premature.

RELIEF SOUGHT

1. The Defence respectfully requests the Chamber to:

- **REJECT** the Group C applications a/65150/19, a/65152/19, a/65153/19, a/65167/19, and a/65173/19;
- **POSTPONE** its decision regarding applications a/65241/19 and a/65987/19 until the issuance of the confirmation of charges decision.

Respectfully submitted,



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