

Annex 26

From: Trial Chamber V Communications
Sent: 30 July 2020 17:29
To: [REDACTED] Trial Chamber V Communications
Cc: [REDACTED] Office of the Director DJSS; [REDACTED]
Subject: RE: Y&N\ VPRS to Trial Chamber V - Request for guidance in relation to applications for participation

Follow Up Flag: Follow up
Flag Status: Flagged

Dear VPRS,

The Chamber notes at the outset that it is eager to ensure the efficiency of the proceedings and appreciates the VPRS's efforts in this regard. Nonetheless, it considers that the majority of the questions raised exceed the scope of what can be resolved informally between VPRS and the Chamber. In particular, the Chamber is of the view that questions relating to the scope of the charges must be raised on the record, in order to afford the parties with the opportunity to make submissions.

Accordingly, the Chamber will only provide limited guidance on questions B.1, D.2, and E, as set out below. As for the remaining questions, VPRS is directed to seek the Chamber's guidance on the record. VPRS may do so either (i) by following the Group C procedure, or (ii) by filing a 'Request for Guidance' on general questions arising from a number of applications, to be notified to the parties and participants in the case (together, the 'Formal Approaches').

Should VPRS wish to file a Request for Guidance at this point, the Chamber invites it to do so by 31 August 2020, by which date the Chamber will also receive the parties and participants' submissions on the scope of the charges.

) **B.1. Discrepancies with regard to dates:** The Chamber considers that applications must be assessed holistically by assessing their internal coherence and the overall context of the alleged acts. In case of doubt, VPRS is instructed to follow the Formal Approaches.

) **D.2. Grounds for persecution:** The Chamber considers that in light of the Confirmation Decision's clear wording, applications of individuals who establish that they were 'perceived as collectively responsible for, complicit with, or supportive of the Seleka' should be accepted. The Chamber is of the view that it is within VPRS's purview to assess whether an individual application falls within this description. In case of doubt, VPRS is instructed to follow the Formal Approaches.

) **E. Issues linked to the fact that some applicants are minors:** The Chamber considers that applications of minors, who do not have a 'person acting on their behalf', may be accepted as long as the application demonstrates the applicant's maturity.

Kind regards, TC V

From: [REDACTED]
 Sent: 17 July 2020 13:41
 To: Trial Chamber V Communications

Cc: [REDACTED]; Office of the Director DJSS; [REDACTED]
 Subject: Y&N\ VPRS to Trial Chamber V - Request for guidance in relation to applications for participation

Dear Trial Chamber V,

The VPRS is respectfully seeking the Chamber's guidance on the approach to be applied when assessing victim application forms.

As reported in its *Update on victims' applications for participation* (ICC-01/14-01/18-470-Conf-Exp-AnxIII paras 6-9), the VPRS has started a comprehensive review of all applications for participation received to date in order to *inter alia* assess whether the crimes suffered by victims admitted to participate at the Confirmation of Charges hearing have remained within the scope of the Case following the *Decision on the Confirmation of Charges against Alfred Yekatom and Patrice-Edouard Ngaiissona* (ICC-01/14-01/18-403-Conf, "Decision on Confirmation of Charges"). The VPRS is conducting this review on the basis of instructions previously provided by Pre-Trial Chamber II ("PTC II"). The latter set forth a flexible approach in assessing victims' applications with regard to the temporal and territorial scope of the Case, "[n]oting in particular the time that has elapsed since the events and the personal circumstances of the victim [...]" (ICC-01/14-01/18-227-Conf, para. 24).

The Registry respectfully recommends to apply the same general 'flexible' approach as during the pre-trial stage of proceedings (ICC-01/14-01-18-227, para 24). This approach is similar to and consistent with the approach adopted in other cases (see for instance PTC I in ICC-01/12-01/18-146, paras 20-22, or ICC-01/05-01/08-1862, para 24). Still, and also in line with its approach in previous cases, the Registry herewith seeks the Chamber's specific guidance on a number of discreet issues linked to the amended scope of the charges. The VPRS has detailed below the issues encountered, together with some examples of relevant applications illustrating these issues. The Chamber will be provided with access to the relevant applications through a URL link to a TRIM container submitted under separate cover.

The VPRS stands ready to submit any or all of these issues for the Chamber's determination through a filing of 'group C applications', should the Chamber prefer these issues to be discussed also with the parties.

A. Issues pertaining to the geographical scope of the Case

1. Events linked to the 5 December Attack in Bangui (including Cattin) and Boeing

In the Decision on Confirmation of Charges, PTC II confirmed charges against Mr Yekatom and Mr Ngaiissona in relation to the 5 December 2013 Bangui attack (paras 75-104). Those charges are developed in section IV B of the decision under the sub-title "Bangui (**including** Cattin) and Boeing" [emphasis added]. While this sub-title suggests that the geographical scope of these events includes other places than Cattin and Boeing, the factual findings described herein refer only to these two locations.

However some applicants mention that they suffered crimes committed in other areas of Bangui than Cattin (inside Bangui's 3rd arrondissement), or in other areas neighboring Bangui other than Boeing.

See for example: application a/65061/19 (which mentions the **Kina-KM5 area of Bangui's 3rd Arrondissement**); application a/65082/19 (which mentions the **Taretara area of Bangui's 5th Arrondissement**); application a/65107/19 (which mentions the **Combatant area of Bangui's 8th Arrondissement**); application a/65137/19 (which mentions the **Boy Rabe area of Bangui's 4th Arrondissement**) application a/66228/18 (which mentions the **Gobongo area of Bangui's 4th**

Arrondissement); application a/65035/10 (which mentions **PK12 in Begoua** in the vicinity of Bangui- See attached Map A-1 showing the different arrondissements and main areas of Bangui).

In similar cases, PTC II applied a flexible approach and decided that the Bangui area may include “all areas commonly considered to be part of Bangui or those neighboring Bangui” (ICC-01/14-01/18-227-Conf, para. 26).

For these cases, the VPRS seeks guidance from the Chamber as to whether the geographical scope of the 5 December 2013 events mentioned in the Decision on Confirmation of Charges - including the attack on religious buildings on 20 December 2013 - comprises arrondissements of Bangui and areas neighboring Bangui (such as PK12 for example). It recommends that, ultimately, a flexible approach be adopted in relation to the areas surroundings Boeing and Cattin, given the adjoining position of the neighborhoods in this area.

2. Events linked with the PK9- Mbaïki Axis

In the Decision on Confirmation of Charges, PTC II confirmed charges in the context of the Anti-Balaka’s advance through and takeover of villages along the PK9-Mbaïki Axis (paras 129-143). It found in particular that Mr Yekatom’s Anti-Balaka group advanced through and took over numerous villages in the Lobaye Prefecture, setting up various checkpoints in the region. In fear of the attacks by the Anti-Balaka, Muslims from the Lobaye Prefecture fled their villages, primarily to the Mbaïki *sous-prefecture* (within the Lobaye prefecture).

Some applicants indicate that they suffered from crimes allegedly perpetrated by the Anti-Balaka group in the Mbaïki *sous-prefecture*, but in localities which are not along on the PK9–Mbaïki axis.

See for example: application a/66138/19 (which refers to **Boukoko** – approximately 10 km from Mbaïki on the road to Boda); application a/66150/19 (which refers to **Mbata** - approximately 40 km from Mbaïki on the road to Mongoumba); see attached Map B showing the Mbaïki *sous-prefecture* within the Lobaye *préfecture* and Map C showing the locations of Boukoko and Mbata within the Mbaïki *sous-prefecture*).

For similar cases, PTC II has previously instructed the Registry to apply the flexible approach adopted for Bangui to other locations (ICC-01/14-01/18-227-Conf, para. 26). It further considered that if a town mentioned in the warrant of arrest belonged to a larger administrative unit bearing the same name – which is the case of Mbaïki -, “applications containing allegations relating to that larger unit should be accepted as well” (ICC-01/14-01/18-227-Conf, para. 27). Additionally, following the issuance of the Prosecutor’s Document Containing the Charge (“DCC”), PTC II specified that locations which fall within the DCC’s general reference to “the villages along the PK9- MBAÏKI axis” or locations “mentioned specifically in the DCC “ are within the geographical parameters of the present case (ICC-01/14-01/18-338, para. 30).

For those cases, the VPRS respectfully suggests to the Chamber to follow PTC II’s flexible approach and consider as falling within the parameters of the Case locations in the Mbaïki sous-prefecture, which are not along the PK9–Mbaïki axis but in its vicinity, such as Boukoko or Mbata.

3. Enlistment and Use of Child soldiers

In the Decision on Confirmation of Charges, PTC II found substantial grounds to believe that Mr Yekatom committed the war crimes of conscripting, enlisting, and using children under the age of 15 years to participate actively in hostilities. According to its findings, these crimes occurred in “several locations under Yekatom’s control or where Yekatom was present as well, including checkpoints and barricades established by his elements” and during hostilities, including the 5 December 2013 Attack (see ICC-01/14-

01/18-403-Red-Corr, paras 146, 149). The operative part of the decision indicates that this occurred in different places “including [REDACTED]” and Bangui (by reference to the 5 December 2013 Attack, see p. 119). The VPRS notes the use of the word “including”, which suggests that this list is not exhaustive.

Some applicants allege to have been enlisted and/or used to participate actively in hostilities by Anti-Balaka forces in localities other than those expressly mentioned in the operative part of the decision.

See for example: application a/65204/19 (which relates to Boda); application a/65391/19 (which relates to PK12, in the vicinity of Bangui). Both applications name [REDACTED] (*alias* for Freddy Ouandjio [REDACTED]) as the person responsible. The OTP has identified this person as part of Yekatom’s group (See ICC-01/14-01/18-1-Red, para. 14).

For similar cases, PTC II considered that “applications by persons alleging to have been enlisted and/or used to participate actively in hostilities by the Anti-Balaka should be accepted irrespective of the location of these crimes at this stage of the proceedings” (ICC-01/14-01/18-227, para. 28).

For those cases, the VPRS respectfully proposes to continue to apply the approach set by PTC II, *i.e.* to consider individuals who allege to have been enlisted and/or used to participate actively in hostilities as falling within the scope of the Case, irrespective of the location these crimes took place.

B. Issues pertaining to the temporal scope of the Case

1. Discrepancies with regards to dates

During the pre-trial stage of the Case, PTC II found that “minor discrepancies in terms of dates [...] should not lead to the exclusion of applications” (ICC-01/14-01/18-227-Red, para. 24). On this basis, it has authorized the participation of applicants where the dates of crimes differed from the scope of the Case (see in particular PTC II’s decision regarding application a/65173/19, ICC-01/14-01/18-338, para. 30).

Accordingly, the VPRS categorised as ‘group A’ all applications that relate to events that have occurred outside the timeframe set in the Document containing the Charges (“DCC”, ICC-01/14-01/18-282-Conf-AnxB1), but which otherwise contain information suggesting that the acts described herein occurred within the timeframe of the Case (such as the geographical scope and the alleged identity/affiliation of the perpetrator(s)). VPRS believes that dates provided by relevant applicants could be the result of errors. This can be explained by a variety of factors - inherent with the nature of the process - that come into play, such as memory issues due to traumatic experiences, generating memory gaps or fragmented accounts, especially with regard to precise dates or numbers); illiteracy; the nature of the relationship between the victim and the interviewer; inadequate interpretation, etc.

See for example: application a/65078/19 (which refers to an Anti-Balaka attack in Cattin in ‘February 2014’, although, according to the DCC, the displacement of nearly all Muslim persons residing in Cattin seems to have occurred in the days following the Attack on 5 December 2013 - see Decision on Confirmation of Charges, para. 92); application a/65204/19 (which refers to the death of [REDACTED] (*alias* Freddy Ouandjio) in ‘August 2014’, during combats between Muslims and Anti-Balaka in Boda, although, according to the DCC, the death of this individual and the combats in Boda occurred in February 2014 - see DCC, paras 474-475).

For those cases, the VPRS respectfully proposes to follow the flexible approach of PTC II, which noted “in particular the time that has elapsed since the events and the personal circumstances of the victim, (...) rendering the provision of information on the overall context of the alleged acts sufficient for the

purposes of the current proceedings” (ICC-01/14-01/18-227-Conf, para. 24), and assess applications in light of the internal coherence of applications and the overall context of the alleged acts.

2. *Enlistment and use of child soldiers*

The VPRS notes that paragraphs 359-360 of the DCC set the time frame of this charge as being “from at least December 2013 through August 2014”. During the pre-trial stage of proceedings, PTC II clarified that the temporal scope of the Case (*i.e.* from September 2013 to December 2014) should be considered to determine the temporal scope of the charge of crimes of enlistment and use of child soldiers (see ICC-01/14-01/18-338, para. 33). In the Decision on Confirmation of Charges, PTC II indicated that the temporal scope of these crimes is “between at least December 2013 and August 2014”, without delineating more clearly the limits of the temporal scope of this charge (Decision on Confirmation of Charges, operative part, page 105, *lit.* (vii)), and in a more limited time frame than the temporal scope of the non-international armed conflict (from September 2013 until at least December 2014 – see para. 72 and page, 105 of the Decision on the Confirmation of Charges, ICC-01/14-01/18-403-Conf). However some applications relate to individuals who allege to have been used or recruited *after* August 2014, up to December 2014.

See for example: application a/65241/19 (joined the Anti-Balaka in November 2014; see also PTC II’s decision on the merits of this application: ICC-01/14-01/18-338, para. 33 (considering that the application falls *within* the parameters of the Case).

For those cases, the VPRS respectfully proposes to follow the flexible approach of PTC II as applied in its decision ICC-01/14-01/18-338, and to assess such applications as falling within the scope of the Case as long as they fall within the general temporal scope of the non-international armed conflict as defined by PTC II (See para. 72 and page, 105 of the Decision on the Confirmation of Charges, ICC-01/14-01/18-403-Conf).

C. Issues pertaining to both the temporal and geographical scope of the Case

The VPRS has received applications which relate to attacks of the civilian population by the Anti-Balaka in the various neighborhoods of Bangui and its vicinity, throughout 2014. The issue here is whether these applications can be assessed as being linked to the attack of 5 December 2013 in Bangui as depicting alleged crimes committed in continuation, and thus as part of said attack.

See for example: application a/65438/19 (in which the applicant refers to an attack of the Anti-Balaka in **Delebama, PK24 on the Damara axis** in front of Boeing, in January 2014); application a/65138/19 (in which the applicant refers to an attack of the Anti-Balaka, in **Kokoro area in front of Boeing**, in February 2014); application a/66217/19 (in which the applicant refers to an attack of the Anti-Balaka in the **Modoua area** in the 6th arrondissement of Bangui in March 2014); application a/66171/19 (in which the applicant refers to an attack of the Anti-Balaka in the **Brazza area** in the 5th arrondissement of Bangui in April 2014); application a/66173/19 (in which the applicant refers to an attack of the Anti-Balaka in **Yazi** in the vicinity of Bangui in June 2014); application a/65444/19 (in which the applicant refers to an attack of the Anti-Balaka in the **Cite elevage** area of the 7th Arrondissement of Bangui in December 2014). See attached Map A-1 showing the different arrondissements and main areas of Bangui as well as Map A-2 showing the vicinity of Bangui.

In instances where a clear end date of the commission time frame was not provided by the OTP in the Warrants of Arrest, PTC II was of the view that “no specific end dates should be applied to alleged criminal conduct lacking a temporal parameter in the Warrants of Arrest at this stage of the proceedings”

(ICC-01/14-01/18-227-Red, para 29). In the DCC, the OTP refers to the Attack of 5 December 2013 as the “attack against civilian population on 5th December and the following days” (DCC, counts 1-5, 8).

For those cases, the VPRS seeks the Chamber’s guidance as to what timeframe, for each geographical parameter, it should apply with regards to the scope of the Attack of 5 December 2013.

D. Issues pertaining to the material scope of the Case

1. Confinement in the PK5 enclave of Bangui

During its review of all applications for participation that had been authorised to participate at the pre-trial stage, the VPRS has been unable to make a clear determination for certain applications regarding the scope of the crimes of persecution and/or attack against civilian population. Those applications were still categorised as group A at pre-trial as they also relate to other crimes which were clearly committed within the geographical scope of the Case, in locations listed by the DCC such as Yaloke or Berberati. Following the Decision on Confirmation of Charges, they do however no longer clearly relate to the new scope of the Case since these locations have not been confirmed.

In the applications concerned, the applicants state that they fled from locations outside the geographical scope of the Case as delimited by the Decision on Confirmation of Charges and sought refuge in the PK5 enclave of Bangui to which the Anti-Balaka had been laying siege. As a result the victims remained confined in PK5 and suffered, *inter alia*, from severe deprivation of liberty.

See for example: application a/65742/19 (in which the applicant was evacuated from Yaloke to the PK5 enclave in January 2014); application a/65958/19 (in which the applicant fled from Berberati to the PK5 enclave in January 2014).

For those instances, the VPRS seeks the Chamber’s guidance as to whether it should consider that the harm suffered as a result of the deprivation of their liberty due to confinement in the PK5 enclave can be considered as an underlying act of counts 1 and/or 8 in Bangui, including Cattin and Boeing) of the Decision on Confirmation on Charges.

2. Grounds for persecution

During its review of applications following the Decision on Confirmation of Charges, the VPRS found an application for which it is unable to make a clear determination regarding the material scope of the crime of persecution, and in particular what grounds for persecution it relates to.

In application a/65136/19 (which has not yet been transmitted), the applicant reports that her home was pillaged specifically because her son refused to join the Anti-Balaka.

Count 28 of the Decision on Confirmation of Charges provides that the crime of persecution on the PK9-Mbaiki Axis was committed by targeting individuals on the basis of political, ethnic and/or religious grounds and that it was committed “against the Muslim civilian population and those perceived as collectively responsible for, complicit with, or supportive of the Seleka” (Decision on Confirmation of Charges, pp. 107 and 111, ICC-01/14-01/18-403-Conf.).

Although there is no indication in application **a/65136/19** that the victim belonged to the Muslim population, the VPRS considers that she and her son, by the latter’s refusal to join Anti-Balaka, may have been perceived as collectively responsible for, complicit with, or supportive of the Seleka (the VPRS notes

that it has received other applications in which the applicants believe that they have been targeted by Anti-Balaka as a result of their relationships with Muslim civilians, *e.g.* a/15096/19 and a/15097/19).

In such case, the VPRS seeks the Chamber's guidance as to whether it may **consider that the applicant has been a victim of the crime of persecution within the scope of the Case.**

E. Issues linked to the fact that some applicants are minors

The VPRS received applications submitted by minors, applying on their own behalf. During its activities the Registry found that former child soldiers, who are still minor today, were often not in a position to have a person acting on their behalf ("PAB") completing their application forms. This is either because of the sensitive nature of the harm they report to have suffered, or because they do not have relatives or a legal guardian anymore (for example the applicant's parents are deceased or have rejected them). It can also be that, for various reasons, they do not want to involve their relatives or legal guardian, for example out of fear for their security or social repercussions.

PTC II has considered that applications submitted by minors who do not have a PAB should be accepted if the maturity of the applicant can be demonstrated. It decided that it was for the VPRS to assess the maturity of a minor submitting an application on the basis of all the information available to it (see email from PTC II to VPRS, 11 July 2019, here attached).

The VPRS has considered as complete an application from a minor who has no PAB but for whom there is enough contextual information in his/her file demonstrating the maturity of the applicant.

See for example: application a/65395/19 (the applicant was 17 years and 4 months old at the time of signature of her application in April 2019; she has one child and sells fish as her profession); application a/65415/19 (the applicant was around 17 years and 3 months old at the time of signature of her application; she was a victim of rape and a child soldier; since her mother has left and her father died, she lives with her aunt; she does not want the latter to be informed of what happened to her).

The VPRS respectfully proposes to adopt, for those cases, the same approach as considered by PTC II for the purpose of victims' participation at trial.

Thank you very much for your consideration of these issues. We stand ready to provide any further information and/or clarification you may find relevant.

Kind regards,

