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No.: **ICC-01/14-01/18**

Date: **26 May 2020**

PRE-TRIAL CHAMBER II

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

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

Public Redacted

**Second Public Redacted version of “Prosecution’s Additional Observations on the
“Registry’s First Assessment Report on Applications for Victims’ Participation in
Pre-Trial Proceedings”**

(ICC-01/14-01/18-198), 14 June 2019, ICC-01/14-01/18-224-Conf

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

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I. INTRODUCTION

1. Pursuant to the order of Pre-Trial Chamber II (“Chamber”),¹ the Office of the Prosecutor (“Prosecution”) hereby provides its Observations concerning (1) the scope of the case as it stands; and (2) the three victim applications transmitted in the Registry’s First Transmission of Group C Applications, concerning allegations of rape in Bangui on or around 5 December 2013 (“Three Applications”).²

2. As concerns the scope of the case, the Prosecution presently intends to modify the charges against Suspect NGAISSONA as set out below.

3. Regarding the Three Applications, the Chamber should defer its determination until at least the filing of the Document Containing the Charges (“DCC”), if not the confirmation decision. Doing otherwise at this point would be premature. However, if the Chamber is disposed to decide the matter now, the Three Applications should be allowed because *prima facie* the alleged victimisation already falls within the current scope of the Prosecution’s case.

II. CONFIDENTIALITY

4. These Observations are filed “Confidential” as they are in part responsive and refer to a filing of the same designation. A public redacted version will be filed as soon as practicable.

¹ ICC-01/14-01/18-220-Conf.

² Victim applications [REDACTED]: see ICC-01/14-01/18-197-Conf-Anx2-Red, ICC-01/14-01/18-197-Conf-Anx3-Red, ICC-01/14-01/18-197-Conf-Anx8-Red.

III. SUBMISSIONS

A. Scope of the Prosecution's Case

5. The Prosecution's case remains substantially the same as that set out in the Warrants of Arrest,³ with some refinements. However, the Prosecution intends to allege additional crimes in the towns of Guen, Gaga and Zawa, and the PK5 neighbourhood of Bangui. These are:

- a. for Guen: the crimes of attack against a civilian population under article 8(2)(e)(i) of the Statute; murder, attempted murder, and extermination under articles 7(1)(a), 7(1)(b) and 8(2)(c)(i); pillaging and destruction of adversary's property under articles 8(2)(e)(v) and 8(2)(e)(xii); forcible transfer, deportation and displacement under articles 7(1)(d) and 8(2)(e)(iv); and persecution under article 7(1)(h);
- b. for Gaga and Zawa: the crime of attack directed against a civilian population under article 8(2)(e)(i); and
- c. for PK5: the crimes of outrage upon personal dignity under article 8(2)(c)(ii); and persecution under article 7(1)(h), regarding the Anti-Balaka blocking the access of Muslims in PK5 to the Muslim cemetery in Boeing.

6. These additional charges are predicated on the Prosecution's continuing review of its collection in light of new information (particularly, witness statements) obtained since the filing of its Application for Warrants of Arrest. That material comprises both direct and indirect evidence, as well as substantial corroboration of reported events.

³ ICC-01/14-01/18-1-Red; ICC-01/14-01/18-89-Red.

7. The intended additional charges concerning Gaga and Zawa identify crimes committed against Muslim civilians in those towns, as part of, and in the lead up to the Anti-Balaka attack in neighbouring Yaloké.

8. The charges concerning Guen are predicated on additional evidence recently obtained [REDACTED]. That information was not previously available or before the Chamber in respect of the Prosecution's Application for Arrest Warrants.

9. Notably, all of the above crimes are of the same classifications already set out in the Warrants of Arrest. That said, the Prosecution continues to investigate the commission of sexual and gender-based crimes ("SGBC") in the provinces and may seek the confirmation of such charges, should the evidence obtained satisfy the requisite threshold. The Prosecution is mindful that, while it may expand the factual basis of the charges beyond that for which Warrants of Arrest were issued, the Defence must be given adequate time to prepare.⁴

B. Disposition of the Three Applications

10. Although the Prosecution does not allege any SGBC in Bangui, the Three Applications already fall *prima facie* within the current scope of the Prosecution's case. Should the Chamber determine the matter now – as opposed to defer its decision, as suggested – the Three Applications should be allowed provisionally.

11. *First*, the instances of SGBC described in the Three Applications fall squarely within the physical elements of certain charged crimes. The applicants recount rapes committed in Bangui on or around 5 December 2013 by perpetrators identified as Anti-Balaka.⁵ The mass criminality committed by the Anti-Balaka in Bangui on or around 5 December 2013 is addressed in the Warrants of Arrest – and soon, also in the DCC – as discrete charges. These include:

⁴ Chambers Practice Manual, pp. 11-12.

⁵ In victim application [REDACTED]: "balakas" (ICC-01/14-01/18-197-Conf-Anx3-Red, pp. 5, 14).

- a. attack against a civilian population under article 8(2)(e)(i);
- b. forcible transfer, deportation and displacement under articles 7(1)(d) and 8(2)(e)(iv); and
- c. persecution under article 7(1)(h).

12. Rape, by its nature, easily falls within the scope of an attack against a civilian population, among other crimes in the Court's jurisdiction other than rape itself. These include, for instance, persecution, inhumane treatment, cruel treatment, outrages on personal dignity, etc.

13. Where the war crime of attacking civilians is charged, an individual civilian harmed by such an "attack", whether directly or indirectly (even collaterally), would be a "victim" within the Court's regulatory framework. This is so, irrespective of whether the individual was attacked in a way that may also amount to another crime. It is not necessary that every single act in an attack — every shooting, beating, looting, or murder — be charged for the affected individuals to be deemed victims of the perpetrator's *course of conduct*. The same holds true for the crime of persecution. Charging each persecutory act as a discrete crime is unnecessary to granting an individual standing as a victim of such crime.

14. Similarly, as an act of violence, rape may also comprise part of the course of conduct (indeed, the *actus reus*) relevant to the commission of other crimes involving force. For instance, forcible transfer may be achieved through many different types of force, threats thereof, or coercion against a person or population causing displacement. Even if a direct victim of that force is never actually displaced, this can still amount to a relevant coercive act underlying the forcible transfer: for example, where a person is notoriously and publicly murdered as a warning to the community at large. As long as it is shown that the perpetrators intended to displace others and that the affected population is in fact displaced, the person murdered

would still be a victim of the perpetrator's *course of conduct* in carrying out the charged displacement. So too would their family members.⁶ Thus, both the individuals fleeing the threat and the person murdered would be victims of conduct underlying the charged crime of forcible transfer.

15. In this case, the Three Applications describe rapes which may fall within the scope of the charged crimes concerning the 5 December 2013 Anti-Balaka attack in Bangui, namely: (i) attack against a civilian population, (ii) forcible transfer, deportation and displacement, and (iii) persecution. Because, as noted, rape can fall within the scope of these crimes either directly or as a collateral consequence or harm, the Three Applications cannot be excluded. Thus, if the Chamber is inclined to rule on the Three Applications now, they should be provisionally allowed.

16. *Second*, the victimisation described in the Three Applications falls within the Prosecution's broader case against the two Suspects. This is because, when determining an individual's standing as a victim, it is the perpetrator's *conduct* and the resulting harm — not the legal classification — that are determinative.

17. A victim's relationship to that *conduct* can be direct, indirect, relevant to only a part of the charged crime, or amount to a discretely chargeable offence. In any of these scenarios, they are a "victim" within the contemplation of the Court's statutory framework where such a nexus is *prima facie* shown.⁷ As the practice of Chambers of this Court shows, victim status is not limited by the specific crimes charged.⁸ It is

⁶ ICC-01/04-01/06-1432 OA9 OA10, para. 35 "[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims").

⁷ See article 68(3) of the Statute ("Where the personal interest of the victims are affected..."); rule 85(a) of the Rules of Procedure and Evidence ("'Victims' mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court").

⁸ See ICC-01/09-01/11-17, para. 6 (The incident alleged by the victim applicant must merely "relate to" the offences alleged in the summons to appear, and later, the DCC). See also ICC-01/04-01/06-925 (Sep. Op. Judge Pikis), para. 13 (suggesting that even persons who suffered harm from the "subject-matter of investigation" are victims whose personal interests are affected).

only necessary to show that the victim suffered harm as a result of an “*incident falling within the parameters* of the confirmed charges.”⁹

18. Importantly, the Three Applications allege rapes committed by elements of the Anti-Balaka. This was the group that NGAISSONA helped to organise and develop, pursuant to a common plan, purpose, and/or policy to *target* the Muslim civilian population of western CAR, based on their perceived responsibility for, complicity with, and/or support for, the Seleka. This targeting encompassed, but was not limited to, the Anti-Balaka’s attack in Bangui on 5 December 2013. The criminal acts committed against the applicants therefore fall not only within the temporal and geographic scope, but also within the material parameters of the case as set out in the Warrants of Arrest.

IV. CONCLUSION

19. For the above reasons, the Chamber should defer its determination on the Three Applications until the DCC is filed, if not, until the confirmation decision is issued. Alternatively, the Three Applications should be provisionally allowed.



Fatou Bensouda, Prosecutor

Dated this 26th day of May 2020
At The Hague, The Netherlands

⁹ ICC-01/04-02/06-449, para. 43 (emphasis added).