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TRIAL CHAMBER V

Before: Judge Bertrand 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 ROMBHOT YEKATOM AND PATRICE-EDOUARD
NGAISSONA

Public

**Defence Observations relating to the “First Registry Assessment Report on Victim
Applications for Participation in Trial
Proceedings”, ICC-01/14-01/18-688**

Source: Defence of Patrice-Edouard Ngaïssona

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 Chamber regarding five categories of issues arising from its assessment of fifteen (15) victim applications.¹ For these applications, the Registry was not able to make a clear determination as to the applicants' status and whether they should remain within the scope of the case following the Confirmation Decision, because "it remains unclear whether or not the personal harm reported by the applicants resulted from an incident falling within the temporal, territorial and material parameters of the Case".²
2. The Ngaïssona Defence ("the Defence") hereby presents its views as to certain issues raised by the Registry and requests consequently, the dismissal of part of the fifteen (15) victim applications being assessed. More generally, the Defence questions the method applied by the Registry to classify victim applicants that consists of following the instructions provided by the Pre-Trial Chamber in its "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", dated 21 June 2019.³

II. Procedural history

3. On 5 March 2019, in its "*Decision Establishing the Principles Applicable to Victims' Applications for Participation*" ("Victim Application Decision"), the Pre-Trial 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
4. In its "Registry's First Assessment Report on Applications for Victims' Participation in Pre-Trial Proceedings" dated 14 May 2019,⁵ the Victims Participation and

¹ ICC-01/14-01/18-688.

² ICC-01/14-01/18-688, para. 16.

³ ICC-01/14-01/18-688, para. 15 referring to ICC-01/14-01/18-227-Red, para. 24 in its footnote 18.

⁴ ICC-01/14-01/18-141, p. 23.

⁵ ICC-01/14-01/18-198.

Reparations Section (“VPRS”) transmitted 15 Group C applications to the Pre-Trial Chamber and parties, *i.e.*, applications for which VPRS was not in a position to make a clear determination.

5. On 21 June 2019, the Pre-Trial 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”).⁶
6. On 19 August 2019, the Registry filed the “Registry’s Second Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings”⁷ and the “Registry’s Fifth Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings”,⁸ whereby 8 Group C applications were transmitted.
7. On the same day, the Prosecution notified to the Chamber, parties and participants its “Document Containing the Charges” (“DCC”).⁹
8. On 13 September 2019, the Pre-Trial Chamber issued the “Decision regarding the Registry’s Outstanding Transmissions of Applications for Victim Participation” (“Second Decision”).¹⁰
9. On 11 December 2019, the Pre-Trial Chamber issued the Confirmation Decision, partially confirming certain charges against Mr Patrice-Edouard Ngaïssona to the extent specified in the Confirmation Decision and committing him to trial on the charges as confirmed.¹¹
10. On 13 March 2020, the Registry transmitted the record of the proceedings to the Presidency,¹² which constituted Trial Chamber V and referred the case against Messrs

⁶ ICC-01/14-01/18-227-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-227-Red.

⁷ ICC-01/14-01/18-280.

⁸ ICC-01/14-01/18-281.

⁹ ICC-01/04-01/18-282-Conf-AnxB1.

¹⁰ ICC-01/14-01/18-338.

¹¹ ICC-01/14-01/18-403-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-403-Red.

¹² Registry, Transmission to the Presidency of the record of the proceedings, including the Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona, 13 March 2020, ICC-01/14-01/18-449.

Yekatom and Ngaïssona to it on 16 March 2020.¹³

11. On 19 March 2020, the Chamber issued its Scheduling Order, in which it (i) endorsed the victim application procedure set out in the Victim Application Decision; and (ii) requested the Registry to provide an update and forecast on applications by victims to participate in the proceedings.¹⁴
12. On 19 October 2020, in its “First Registry Transmission of Group C Applications for Victim Participation in Trial Proceedings”,¹⁵ the Registry transmitted 15 Group C applications to the Chamber and parties, *i.e.*, applications for which VPRS was not in a position to make a clear determination and issued on the same day its related “First Registry Assessment Report on Victim Applications for Participation in Trial Proceedings” (Registry’s First Report’).¹⁶

III. Applicable Law

13. 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.¹⁷

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

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.

15. 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)

¹³ Presidency, Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, 16 March 2020, ICC-01/14-01/18-451.

¹⁴ Trial Chamber V, “Order Scheduling First Status Conference”, 19 March 2020, ICC-01/14-01/18-459, Para. 3(I).

¹⁵ ICC-01/14-01/18-687.

¹⁶ ICC-01/14-01/18-688.

¹⁷ “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.”

16. Finally, the Chambers Practice Manual (2019) provides that “the confirmation decision constitutes the final, authoritative document setting out the charges, and by doing so *the scope of the trial*” (emphasis added) and that “[t]he description of the facts and circumstances in the charges as confirmed by the Pre-Trial Chamber is binding on the Trial Chamber”.¹⁸

IV. Submissions

17. The Registry’s suggestion to follow the approach of the Pre-Trial Chamber as set out in its First Decision, issued prior to confirmation, and even before the DCC was completed, is misguided.¹⁹ The First Decision was based on the Chamber’s recalling that “Warrants of Arrest are not determinative as to the scope of the confirmation hearing or a possible trial if the charges are confirmed”.²⁰ It is in light of this principle, specific to this particular stage of the proceedings, that the Pre-Trial Chamber instructed the Registry to “adopt a flexible approach in assessing victim applications with regard to the temporal and territorial scope of the present case”²¹ and to accept the relevant applications, “for the time being”.²²

18. Meanwhile, the Confirmation Decision has been issued and is now authoritative for the purpose of determining the material, temporal and geographical scope of the case. The strong stance expressed by Pre-Trial Chamber II in its decision on the Prosecution’s request to amend the charges further emphasizes the fundamental difference between the pre-confirmation and post-confirmation stages of the proceedings when it comes to the determinative nature of the scope of the charges:

The fundamental function of the control exercised by the Pre-Trial Chamber through the confirmation decision is not only to filter out weak cases, but also (and, critically, every time a confirmation does occur) to set the factual boundaries of the trial by declining to confirm those charges which are not supported by ‘sufficient evidence to establish substantial grounds’ as set out in article 60(5) and (7), consistently with the ‘gatekeeper function of the Pre-Trial Chamber according to which [...] only those cases proceed to trial for which the Prosecutor has presented sufficiently compelling evidence going

¹⁸ Chamber Practice Manual (2019), paras 57-58.

¹⁹ Registry’s First Report, paras 15, 21-22, 25-26, 33.

²⁰ First Decision, para. 30. *See also ibid.* para. 23.

²¹ *Ibid.*, para. 24.

²² *Ibid.*, para. 30.

beyond mere theory or suspicion'.²³

19. While the Pre-Trial Chamber might have adopted a flexible approach by provisionally accepting certain unclear victim applications before confirmation, this decision was made in light of the provisional lack of clear factual boundaries of the case at a stage of the proceedings where the Warrants of Arrest were the only possible references.
20. The Defence will hereby focus on the specific 15 applications for which the Registry expressly reported the unclear status of the related applicants. However, given the Registry's confirmation that the VPRS's review had been conducted based on the instructions previously provided by the Pre-Trial Chamber in its First Decision,²⁴ the Defence wishes to generally question the method applied by the Registry to classify victim applicants, and more specifically those who according to the Registry clearly qualify as victims in this case (Group A). While this Chamber has decided to endorse the victim application *procedure* adopted by the Pre-Trial Chamber,²⁵ the Chamber never endorsed the Pre-Trial Chamber's *instructions* provided in its First Decision as to how to classify victim applications, and logically so, as they were based, as explained above, on the stage of the proceedings at the time, which is totally different today.
21. Therefore, the fact that the Registry followed the Pre-Trial Chamber's obsolete instructions must have had an impact not only on the number of victims classified as participating victims out of the total number of applications submitted but also on the number of applications submitted itself, as the Defence understands that these instructions have been relayed to the intermediaries in the field.²⁶
22. In light of the above, the Defence respectfully requests the Chamber to instruct the Registry to assess all victim applications classified as Group A applications anew, only on the basis of the Confirmation Decision and any guidance the Chamber might give in its upcoming decision on this topic, and leaving aside of this new assessment the previous instructions provided by the Pre-Trial Chamber in its First and Second Decisions.

²³ ICC-01/14-01/18-517, para. 23.

²⁴ Registry's First Report, para. 15 and footnote 18.

²⁵ ICC-01/14-01/18-459, para. 8 (iv), referring to the Victim Application Decision.

²⁶ Registry's First Report, para. 18.

23. Turning now to the 15 applications at hand, and, to begin with, to the issue pertaining to the geographical scope of the 5 December 2013 Bangui attack (category 1), the Defence disagrees with the Registry's suggestion.²⁷

24. A flexible approach was adopted by the Pre-Trial Chamber for the purpose of assessing the geographical scope of the 5 December 2013 Bangui attack, *at that particular stage of the proceedings*, as further developed above, and in light of the fact that "the Warrants of Arrest [did] not limit the territorial scope of the Bangui area to the locations explicitly mentioned in the context of this attack".²⁸ To reach this conclusion, the Pre-Trial Chamber cited the part of the Warrant of Arrest stating that "Yekatom led members of his group *in Bangui and adjacent neighbourhoods* in their participation in the 5 December 2013 Bangui Attack".²⁹ In the meantime however, the Pre-Trial Chamber, in the now authoritative Confirmation Decision, circumscribed its factual findings in relation to "Bangui and adjacent neighbourhoods" to the Cattin and Boeing areas.³⁰ The Registry acknowledged itself that "[t]he factual findings described in the relevant sub-section of the decision refer only to two locations, namely Cattin (inside Bangui's 3rd arrondissement) and Boeing".³¹

25. In paragraph 92 of the Confirmation Decision, which is referred to in the operative paragraphs of the Confirmation Decision,³² the Pre-Trial Chamber finds that "[t]he evidence also reveals that, following the 5 December 2013 Attack, nearly all the Muslim residents *of Boeing and Cattin* fled to PK5, a predominantly Muslim neighbourhood in Bangui, other parts of the CAR or neighbouring countries. [...]" (emphasis added).

26. Yet, it must be noted that all category 1 applicants describing having fled specify that they did so from other areas of Bangui or its vicinity.

27. The Pre-Trial Chamber did not exclude the possibility that there were intervening Anti-Balakas who were not under the command of Mr Yekatom and who participated in the alleged attack of 5 December, and that therefore, other groups' orders might

²⁷ Registry's First Report, paras 21-22.

²⁸ First Decision, para. 26.

²⁹ *Ibid.*

³⁰ Confirmation Decision, paras 86-92.

³¹ Registry's First Report, para. 19.

³² Confirmation Decision, page 110 (ii)(a).

have caused the displacement of Muslim persons in areas other than Boeing and Cattin.³³ No link to either Mr Yekatom and Mr Ngaïssona was established in the present case in relation to alleged displacements in areas other than Cattin and Boeing.

28. Therefore, victim applicants, none of whom implicates Mr Yekatom's group as the alleged perpetrators, and who were allegedly forced to relocate from, or who suffered some alleged harm in, the 8th, 5th and 4th arrondissements, miles away from the alleged locations(s) of the alleged attack, sometimes days after the alleged incidents of Boeing and Cattin, for reasons that are not always specified (see a/65107/19), should clearly not be permitted to participate in the proceedings. While in its First Decision, the Pre-Trial Chamber decided that "it [was] not necessary to demonstrate that they were subordinate to Ngaïssona or Yekatom *at this stage of the proceedings*" (emphasis added),³⁴ the present stage of the proceedings and the substance of the Confirmation Decision so warrants, as emphasized above.

29. If one could at the utmost agree to provisionally admit applicant a/65061/19 who was located in the 3rd arrondissement (although not in the Cattin area) and who describes alleged incidents on 5 December 2013 as a result of which, allegedly, he and his family fled, the other five applicants were too far removed from the relevant area to be accepted as participating victim in the present case. In addition, some of them describe incidents having occurred outside of the temporal scope of the Bangui attack, as specified in the Confirmation Decision. For instance, applicant a/65082/19 describes incidents in the 5th arrondissement on 12 December 2013.

30. As to application a/66228/19, in addition to the issue of the location of the reported incident, *i.e.* the Gobongo area in the 4th arrondissement, and the lack of mention of any date,³⁵ the alleged incident itself, *i.e.* the destruction of the Gobongo mosque, is not included in the crimes confirmed in the Confirmation Decision. The charge of directing attacks against buildings dedicated to religion has only been confirmed in relation to the Boeing mosque by 20 December 2013 and the central mosque of Bossangoa, but not the Gobongo mosque.

³³ Confirmation Decision, paras 93-94.

³⁴ First Decision, para. 24.

³⁵ The Defence notes that this application is heavily redacted.

31. Thus, the Defence requests the dismissal of the following applications: a/65082/19, a/65107/19, a/65137/19, a/66228/19, and a/65035/19.
32. Similarly, regarding the issue pertaining to the geographical scope of the crimes committed along the PK9-Mbaïki Axis, the two (2) applications in question relate to alleged acts having been allegedly committed in localities that are not along that axis, as also confirmed by the Registry.³⁶ Therefore, these applications should be automatically rejected on this basis.
33. Assuming the Trial Chamber would decide to follow a rule similar to that applied by the Pre-Trial Chamber in its Second Decision, and accept applications which (i) fall within the Confirmation Decision's general reference to the "PK9 -Mbaïki Axis" or (ii) are mentioned specifically in the Confirmation Decision, the village mentioned in application a/66138/19 would not fall within either reference. Indeed, this village is located on the Boda road, and is therefore located on the Mbaïki-Boda Axis, not the PK9-Mbaïki Axis. Secondly, the Confirmation Decision makes no mention whatsoever of that locality.
34. The Defence strongly disagrees with the Registry's suggestion "to follow the PTC's approach and consider as falling within the parameters of the Case all those locations in the Mbaïki sous-préfecture which are not along the PK9-Mbaïki axis but in its vicinity [...]".³⁷ First, this rule was not reiterated or recalled in the Second Decision, which, to the contrary, proposed a different rule for that particular issue, and therefore suggests that the initial rule, made before the DCC was even issued, was already considered moot by the Pre-Trial Chamber itself.³⁸ Second, as developed above, the current stage of the proceedings no longer necessitates to maintain such an extremely broad rule given that the Pre-Trial Chamber has now entered into precise and binding factual findings in relation to the charges allegedly committed on the PK9-Mbaïki axis.
35. Regarding application a/66150/19, while the village of Mbata is specifically mentioned in the Confirmation Decision, such a mention was made in the context of certain Muslims allegedly fleeing first from Mbata to Mbaïki, and then only in a

³⁶ Registry's First Report, para. 24.

³⁷ Registry's First Report, para. 26.

³⁸ See First Decision, para. 27 and Second Decision, para. 30.

second stage to PK5, Chad or Cameroon.³⁹ Therefore, the Defence's view is that the factual description contained in the application does not match the factual findings contained in the Confirmation Decision in that the applicant suggests having fled from Mbata directly to Chad. Secondly, Mbata is located 40 km away from Mbaïki on the road to MOUNGOUNBA, *i.e.* too far removed from the PK9-Mbaïki axis.

36. In conclusion, the Defence requests the dismissal of applications a/66138/19 and a/66150/19.

37. Regarding application a/65196/19 (category 3), given that the crime of enlistment and use of children under the age of fifteen to participate actively in hostilities has not been confirmed in relation to Mr Ngaïssona, the Defence defers to, and supports, the position on this issue to be taken by the Yekatom Defence.

38. Regarding the Registry's issues pertaining to both the temporal and geographical scope of the case (*i.e.* the category 4 applications), the Defence notes that the Registry's arguments in this respect are based exclusively on its review of the Document Containing the Charges, with no mention whatsoever of the Confirmation Decision, despite it now being the authoritative document in relation to the scope of the charges.⁴⁰

39. The Defence's submissions made above in relation to the geographical scope of the alleged Bangui attack can be reiterated here to submit that the category 4 applications should be rejected. Indeed, all category 4 applicants were located in areas other than Cattin and Boeing at the time of the alleged incident. The second reason why they should be rejected is that the alleged crimes as described by the relevant victim applicants fall outside the temporal scope of the charges as delineated in the Confirmation Decision. Indeed, all confirmed counts allegedly committed in the context of the alleged Bangui attack, including count 1 itself (directing attacks against the civilian population), save for the destruction of the Boeing mosque and displacement of the Muslims from Cattin and Boeing, allegedly occurred on 5 December 2013.⁴¹ As to counts 4 and 5 (the alleged displacement / forcible transfer

³⁹ Confirmation Decision, footnotes 307, 308 and 313.

⁴⁰ Registry's First Report, para. 31.

⁴¹ Confirmation Decision, paras 86-92. See also the operative part of the Confirmation Decision in which it is stated that count 1 is confirmed "on the basis of the conduct pertaining to Counts 2 to 6 and 8, as set out in paragraphs 246-256 of the DCC and paragraphs 86-92 of the present decision".

and deportation from Bangui), while it is stated it occurred “following the 5 December 2013 Attack” without additional precision, the Confirmation Decision expressly circumscribes the alleged victims to the Muslim residents of Boeing and Cattin.⁴² Therefore, the victim applicants having reported being the victims of crimes, including displacement, in 2014, in areas other than Boeing and Cattin, should be dismissed as falling outside of the geographical and temporal scope of the charges.

40. For instance, in application a/65138/19, the fact that the applicant dates the harm allegedly suffered *after* the resignation of Djotodia further reinforces the conclusion that this alleged victim cannot be classified as a victim of the alleged Bangui attack. As to application a/66140/19, Delebama is located outside of Bangui and the incidents described in there, *i.e.* the appropriation of goods and certain violent acts, in the night of 19 January 2014, have neither been mentioned in the Confirmation Decision, let alone being considered as part of the same course of action of the alleged Bangui attack.

41. Not only do the present category 4 applications not fall within the geographical and temporal parameters of the case, as fixed by the Confirmation Decision, but save for one,⁴³ they do not specifically identify the ‘Anti-Balaka of Yekatom’ as the alleged perpetrators. Therefore, accepting these applications which refer to events having occurred from 19 January 2014 onwards in or even outside of Bangui (other than in Cattin and Boeing), at a time when the Yekatom group was allegedly taking over a number of villages in the Lobaye Prefecture, would overstretch the Confirmation Decision and impermissibly exceed the factual boundaries set by the Pre-Trial Chamber.

42. Thus, the Defence requests the dismissal of the following applications: a/66140/19, a/65138/19, a/66217/19, and a/66171/19.

43. Finally, regarding applications a/65742/19 and a/65958/19 (category 5), the Pre-Trial Chamber’s findings in relation to PK5 exclusively relate to the alleged victims of the 5 December 2013 Bangui attack, who allegedly fled, *inter alia*, to the PK5 area, *in response* to that particular alleged attack having occurred in the specific location of

⁴² Confirmation Decision, para. 92. *See also* operative part of the Confirmation Decision.

⁴³ Application a/65138/19, which as mentioned above, referred to events having allegedly occurred after Djotodia’s resignation in February 2014 in the Koroko area.

the Boeing and Cattin areas of Bangui (or its vicinity).⁴⁴ The Pre-Trial Chamber refrained from making any findings regarding the alleged Yaloké and Berberati attacks and the alleged victims related thereto because it determined that these alleged attacks should be excluded from the scope of the charges. Therefore, the alleged consequences of these alleged attacks in terms of dislocation fall equally outside the scope of the charges of the case as delineated by the Confirmation Decision. The two victim applicants in question are geographically attached to the provinces that have been excluded from the charges and the Defence requests consequently the dismissal of their application.

RELIEF SOUGHT

44. The Defence respectfully requests the Chamber to:

- **REJECT** the Group C applications a/65082/19, a/65107/19, a/65137/19, a/66228/19, a/65035/19, a/66138/19, a/66150/19, a/66140/19, a/65138/19, a/66217/19, a/66171/19, a/65742/19, and a/65958/19;
- **INSTRUCT** the Registry to assess all victim applications classified as Group A applications anew, according to the method set out in paragraph 22 above.

Respectfully submitted,



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⁴⁴ See paragraph 253 of the Document Containing the Charges.