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**International
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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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

**Public Redacted Version of “Ngaïssona Defence Response to the “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)”, ICC-01/14-01/18-224-Conf”, 27 June 2019, ICC-01/14-01/18-231-Conf**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. On 14 June 2019, the Prosecution filed the “Prosecution’s Additional Observations on the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings”¹ (“the Request”) that, despite their title as “observations”, substantially consist of a request to Pre-Trial Chamber II (“the Chamber”) to defer its determination on 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 (“the Three Applications”),² until the Document containing the charges (“the DCC”) is filed, if not until the confirmation decision is issued, or in the alternative, to provisionally admit the Three Applications.
2. The Defence for Patrice-Edouard Ngaïssona (“the Defence”) hereby opposes the Request as it misconstrues the fundamental principle of legality, as a general principle of criminal law, it exceeds the Prosecution’s mandate as enshrined in the Rome Statute (“the Statute”) and the system of the Statute, and it lacks the necessary evidence to be entertained further.

II. Confidentiality

3. These submissions are filed “confidential” as they are responsive to a filing of the same designation. The Defence does not oppose a reclassification as “public”.

¹ ICC-01/14-01/18-224-Conf.

² Victim applications [RECATED], [REDACTED] and [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. Procedural history

4. On 5 March 2019, the Chamber issued the “Decision Establishing the Principles Applicable to Victims’ Applications for Participation”,³ thereby instructing the Registry to, *inter alia*, (i) transmit to the Chamber on a rolling basis, and in unredacted form, all complete victims’ applications for participation, including those for which the Registry could not make a clear determination (the ‘Group C Applications’), and (ii) prepare assessment reports highlighting the difficulties encountered in relation to the assessment of the Group C Applications.⁴
5. On 14 May 2019, the Registry filed the “Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings”⁵ and the “Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings”.⁶
6. On 23 May 2019, the Chamber issued the “Decision on the Legal Representation of Victims”.⁷
7. On 24 May 2019, the Defence for Alfred Rombhot Yekatom and 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)”.⁸
8. On 27 May 2019, the Prosecution filed the “Prosecution’s Observations on “Registry’s First Assessment Report on Applications for Victims’ Participation

³ ICC-01/14-01/18-141.

⁴ *Ibid.*, para. 41.

⁵ ICC-01/14-01/18-197, together with Annexes 1-15 Confidential EX PARTE only available to the Registry and Redacted Annexes 1-15 Confidential.

⁶ ICC-01/14-01/18-198, together with a confidential annex.

⁷ ICC-01/14-01/18-205.

⁸ ICC-01/14-01/18-208-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-208-Red.

in Pre-Trial Proceedings” (ICC-01/14-01/18-198)”.⁹

9. On 11 June 2019, the Chamber issued the “Order for the submission of additional observations by the Prosecutor regarding the ‘Registry’s First Transmission of Group C Applications for Victims’ Participation in Pre-Trial Proceedings’ and the ‘Registry’s First Assessment Report on Applications for Victims’ Participation in Pre-Trial Proceedings’”.¹⁰

10. On 14 June 2019, the Prosecution filed the Request.

IV. Submissions

11. By filing the Request, the Prosecution (i) has misconstrued the fundamental principle of legality, (ii) has acted as a legal representative for victims, i.e. beyond the limits of its mandate, and (iii) has failed to identify and/or disclose the evidence supporting the Request.

(i) The Prosecution has misconstrued the principle of legality

12. Pursuant to article 22(1) of the 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.”

13. Article 22(2) of the Statute also states that:

⁹ ICC-01/14-01/18-212-Conf.

¹⁰ ICC-01/14-01/18-220-Conf.

“[t]he 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.”¹¹

14. Article 7(1) of the Statute distinguishes between several acts as constituting crimes against humanity. Notably, rape, deportation or forcible transfer of population and persecution have been erected as separate and distinguished crimes.¹² In this regard, article 7(2) of the Statute provides relevant and separate definitions for each of these crimes.¹³

15. Article 8(2) of the Statute distinguishes between several acts as constituting war crimes. Notably, rape, attack against a civilian population and unlawful deportation or transfer have been erected as separate and distinguished crimes.¹⁴

16. In *Ntaganda*, the Appeals Chamber recalled that:

“[w]hen the provisions on war crimes were negotiated, there was a desire to “define the specific content or constituent elements of the violations in question”.¹⁵ States were concerned, in particular, with providing certainty as to the specific conduct that would give rise to criminal liability and in upholding the principle of legality.¹⁶ As the Trial Chamber noted, while the drafting history is silent as to whether the drafters intended the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (e) (vi) to be subject to the Status Requirements, it is clear that the drafters intended these crimes to be “distinct war crimes”, as

¹¹ Emphasis added.

¹² See articles 7(1)(g), 7(1)(d) and 7(1)(h) of the Statute.

¹³ See articles 7(2)(d) and 7(2)(g) of the Statute.

¹⁴ See articles 8(2)(b)(xxii), 8(2)(e)(vi), 8(2)(b)(i), 8(2)(e)(i) and 8(2)(a)(vii).

¹⁵ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records - Fiftieth Session Supplement No. 22, A/50/22, paras 57, 76.

¹⁶ “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.”

opposed to merely illustrations of grave breaches of the Geneva Conventions or violations of Common Article 3.¹⁷¹⁸

17. In the instant case, it is clear that the drafters intended the crime of rape to be a distinct war crime and/or crime against humanity, as opposed to the other crimes mentioned in articles 7 and 8 of the Statute. Therefore, supporting that *“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”*¹⁹ fully and plainly contravenes the text and nature of the Statute.

18. In *Lubanga*, Trial Chamber I held that:

“[i]n accordance with the jurisprudence of the Appeals Chamber, the Trial Chamber’s Article 74 Decision shall not exceed the facts and circumstances (i.e. the factual allegations) described in the charges and any amendments to them. The Trial Chamber has earlier pointed out that “[f]actual allegations potentially supporting sexual slavery are simply not referred to at any stage in the Decision on the Confirmation of Charges”. Regardless of whether sexual violence may properly be included within the scope of “using [children under the age of 15] to participate actively in hostilities” as a matter of law, because facts relating to sexual violence were not included in the Decision on the Confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.”²⁰

19. Therefore, considering the case at hand and the Request, regardless of whether rape may properly be included within the scope of other alleged crimes against the Suspect, as a matter of law, because facts relating to alleged acts of rape were not included in the warrant of arrest, it would be impermissible for the Chamber to base the acceptance of the Three

¹⁷ [ICC-01/04-02/06-1707], para. 42. See further M. Cottier, “War Crimes”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Beck et al., 3rd ed., 2016), p. 503.

¹⁸ Appeals Chamber, Judgment on the appeal of Mr Ntaganda against the “Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 15 June 2017, ICC-01/04-02/06-1962, para. 48.

¹⁹ The Request, para. 14.

²⁰ Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 630. Footnotes omitted.

Applications, even provisionally, on prospective evidence not yet identified in the record of the case, or even undisclosed, at this stage.²¹

20. In *Kenyatta*, in the “Decision on the Confirmation of the Charges” issued on 23 January 2012,²² the Chamber held that:

“[a]rticle 7(l)(k) of the Statute refers to “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. The Chamber understands that other inhumane acts is a residual category within the system of article 7(1) of the Statute. Therefore, if a conduct could be charged as another specific crime under this provision, its charging as other inhumane acts is impermissible.”²³

21. However, in the Request, the Prosecution contends that “*[r]ape, 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*” and that “*an individual civilian harmed by such an ‘attack’, whether directly or indirectly (even collaterally), would be a ‘victim’ within the Court’s regulatory framework [...], irrespective of whether the individual was attacked in a way that may also amount to another crime.*”²⁴

22. The Prosecution here intends to ignore the specificity of the crime of rape, under articles 7 and 8 of the Statute, trying to include allegations of rape in other crimes, as if the latter could serve as a residual category for the former. Therefore, the Defence submits that, pursuant to the Chamber’s jurisprudence, it should not be permissible to charge an alleged conduct other than as the specific crime designed under these provisions.

23. Finally, assuming *arguendo* that an ambiguity on the definition of the alleged crimes would arise in the present case, pursuant to article 22(2) of the Statute,

²¹ See *infra*, paras 39-43.

²² Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red.

²³ *Ibid.*, para. 269. Emphasis added.

²⁴ The Request, para. 13.

such ambiguity “shall be interpreted in favour of the person being investigated, prosecuted or convicted”. Therefore, the Request cannot be entertained further.

(ii) The Prosecution has acted as a legal representative of victims

24. Pursuant to article 68 of the Statute, victims and their representatives are participants to the trial and the pre-trial stage and not parties. It is the constant jurisprudence of this Court that victims and their legal representatives cannot act as a second Prosecutor.²⁵ In return, the Prosecutor cannot act as a legal representative for victims. The representation of victims indeed falls outside of the Prosecution’s mandate pursuant to the Statute.²⁶

25. In the instant case, the Prosecution has nevertheless acted as a legal representative of victims, hence exceeding its mandate, by making submissions on the determination of an individual’s standing as a victim. Therefore, the Prosecution’s assertion that, on this matter, “*it is the perpetrator’s conduct and the resulting harm – not the legal classification – that are determinative*”²⁷ is both legally irrelevant and defective.

26. *At the outset*, and without entering yet into the substance of the Prosecution’s analysis, by acting as a legal representative of victims, the Prosecution seeks the application of a lighter standard in the delimitation of the alleged charges. As a party to the confirmation proceedings, the Prosecution has the duty to define and circumscribe the alleged factual charges and their legal characterization. Submitting that such duty would be discharged only because the Three Applications mention alleged acts of rape, and in the absence of any reference to these alleged crimes in the warrant of arrest,

²⁵ See ICC-01/04-01/07-1665-Corr, para. 82; See also ICC-01/05-01/08-1023, para. 17.

²⁶ See article 42 of the Statute, read by opposition to article 68 of the Statute.

²⁷ The Request, para. 16.

would amount to enabling the Prosecution to amend freely the warrant of arrest, depending on the victims' applications that could be submitted in the present case, at such an early stage of the proceedings. The Prosecution cannot reasonably vary its case against the Suspect on the sole basis of victims' applications.

27. *First*, the Prosecution relies upon article 68(3) of the Statute to substantiate the Request, whereas this provision does not apply to the Prosecution, but to the victims and, through their mandates, to their legal representatives, rendering it irrelevant to the present debates:

"Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."²⁸

28. *Second*, the Prosecution has misrepresented the jurisprudence it has relied upon to support the Request. Contrary to the Prosecution's assertion and as elaborated below, the practice of Chambers of this Court shows that victim status is limited by the specific crimes charged.

29. In *Ruto and Sang*, the Single Judge of Pre-Trial Chamber II, recalling previous jurisprudence of the Court, determined that, for the purpose of the rule 85 of the Rules assessment, and regarding specifically the requirement that "*a crime within the jurisdiction of the Court appears to have been committed*":²⁹

"[w]ith reference to the second requirement mentioned above, [...] not every incident alleged by the victim applicant, which falls within the meaning of article 7 of the Statute, may satisfy the requirements of rule 85 of the Rules. In this regard the Single Judge emphasizes the importance of establishing a link between the alleged incident and the present case. The alleged incident must relate to the offences alleged in the summonses to appear, or, at a later

²⁸ Article 68(3) of the Statute.

²⁹ See ICC-01/09-01/11-17, para. 6.

stage in the proceedings, the document containing the charges, in the case in which the application is made.^{30/31}

30. Therefore, only the alleged offences charged by the Prosecution in the summonses to appear or, at a later stage, in the document containing the charges, can serve as a basis to determine the status of victim in proceedings before the Court. Besides, since “*the alleged incident must relate to the offences alleged*”,³² it is hence clear that the delimitation of the offences charged will determine the scope of the incidents that will give rise to victims’ applications and not the other way round. As a consequence, the Prosecution cannot reasonably support that “[t]he incident alleged by the victim applicant must merely ‘relate to’ the offences alleged in the summons to appear, and later, the DCC.”³³

31. In the present case, the Defence notes that the warrant of arrest does not mention rape as an alleged offence charged against Mr Ngaïssona.³⁴ The document containing the charges not being available, victims’ applications invoking crimes of rape cannot be admitted to the present proceedings.

32. *Third*, the Defence notes that the Prosecution relies upon a Separate Opinion of Judge Pikis in *Lubanga*,³⁵ whereas a separate opinion is not authoritative and hence, cannot be considered as authoritative jurisprudence of the Court.

33. *Fourth*, contrary to what the Prosecution suggests, Trial Chamber VI in *Ntaganda* did not hold that “[i]t is only necessary to show that the victim suffered

³⁰ See also Pre-Trial Chamber I, “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-02/05-02/09-121, para. 12; *id.*, “Decision on 6 Applications for Victims’ Participation in the Proceedings”, ICC-02/05-01/07-58, para. 6; following the same line of argumentation at the stage of trial proceedings. Appeals Chamber, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/061432, paras 2 and 63.

³¹ See ICC-01/09-01/11-17, para. 6, mentioned in The Request, para. 17, footnote 8.

³² ICC-01/09-01/11-17, para. 6. Emphasis added.

³³ The Request, para. 17, footnote 8.

³⁴ ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available, ICC-01/14-01/18-89-Red.

³⁵ The Request, para. 17, footnote 8, mentioning ICC-01/04-01/06-925 (Sep. Op. Judge Pikis), para.13.

*harm as a result of an 'incident falling within the parameters of the confirmed charges.'"*³⁶ The entire paragraph from which the quote mentioned by the Prosecution in the Request was extracted completely contradicts the Prosecution's point, especially the start of the said paragraph:

"[t]he Chamber, consistent with the established jurisprudence of the Court, considers that only those persons who are victims of the crimes charged may participate in trial proceedings."³⁷³⁸

34. Therefore, and once again, only an alleged crime that has been charged against an Accused or a Suspect can serve as a basis for a victim application to participate to the proceedings.

35. *Fifth*, the Prosecution alleges that:

"[t]he Three Applications allege rapes committed by elements of the Anti-Balaka. This group that [Mr] 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."³⁹

36. Therefore, the Prosecution, without any reference to supporting evidence, has requested the Chamber to accept, at this early stage of the proceedings, its overall narrative against Patrice-Edouard Ngaïssona in order to rule on the Three Applications. Not only accepting this allegation, as a whole, would be utterly premature, but most importantly, it would amount to an abdication of the fact-finding mission of the Chamber.

37. In a nutshell, by seeking the admission of the Three Applications, the Prosecution has misstated the standard applying to its own determination of

³⁶ The Request, para. 17.

³⁷ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, OA9-OA10 ('Lubanga OA9-OA10 Judgment'), para. 62.

³⁸ ICC-01/04-02/06-449, para. 43. Emphasis added.

³⁹ The Request, para. 18.

the alleged charges in the case at hand. Moreover, it has misstated this standard by trying to minimize it to a mere nexus between the harm allegedly suffered by the victims and the global consideration of its case as expressed in the application for a warrant of arrest.

38. For the foregoing reasons, the Prosecution has failed to demonstrate sufficient ground for the Chamber to defer its determination on the Three Applications until the DCC is filed, if not until the confirmation decision is issued, or in the alternative to provisionally allow the Three Applications.

(iii) The Prosecution has failed to disclose and/or identify the relevant evidence supporting its argument.

39. In the Request, the Prosecution asserts that it “intends to allege additional crimes”⁴⁰ to its case. It contends that:

“[t]hese additional charges are predicted 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. [...] These 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.”⁴¹

40. However, in the Request, the Prosecution has failed to identify the relevant evidence that it still describes with a certain level of detail.⁴² The Defence is currently reviewing the evidence disclosed so far by the Prosecution,⁴³ which

⁴⁰ The Request, para. 5.

⁴¹ The Request, para. 6.

⁴² The Request, paras 6-9.

⁴³ Pre-Confirmation INCRIM package 01 of 25 January 2019, Pre-Confirmation INCRIM package 02 of 22 February 2019, Pre-Confirmation INCRIM package 03 of 26 March 2019, Pre-Confirmation INCRIM package 04 of 25 April 2019, Pre-Confirmation INCRIM package 05 of 7 May 2019, Pre-Confirmation INCRIM package 06 of 7 May 2019, Pre-Confirmation INCRIM package 07 of 17 May

is a time consuming and highly labour intensive task. Given the importance of the evidence at stake, the Prosecution should have provided the Chamber and the parties with the relevant ERN of the said evidence, which would have enabled the Defence to prioritize its evidence review for the purpose of the present response.

41. Either the Prosecution has failed to do so, or it has not disclosed the above-mentioned evidence, which would render the whole submission purely speculative and place the Defence in the unfair position of having to respond to evidence not yet disclosed, i.e. virtual evidence.

42. In both cases, the Prosecution has requested the Chamber to make a decision on the Three Applications on the mere assumption that it would present evidence on additional charges in the future; evidence that has not been identified or disclosed to the parties at trial. In a nutshell, the Prosecution cannot reasonably request the Chamber to issue a decision on the Three Applications on the basis of merely virtual and non-existing evidence.

43. For the foregoing reasons, the Defence submits that the Request should be rejected.

RELIEF SOUGHT

44. The Defence respectfully requests the Chamber to:

- **REJECT** the Request.

2019, Pre-Confirmation INCRIM package 08 of 17 May 2019, Pre-Confirmation INCRIM package 09 of 17 May 2019, Pre-Confirmation INCRIM package 10 of 17 May 2019, Pre-Confirmation INCRIM package 11 of 13 June 2019.

Respectfully submitted,



Mr. Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 15 February 2021,
At The Hague, the Netherlands.