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**International
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Date: **9 July 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 YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA**

Confidential

**Victims' Views and Concerns arising from the Prosecution's Additional
Observations on the Registry's First Assessment Report on Applications for
Victims' Participation in Pre-Trial Proceedings**

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Legal Representatives of the Victims of Other Crimes and the Legal Representative of the Former Child Soldiers (jointly the "Common Legal Representatives")¹ convey to Pre-Trial Chamber II (the "Chamber") the views and concerns of the victims in relation to the Observations submitted by the Prosecution on the Registry's First Assessment Report on Applications for participation in pre-trial proceedings (the "Additional Observations").² Said Additional Observations were filed confidentially before the appointment of the Common Legal Representatives who were only retroactively notified of the confidential Additional Observations and related filings, following the Chamber's Decision on legal representation.

2. The Additional Observations contain information which deeply affects the personal interests of the victims because the Prosecution indicates its intention not to include charges of rape and sexual violence in the Document Containing the Charges.

3. Rape and other forms of sexual and gender-based violence are specifically proscribed in the Rome Statute (the "Statute") which seeks to criminalise particularly despicable forms of conduct used as a weapon of war against the most vulnerable victims. In this regard, the Prosecution made repeated public commitments to fighting impunity of sexual and gender-based crimes. In the present instance, the Prosecution seems, however, to fail to deliver on this promise, considering sufficient to deal with such crimes as constituent elements of 'other inhumane acts' or

¹ See 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", No. ICC-01/14-01/18-227-Conf, 21 June 2019, p. 14.

² See 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)", No. ICC-01/14-01/18-224-Conf, 14 June 2019.

underlying acts of deportation and forcible transfer. This approach does not take into account both the law and, moreover, the interests of the victims.

4. The Common Legal Representatives submit that if specific charges of sexual and gender-based crimes are not contemplated as such in the forthcoming Document Containing the Charges, victims will not have the opportunity to see justice done for the real events they have suffered from and for the consequences said crimes had and continue to have on their daily life. The proper legal characterisation of the facts will allow the Chamber to fully appraise the nature of the crimes allegedly committed and the full extent of the victimisation suffered by the victims.

5. Therefore, the Common Legal Representatives posit that, taking into account the views and concerns of the victims, the Prosecution should investigate sexual and gender-based crimes and include related charges in the Document Containing the Charges, namely rape and sexual violence. In this regard, the Common Legal Representatives note that, in order to not delay the proceedings, this matter should be addressed by the Prosecution at this juncture of the case.

II. CONFIDENTIALITY

6. Pursuant to regulations 23*bis*(1) and (2) of the Regulations of the Court, the present submission is classified as 'confidential' as it refers to documents bearing the same level of classification. A public redacted version will be filed in due course.

III. PROCEDURAL BACKGROUND

7. On 23 May 2019, the Chamber appointed a Counsel from the Office of Public Counsel for Victims (the "OPCV") to act as the common legal representative of the former child soldiers.³ The appointment of Mr Dmytro Suprun was subsequently acknowledged by the Chamber.⁴

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" (the "Decision of 21 June 2019"),⁵ whereby it, *inter alia*, (i) appointed the Common Legal Representatives of Victims of other crimes than the former child soldiers; (ii) accepted three victims' applications reporting rape; (iii) ordered the Prosecution to file additional observations; and (iv) granted all appointed Common Legal Representatives access to the confidential documents and material in the case record.⁶

IV. VIEWS AND CONCERNS OF THE VICTIMS

9. The Common Legal Representatives submit that it is in the interest of the victims they represent that the Document Containing the Charges includes, at the very least, the crimes of rape and sexual violence. Indeed, from the account of their clients it appears that rape was a systematic practice allegedly committed by Anti-Balaka during the period referred to in the Warrants of Arrest. Moreover, said crimes were also committed in the framework of the recruitment of child soldiers. Therefore, the non-inclusion of charges related to sexual and gender-based crimes in the

³ See the "Decision on the Legal Representation of Victims" (Pre-Trial Chamber II), No. ICC-01/14-01/18-205, 23 May 2019, para. 16.

⁴ See *infra* note 5.

⁵ See 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" (Pre-Trial Chamber II), No. ICC-01/14-01/18-227-Conf, 21 June 2019 (the "Decision of 21 June 2019").

⁶ *Idem*, para. 46.

Document Containing the Charges will result in not adequately addressing such grave conduct, as well as in the failure to acknowledge the specific characteristics of said crimes, which is an important component of what victims wish the Court to know about their victimisation.

10. In this regard, the Prosecution's assertion according to which "*instances of [sexual and gender-based violence] [...] fall squarely within the physical elements of certain [other] charged crimes [such as inhumane acts, deportation and forcible transfer]*"⁷ falls short of properly accounting for the criminalisation of that specific conduct. The Common Legal Representatives consider inadequate to revert back to the practices of over 70 years ago when rape as a war crime was prosecuted as an 'other inhumane act'.⁸ The law has moved on since, and so should the Court.

11. Rape, deportation or forcible transfer as well as 'other inhumane acts' are separate, distinguishable crimes defined in their own right in the Statute and relevant Elements of Crime.

12. While it is true that acts of rape may *also* be relevant to establishing underlying acts of other crimes, including genocide, extermination, enslavement, torture, persecution, other inhumane acts, grave breaches, outrages upon personal dignity and cruel or inhuman treatment,⁹ through the adoption of the Rome Statute, rape has first and foremost been recognised as an autonomous crime against humanity and a war crime. The inclusion of rape as an autonomous crime in the Statute has a reason. Indeed, the Commentary on the Rome Statute indicates that

⁷ See the Additional Observations, *supra* note 2, para. 11.

⁸ See HALL K., POWDERLY J., and HAYES N., in TRIFFTERER O. and AMBOS K. (eds.), *Commentary on the Rome Statute of the International Criminal Court*, 3rd edition, Beck Publishing Munich, 2016, (the "Commentary on the Rome Statute"), p. 246: "*Rape was not included in the definition of crimes against humanity or war crimes in the Nuremberg Charter or in the Tokyo Charter, although it had been covered by the phrase '... other inhumane acts ...' which had been included in both definitions. Rape charges were brought against defendants before the Tokyo Tribunal, concerning evidence of widespread violence committed by Japanese soldiers against the civilian population of Nanking in 1937. The Nuremberg Principles also did not expressly include rape*".

⁹ See the Commentary on the Rome Statute, *supra* note 8, p. 248.

“[t]he explicit inclusion of rape and other crimes of sexual violence in the Rome Statute is an important advance over their previous categorisation by international instruments as violations of the honour and reputation of women. Instead of as criminal acts aimed at the physical and mental integrity of a person”.¹⁰ The Prosecution itself recognises in its public “Policy Paper on Sexual and Gender-Based Crimes” that, as a *progressive step* taken by the international community “[t]he Statute of the ICC is the first international instrument expressly to include various forms of sexual and gender-based crimes – including rape [...]”,¹¹ and that “sexual and gender-based crimes are amongst the gravest under the Statute”.¹²

13. In the Common Legal Representatives’ view, the announced intention by the Prosecution of subsuming the crimes of rape and sexual violence under other charges, does not take into account its repeated public statements and promises that it ‘prioritises’ sexual and gender-based crimes in its investigations and prosecutions.¹³ It indeed pledged that it “*will bring charges for sexual and gender-based crimes explicitly as crimes per se, in addition to charging such acts as forms of other violence*”.¹⁴

14. Moreover, the announced choice of the Prosecution deprives victims of their right to the truth and potentially to reparations in the future. As far as the right to truth is concerned, while acknowledging the rapes recounted by three victims’

¹⁰ *Idem*.

¹¹ See the [Policy Paper on Sexual and Gender-Based Crimes](#), June 2014, p. 6.

¹² *Idem*.

¹³ *Ibidem*, pp. 5, 10: “Recognising the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crimes, the Office elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015. [...] [A]dopting a victim-responsive approach in its work [...] It will increasingly seek opportunities for effective and appropriate consultation with victims’ groups and their representatives to take into account the interests of victims”; “The Prosecutor has, on various occasions since her election in December 2011, expressed her commitment to paying particular attention to the investigation and prosecution of sexual and gender-based crimes, and to enhancing access to justice for victims of these crimes through the ICC”. See also the [Office of the Prosecutor’s Strategic Plan 2016-2018](#) in which the implementation of the Prosecution’s policies in relation to sexual and gender-based crimes constituted “Strategic Goal 2”.

¹⁴ *Ibidem*, p. 6 (emphasis added).

applicants as falling “squarely within the physical elements of certain charged crimes”,¹⁵ the Prosecution does not seem to feel compelled to investigate and include specific charges of rape and sexual violence as crimes *per se* in the Document Containing the Charges. Rather, it is reverting back to declassifying rape and sexual violence to the position of an accessory or collateral matter which, inevitably, will lead to the forfeiting of victims’ rights even before the case is proceeding to confirmation. By leaving unnoticed the specific *mens rea* and the particular prejudice caused to the victims by those conducts, the Prosecution fails to appreciate the overall impact of said acts on victims and the extent of their victimisation, and to describe the full extent of the alleged criminal conduct of the Suspects.¹⁶ Furthermore, if no such charges are included in the scope of the case, victims will never be able to attain the right to reparations for the harms specifically suffered as a consequence of said crimes. This is neither in the interest of justice, nor that of victims, nor consistent with the applicable law before the Court and the Prosecution’s policies and strategic goals so emphatically proclaimed publicly.

15. The Common Legal Representatives find also concerning that the Prosecution is only now “*continu[ing] to investigate the commission of sexual and gender based crimes [...] and may seek the confirmation of such charges, should the evidence obtained satisfy the requisite threshold*”.¹⁷ The cautious language of this statement does not instil confidence that such charges will indeed be sought to be included in the Document Containing the Charges. Since the Prosecution’s Strategic Goal 2 focuses on the *investigation* and prosecution of sexual and gender-based crimes, it is puzzling that investigation into such crimes seems to have taken the back seat in this case, because other crimes forming the basis of the Warrants of Arrest were clearly investigated first. The Prosecution should have known through its investigations of the crimes

¹⁵ See the Additional Observations, *supra* note 2, para. 9.

¹⁶ See ECCC, *the Prosecutor v. Im Chaem*, “Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons)” (Pre-Trial Chamber), No. D308/3/1/20, 28 June 2018, para. 331. See also ICTY, *the Prosecutor v. Jelisić*, Judgment, Partial Dissenting Opinion of Judge Shahabuddeen (Appeals Chamber), IT-95-10-A, 5 July 2001, para. 42.

¹⁷ See the Additional Observations, *supra* note 2, para. 9.

already in the *Bemba* case that the Central African Republic conflict saw significant numbers of sexual and gender based crimes. It is therefore highly regrettable that the investigations of the crimes that served as a basis for the Warrants of Arrest issued against the Suspects did not extend sufficiently to the available accounts of hundreds of victims who suffered sexual and gender-based crimes in the conflict.

16. However, through the repeated statements that instances of rape can be underlying acts of other crimes against humanity,¹⁸ the Prosecution seems to simply continue clinging on to its previous strategy of believing it to be sufficient that “recognising the sexual and gender violence as part of the harm suffered [...] effectively presents the dimensions of the victims’ suffering and the full criminal responsibility of the Accused at trial, and will itself justify an appropriately severe sentence”.¹⁹ It is by no means sufficient to classify rape and sexual violence solely as an aggravating circumstance in a potential sentencing procedure.

17. Rape does not just “easily [fall] within the scope of an attack against a civilian population” as contended by the Prosecution now – in line with its position of ten years ago illustrated *supra*.²⁰ Sexual violence – be it rape, sexual slavery, enforced pregnancy or other proscribed conduct – is extremely serious and its consequences devastating for victims. It must be seen, understood, and prosecuted as such as an autonomous crime. Victims of sexual and gender-based crimes have the same right to the truth, the same right to justice, and the same right to reparation as victims of other crimes under the Statute. The harm they suffered from is not merely collateral to an attack or a displacement. Their victimisation is grave and they deserve that

¹⁸ See the Additional Observations, *supra* note 2, and the “Prosecution’s Response to the Ngaiisona Defence Request for Leave to Appeal the ‘Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, 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’(ICC-01/14-01/18-227-Conf)”, No. ICC-01/14-02/06-236-Conf, 21 June 2019, paras. 11-12.

¹⁹ See the “Prosecution’s Observations on the consequences of the Appeal Judgment of 8 December 2009”, No. ICC-01/04-01/06-2215, 22 December 2009, para. 5.

²⁰ See the Additional Observations, *supra* note 2, para. 12.

these crimes be prosecuted in their own right. Indeed, the international community has only recently reaffirmed its commitment to ending impunity for sexual violence in conflict situations and noted with concern that only very limited numbers of perpetrators of sexual violence have been brought to justice.²¹

18. The Common Legal Representatives also note that the Prosecution expresses its 'mindfulness' that expansion of the charges beyond those for which Warrants of Arrest were issued would involve adequate time to be given to the Defence to prepare.²² This statement is foretelling that no such charges will be included in the future so as to avoid potential delays. Therefore, the Common Legal Representatives submit that in the very interests of the victims, of the proper administration of justice and of the integrity of the proceedings, the Prosecution should now review its stated position in relation to sexual and gender-based crimes, given that the case is still at a very early stage.

19. If such charges are not added now at the beginning of this case, there is a high potential that lengthy litigation concerning the re-characterisation of the charges pursuant to regulation 55 of the Regulations of the Court (the "Regulations") such as those seen in the *Lubanga* case, will result in significant delays and uncertainty for the victims. Such delays could negatively impact upon the rights of victims and further prejudice fair trial rights. It is therefore imperative that charges are correctly brought before the Chamber, or eventually amended accordingly by the Chamber,²³ at this early stage of the proceedings to avoid further and significant delays at later stages.

²¹ See e.g. [UN Security Council Resolution 2467\(2019\)](#) on sexual violence in conflict.

²² *Idem*.

²³ The Common Legal Representatives note the power of the Pre-Trial Chamber under article 61(7)(c)(ii) of the Statute.

20. At this stage of the proceedings, and potentially the ensuing stage if the charges are confirmed, the explicit inclusion or exclusion of charges of sexual and gender-based crimes has the potential of denying victims' access to justice if their victimisation does not fall within the parameters of the case. Despite the Pre-Trial Chamber's flexible approach in accepting the applications of victims' applicants reporting rape "*for the time being*";²⁴ there is no guarantee that victims of said crimes would be able to participate in a potential trial if the confirmed charges do not specifically include rape and sexual violence as such. It is unfair to them, if their participation is dependent on a legal construct of subsuming acts of sexual and gender-based crimes under "*mass criminality committed by the Anti-Balaka*" which the Prosecution intends to establish as attacks against a civilian population under article 8(2)(e)(i), forcible transfer, deportation and displacement under articles 7(1)(d) and 8(2)(e)(iv), and persecution pursuant to article 7(1)(h);²⁵ nor would such characterisation reflect the full breath of the criminal conduct in question.

21. Furthermore, as underlined *supra*, since reparations are inextricably linked with a conviction before this Court,²⁶ it is paramount that the Prosecution formulates separate charges involving said conduct for victims to be able to eventually claim reparations for their sufferings. If these types of crimes are simply left to serve as contextual elements or underlying acts, the victims' right to reparation is unjustifiably jeopardised.

22. For the foregoing reasons, and considering the Chamber specifically recalled that the Warrants of Arrest are not determinative as to the scope of the confirmation hearing or a possible trial if the charges are confirmed,²⁷ the Common Legal Representatives posit that, in order to ensure the best interest of victims of sexual and gender-based crimes, as well as the integrity of the proceedings, the views and

²⁴ See the Decision of 21 June 2019, *supra* note 5, para. 30.

²⁵ See the Additional Observations, *supra* note 2, para. 11.

²⁶ See the "Order on Reparations" (Trial Chamber II), No. ICC-01/04-01/07-3728-tENG, 17 August 2017, para. 271.

²⁷ See the Decision of 21 June 2019, *supra* note 5, para. 30.

concerns of victims should be taken into account at this juncture of the proceedings, so as to ensure that said crimes are thoroughly investigated and included as separate charges in the Document Containing the Charges.

Respectfully submitted.



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Dated this 9th day of July 2019

At The Hague, The Netherlands; Saint Louis (Senegal); La Rochelle (France) and Bangui (CAR)