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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

**Joint Defence Observations relating to the “Seventh Registry Assessment Report on
Victim Applications for Participation in Trial Proceedings”, ICC-01/14-01/18-939**

Source: Defence of Patrice-Edouard Ngaiissona and Defence of Alfred Rombhot
Yekatom

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 twenty-five (25) victim applications.¹ For these applications, the Registry was not able to make a clear determination as to the applicants' status 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 Yekatom and Ngaissona Defence (together "the Defence") hereby present their views as to the issues raised by the Registry in its Seventh Assessment Report and request consequently, the dismissal of part of the twenty-five (25) victim applications being assessed.

II. Procedural history

3. On 5 March 2019, in its "*Decision Establishing the Principles Applicable to Victims' Applications for Participation*" ("Victim Application Decision"), Pre-Trial Chamber II ("PTC II") 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.³
4. In its "Registry's First Assessment Report on Applications for Victims' Participation in Pre-Trial Proceedings" dated 14 May 2019,⁴ the Victims Participation and Reparations Section ("VPRS") transmitted 15 Group C applications to PTC II and parties, *i.e.*, applications for which VPRS was not in a position to make a clear determination.
5. On 21 June 2019, PTC II 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" ("21 June 2019 Decision").⁵
6. On 19 August 2019, the Registry filed the "Registry's Second Transmission of Group

¹ ICC-01/14-01/18-939 together with confidential Annexes I, II and III ("Seventh Assessment Report").

² Seventh Assessment Report, para. 19.

³ ICC-01/14-01/18-141, p. 23.

⁴ ICC-01/14-01/18-198.

⁵ ICC-01/14-01/18-227-Conf. A public redacted version is also available, *see* ICC-01/14-01/18-227-Red.

C Applications for Victims' Participation in Pre-Trial Proceedings"⁶ and the "Registry's Fifth Assessment Report on Applications for Victims' Participation in Pre-Trial Proceedings",⁷ 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" ("Document Containing the Charges").⁸
8. On 13 September 2019, PTC II issued the "Decision regarding the Registry's Outstanding Transmissions of Applications for Victim Participation".⁹
9. On 11 December 2019, PTC II issued the Decision on the Confirmation of the Charges.¹⁰
10. On 13 March 2020, the Registry transmitted the record of the proceedings to the Presidency,¹¹ which constituted Trial Chamber V and referred the case against Messrs Yekatom and Ngaïssona to it on 16 March 2020.¹²
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.¹³
12. On 19 October 2020, in its "First Registry Transmission of Group C Applications for Victim Participation in Trial Proceedings",¹⁴ 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".¹⁵

⁶ ICC-01/14-01/18-280.

⁷ ICC-01/14-01/18-281.

⁸ ICC-01/04-01/18-282-Conf-AnxB1. A public redacted version is also available, *see* ICC-01/14-01/18-282-Conf-AnxB-Red2.

⁹ ICC-01/14-01/18-338.

¹⁰ ICC-01/14-01/18-403-Corr-Conf. A corrected public redacted version is also available, *see* ICC-01/14-01/18-403-Red-Corr.

¹¹ ICC-01/14-01/18-449.

¹² ICC-01/14-01/18-451.

¹³ ICC-01/14-01/18-459, para. 3(I).

¹⁴ ICC-01/14-01/18-687.

¹⁵ ICC-01/14-01/18-688.

13. On 23 November 2020, the Chamber issued its “Decision on Victims’ Participation in Trial Proceedings” (“23 November 2020 Decision”).¹⁶
14. Between 30 November 2020 and 29 March 2021, the Registry transmitted 472 applications categorised in Group A and 250 applications categorised in Group B together with related reports.¹⁷
15. Between 11 December 2020 and 29 January 2021, the Chamber issued three decisions on the merits of these applications.¹⁸
16. On 31 March 2021, in its “Second Registry Transmission of Group C Applications for Victim Participation in Trial Proceedings”,¹⁹ the Registry transmitted 25 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 Seventh Assessment Report.

III. Applicable Law

17. 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.²⁰

18. 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.

19. Moreover, article 74(2) of the Statute states:

¹⁶ ICC/01/14-01/18-738.

¹⁷ See ICC-01/14-01/18-747, ICC-01/14-01/18-777, ICC-01/14-01/18-846, ICC-01/14-01/18-895, ICC-01/14-01/18-934.

¹⁸ ICC-01/14-01/18-765, ICC-01/14-01/18-798, ICC-01/14-01/18-858.

¹⁹ ICC-01/14-01/18-940, together with 25 confidential redacted annexes.

²⁰ “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.”

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)

20. 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”.²¹

IV. Submissions

21. The Defence submits that at this stage of the proceedings, with the trial ongoing and witnesses already testifying, the geographical and temporal scope of the case should strictly adhere to the delimitation set forth by the Decision on the Confirmation of the Charges issued by PTC II.
22. A “flexible approach” as suggested by the Registry²² would both contradict the Chamber’s view that “it is no longer appropriate to apply the same flexible approach as adopted in the 21 June 2019 Decision”,²³ and prejudice both accused by increasing significantly their investigative obligation in relation to the new location and timeframe where and within which they allegedly operated.

A. *Issues pertaining to the geographical scope of the case*

1. Issues pertaining to the geographical scope of the alleged 5 December 2013 attack in Bangui (‘Category 1’)

23. The Defence contends that all the applications listed in Category 1 of Annex 1 of the Seventh Assessment Report²⁴ should be rejected as falling outside the geographical scope of the 5 December 2013 attack in Bangui.
24. In its previous 23 November 2020 Decision, the Chamber ruled “that the geographical

²¹ Chamber Practice Manual (2019), paras 57-58.

²² ICC-01/14-01/18-939, para. 26.

²³ 23 November 2020 Decision, para.18.

²⁴ ICC-01/14-01/18-939-Conf-AnxI.

scope of these charges is confined to crimes occurring or, as concerns displacement, forcible transfer and deportation, starting in the areas of Boeing and Cattin”.²⁵ The Chamber however authorised the participation of a victim claiming to have suffered harm during his flight from “KINA-KM5” as it was noted that KM5 is located in the 3rd arrondissement which “neighbours the Cattin area”.²⁶ On this basis the Registry indicated that VPRS listed several areas as “bordering or neighbouring Cattin and Boeing” on Map A provided in Annex II.²⁷

25. It can only be noted that on the abovementioned map none of the new applications are in the area considered by VPRS as “bordering or neighbouring” the relevant location of Cattin and Boeing.²⁸ Most applications are located to the east of PK5, some even further east than the area considered as “PK5 Enclave” on the Registry’s map,²⁹ or in the northern areas of the 3^{ème} arrondissement,³⁰ while one is south east of PK5 and not even in the same arrondissement.³¹

26. The Defence recalls that both the Document Containing the Charges and the Decision on the Confirmation of the Charges allege that Mr. Yekatom, during the 5 December attack, went to the neighbourhood of Boeing and Cattin before retreating.³² As it is not alleged that Mr. Yekatom or his elements entered the 3^{ème} arrondissement or went up to PK5, the Defence opposes the admission of victim’s applications which indicate that the location of the harm suffered is not directly neighbouring either Boeing or Cattin.

27. Finally, the Defence also contends that specific information contained in some of the applications further support their dismissal :

- Application a/15056/20 specifically indicates that the Anti-Balaka that attacked “*quartier Fondo*” came from Combattant,³³ thus ruling out any possibility that this incident is covered by the confirmed charges;³⁴

²⁵ 23 November 2020 Decision, para. 28.

²⁶ 23 November 2020 Decision, para. 29.

²⁷ ICC-01/14-01/18-939-Conf-AnxII.

²⁸ *Ibid.*

²⁹ See applications a/65066/19, a/65113/19, a/15118/20, a/65171/19.

³⁰ See applications a/15056/20 and a/65119/19.

³¹ See application a/66148/19.

³² Document Containing the Charges, para. 247 ; Decision on the Confirmation of the Charges, para. 88.

³³ ICC-01/14-01/18-939-Conf-AnxI, application #7.

³⁴ Regarding the Combattant neighbourhood, it should be noted that the Chamber dismissed in its previous decision an application noting that this area is “located on the other side of Bangui and do not share any border with Boeing or Cattin”, see 23 November 2020 Decision, para. 30.

- Application a/15133/20 does not provide any indication as to what happened to the alleged victim who mentions only an attack against “*un groupe de musulmans*”; in addition it could be noted that the perpetrator identified in the application is “*Commandant de la milice Anti-Balaka surnommé Francis*” which is another indicia that his application does not fall under the scope of the case.³⁵

28. Thus, the Defence requests the dismissal of the following applications: a/15056/20, a/65119/19, a/15138/20, a/65060/19, a/65066/19, a/15102/20, a/65113/19, a/15118/20, a/65171/19, a/66148/19, a/15133/20 and a/65079/19.

2. Issues pertaining to the geographical scope of the alleged crimes committed along the PK9-Mbaïki axis ('Category 2')

29. The Defence contends that the two applications which allege harm suffered in villages not situated on the PK9-Mbaïki axis should be dismissed.

30. In defining the PK9-Mbaïki, the Document Containing the Charges mentioned “the approximately 110km stretch of road in the LOBAYE Prefecture to gain control over the villages along the PK9 – MBAIKI axis”,³⁶ while the Decision on the Confirmation of the Charges listed the villages Sekia, Ndangala, Bimon, Kapou, Bossongo, Pissa, and Mbaïki.³⁷

31. The Defence notes that for applications a/65433/19 and a/20103/21 the locations where incidents were alleged to have happened are the villages of Gbokila and Yombo which are neither specifically listed in the Decision on the Confirmation of the Charges nor directly located on the PK9-Mbaïki axis, being respectively 4.5 and 6 kilometres away from the road.³⁸ In addition, it appears from the description of the events that neither applicants went from their village to Mbaïki³⁹ which could make their application fall within the geographical parameters of the case per the Chamber’s 23 November 2020 Decision.⁴⁰

³⁵ ICC-01/14-01/18-939-Conf-AnxI, application #8 ; ICC-01/14-01/18-940-Conf-Anx6-Red.

³⁶ Document Containing the Charges, para. 336.

³⁷ Decision on the Confirmation of the Charges, page 105.

³⁸ Seventh Assessment Report, footnote 38.

³⁹ ICC-01/14-01/18-939-Conf-AnxI, Category 2.

⁴⁰ 23 November 2020 Decision, para. 42.

32. In conclusion, the Defence requests the dismissal of applications a/65433/19 and a/20103/21. The Defence defers to the Chamber's discretion as to application a/65171/19 for the part referring to incidents in Kpalongo.

B. Issues pertaining to the temporal scope of the case

1. Issues pertaining to the temporal scope of the alleged 5 December 2013 attack in Bangui ('Category 3')

33. The Defence recalls that 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

34. The Defence also recalls that the flexible approach as adopted in the 21 June 2019 Decision, and which the Chamber determined was no longer appropriate at this stage of the proceedings, consisted in adopting "flexibility with respect to the precise dates of the alleged acts" and ignoring "minor discrepancies in terms of dates [...]".⁴²

35. Therefore, *a contrario*, victim applicants having reported harm as a result of an attack any time after 5 December 2013, should be dismissed as falling outside of the temporal scope of the charges.

36. The Registry seems to suggest that the parameters of the case are alternative conditions and that it could suffice for victims applications to fall "clearly within the geographical scope of the case" to be admitted, although falling outside the temporal scope of it.⁴³ The Defence disagrees. The alleged harm suffered by the applicants must result from incidents falling within the temporal, geographical *and* material parameters of the case. All three conditions must be met for the application(s) to be accepted.

37. Therefore, victim applicants having reported harm as a result of an attack having occurred any time after 5 December 2013, *irrespective of the location, i.e.* despite the

⁴¹ Decision on the Confirmation of the Charges, paras 86-92. *See* also the operative part of the Decision on the Confirmation of the Charges 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".

⁴² 21 June 2019 Decision, para. 24.

⁴³ Seventh Assessment Report, footnote 40.

reported location being Boeing or Cattin, should be dismissed.

38. Applicant a/15307/20 claims to have suffered harm as a result of her flight from Boeing on 10 December 2013 following Mr Yekatom's Anti-Balaka group having allegedly established a base at the Yamwara School. Considering that the applicant's flight did not occur in the context of the alleged 5 December 2013 attack in Bangui but as a result of the alleged presence of Mr Yekatom's Anti-Balaka group at the Yamwara School, the Defence submits that it cannot be established that this application falls within the temporal scope of the present case.
39. Applicant a/15281/20 claims to have suffered harm as a result of her flight from Cattin following an Anti-Balaka attack on 16 December 2013. Considering that the applicant's flight did not occur in the context of the alleged 5 December 2013 attack in Bangui but as a result of an alleged attack on 16 December 2013, the Defence submits that it cannot be established that this application falls within the temporal scope of the present case.
40. Applicant a/15119/20 claims to have suffered harm as a result of the Anti-Balaka attack in the Boyigui neighbourhood, in the 3rd arrondissement, at the end of December 2013, which necessitated the intervention of the Chadian army at sunset on that day. First, the Registry fails to substantiate its belief that the applicant would be referring to Boeing (and not Boyigui) and that it would be a mistake from the person assisting the applicant in filing the application form.⁴⁴ The Boeing area being located outside the 3rd arrondissement suggests, contrary to the Registry's submissions, that the applicant was in fact not referring to Boeing. Second, noting that this application refers to harm suffered as a result of crimes allegedly committed outside the context of the alleged 5 December 2013 attack, the Defence submits that it cannot be established that this application falls within either the geographical or temporal parameters of the present case.
41. Thus, the Defence requests the dismissal of the following applications: a/15307/20, a/15281/20 and a/15119/20. As to application a/65170/19, the Defence defers to the Chamber's discretion.

⁴⁴ Annex 1 to Seventh Assessment Report, footnote 1.

2. Issues pertaining to the temporal scope of the alleged crimes committed along the PK9-Mbaïki axis ('Category 4')

42. The Defence submits that all Category 4 applications should be rejected as falling outside the temporal scope of the case.
43. Applicant a/15387/20 claims to have suffered harm as a result of her flight from Bossongo to Bangui following an alleged Anti-Balaka attack on 16 December 2013. Applicant a/15418/20 claims to have suffered harm as a result of her flight from Sekia to Bangui on 17 December 2013 following an alleged Anti-Balaka attack. Applicant a/66029/19 claims to have suffered harm as a result of his flight from Mbaïki to the camp of the Congolese soldier of Misca, following an alleged Anti-Balaka attack on 28 February 2014. Noting that PTC II confirmed the charges of displacement for “the dislocation of the majority of the Muslim population from their towns and villages between on or about 10 January 2014 and on or about 6 February 2014, in the context of the Anti-Balaka’s advance through and takeover of villages along the PK9-Mbaïki Axis”,⁴⁵ the Defence submits that it cannot be established that the above applications fall within the temporal parameter of the present case.
44. Applicant a/15015/20 claims to have suffered harm as a result of the alleged appropriation of her belongings and animals as well as the destruction of her house by the Yekatom group after she had left Mbaïki on 15 February 2014. This applicant does not specify that his departure was caused in any way by an alleged attack. This application therefore does not fall within either the temporal or material scope of the present case.
45. Therefore, the Defence requests the dismissal of the following applications: a/15387/20, a/15418/20, a/15015/20 and a/66029/19.

3. Issues pertaining to the temporal scope of the alleged crimes committed in Bossangoa ('Category 5')

46. Applicants a/15302/20, a/15304/20 and a/15303/20 claim to have suffered harm as a result of the destruction of their house and the looting of their belongings, in Bossangoa, on 10, 20 and 28 December 2013 respectively. Noting that PTC II, in paragraph 108 of

⁴⁵ Decision on the Confirmation of the Charges, pp. 101, 102, 104 and 106.

the Decision on the Confirmation of the Charges, circumscribed the period within which the Anti-Balaka in Bossangoa would have allegedly pillaged, looted and destroyed the houses of Muslims to “*the days* following the attack on Bossangoa” (emphasis added),⁴⁶ and while the Defence recalls the Chamber’s determination that “a certain degree of leeway when assessing the information provided by an applicant” is allowed, it also clarified that this leeway could “not be equated with the flexible approach referred to in the 21 June 2019 Decision”.⁴⁷ Therefore, while deferring to the Chamber’s discretion in respect of application a/15302/20, given that five days only elapsed between the alleged attack and the alleged harm, the Defence requests the dismissal of applications a/15304/20 and a/15303/20 as it would overstretch the Decision on the Confirmation of the Charges to conclude that these applications fall within the temporal scope of the case.

RELIEF SOUGHT

47. The Defence respectfully requests the Chamber to **REJECT** the following Group C applications: a/15056/20, a/65119/19, a/15138/20, a/65060/19, a/65066/19, a/15102/20, a/65113/19, a/15118/20, a/65171/19, a/66148/19, a/15133/20, a/65079/19, a/65433/19, a/20103/21, a/15307/20, a/15281/20, a/15119/20, a/15387/20, a/15418/20, a/15015/20, a/66029/19, a/15304/20 and a/15303/20.

Respectfully submitted,

On 12 April 2021



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⁴⁶ Decision on the Confirmation of the Charges, para. 108.

⁴⁷ 23 November 2020 Decision, para. 21.