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

Date: **14 January 2021**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

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

Public

**Public redacted version of “Prosecution’s Response to the “Request of Mr. Yekatom
to exclude the proposed Prosecution background expert P-2926 and his report”
(ICC-01/14-01/18-780-Conf)”, 24 December 220,
ICC-01/14-01/18-797-Conf**

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should dismiss the YEKATOM Defence’s Request to exclude the proposed Prosecution background expert P-2926 and his report.¹ *First*, the request is premature since the proposed expert’s evidence has not yet been submitted to the Chamber. *Second*, to the extent the Prosecution intends to offer P-2926 as an expert in conflict analysis in respect of events in the Central African Republic (“CAR”) underlying, leading up to, and including the events at issue, the Request fails on the merits. The proposed expert evidence regarding the context and background of the conflict in CAR bearing on the relevant period in this case, *prima facie*, satisfies the conditions for expert testimony under the Court’s well-established jurisprudence.

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“RoC”), this Request is filed as “Confidential”, as it responds to a confidential filing and contains information concerning a witness which should not be made public. A “Public Redacted” version of the Request will be filed as soon as practicable.

III. SUBMISSIONS

A. The Request is premature

3. As the Chamber has previously recognised, the Court’s regulatory framework:

“does not provide ... for objections to be raised *prior* to the submission of evidence. It is therefore clear that the parties and participants cannot raise any such objections before the time of submission.”²

¹ See ICC-01/14-01/18-780-Conf (“Request”).

² See ICC-01/14-01/18-602, para. 16.

4. Absent the actual tendering of evidence, save for very specific exceptions (as noted below), requests to preclude its submission are necessarily premature.³ As the Request fails to satisfy any recognised exception, it should be rejected.

B. The Request fails on the merits

5. The Prosecution defers to the Chamber in respect of entertaining the Request on its merits. Although “parties are entitled to a degree of deference in the selection and presentation of their evidence”,⁴ this discretion is not unlimited. Exceptionally, a Chamber may “entertain certain objections to the admissibility of evidence prior to formal submission when doing so would ensure a fair and expeditious trial.”⁵ A Chamber may thus reject an expert witness in advance where their “anticipated testimony is *irrelevant* or goes solely to factual and/or legal matters which usurp the functions of the Chamber”.⁶ However, no reasonable argument to this effect can be advanced here – nor does the Request present one.

i. The proposed expert evidence prima facie satisfies the legal threshold

6. The prospective expert evidence satisfies the well-established legal criteria for the qualification of such evidence before the Court — specifically that, “an expert witness [is] a person who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute.”⁷ This threshold is met where the prospective expert evidence “*may*

³ See ICC-01/14-01/18-602, para. 17; ICC-01/05-01/08-1386, paras. 48-49.

⁴ ICC-01/05-01/13-1622, para. 9.

⁵ ICC-01/09-01/11-844, para. 15 (“*Ruto and Sang* Decision on Expert Witness”).

⁶ ICC-01/05-01/13-1622, para. 9.

⁷ *Citing, Ruto and Sang* Decision on Expert Witness, para.11; *Popović* Appeals Chamber Decision on Richard Butler, para. 27; *Prosecutor v. Mladić*, Case No. IT-09-92-T, Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012 (“*Mladić* Decision on Expert Witness”), para. 8.

potentially be of assistance in the Chamber's assessment of the evidence presented, as it provides background information which could be of service to assess evidence...".⁸

7. Despite its length, the Request presents no statement or analysis of the legal standard applicable to the qualification of an expert at the Court. This is even more striking given the clarity of the jurisprudence, particularly regarding expert witnesses called to testify within various disciplines bearing on the broader context or background of cases.⁹ Moreover, such expert evidence, particularly in respect of background or historical events, has been readily accepted in other international courts to no lesser extent.¹⁰

8. The witness is an expert in the field of political science and conflict analysis, having served as an independent consultant and associate research fellow with the [REDACTED] and as a consultant with the [REDACTED], as shown in his Curriculum Vitae. The Prosecution will not repeat its contents here, particularly since the Defence do not challenge his qualifications as such. But, instead rest their arguments on the *utility* of his prospective evidence,¹¹ an argument which equally fails as shown below.

ii. The subject-matter is within a recognised field of expertise

9. There is no question, and it has not been substantively disputed in the Request, that 'conflict analysis' is a recognised field of expertise. As noted by practitioners, the discipline comprises "a structured inquiry into the causes and potential direction of a

⁸ ICC-01/05-01/13-1653, para. 15 ("*Bemba et al* Decision on Expert Witnesses") (emphasis added).

⁹ See ICC-01/04-02/06-1159 ("*Ntaganda* Decision on Expert Witnesses"); *Ruto and Sang* Decision on Expert Witness; ICC-01/05-01/08-2273 ("*Bemba* Decision on Expert Witness"); ICC-01/05-01/13-1653.

¹⁰ See e.g., V. Petrović, *Historians as Expert Witnesses in the Age of Extremes – A Dissertation in History*, p. 37 (noting the several historians testimony who provided expert testimony in ICTY proceedings).

<https://www.niod.nl/sites/niod.nl/files/hphpev01.pdf>

¹¹ ICC-01/14-01/18-780-Conf, para. 11.

conflict. It seeks to identify opportunities for managing or resolving disputes without recourse to violent action. It may include a variety of analytical methods.”¹²

10. [REDACTED],¹³ [REDACTED].¹⁴ [REDACTED].¹⁵

11. The subject matter of the prospective expert report and testimony, more specifically, the socio-political background and principal actors involved in the CAR conflict or crisis at issue, falls squarely within the specialisation of conflict analysis. Moreover, in this context, it is a virtual textbook application of the specialty, which obviously devolves on various academic and practical disciplines – including political science, in which P-2926 also holds a master’s degree [REDACTED].¹⁶

iii. The Subject-matter falls within the expert’s field of expertise

12. It is incumbent on a Chamber “[w]hen determining the admissibility of an expert report or testimony [to] determine that the content of the report and/or anticipated testimony falls within the expertise of the witness.”¹⁷

13. Here, the subject matter of P-2926’s evidence is *directly* related to and within his substantial work experience, training, and research [REDACTED], particularly, specialising in CAR. Importantly, even if the witness’s prospective evidence were not directly related to his specialisation – which it unquestionably is – this would not preclude its submission. As other Chambers have properly observed – “[i]t is not

¹² See also United States Institute of Peace - Conflict Analysis: Questions and Answers with the Author (referencing Matthew Levinger, author of Conflict Analysis: Understanding Causes, Unlocking Solutions, defines conflict analysis and discusses its significant role in the prevention of deadly conflict). <https://www.usip.org/publications/conflict-analysis-questions-and-answers-author>

¹³ CAR-OTP-2127-4327 at 4328.

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ CAR-OTP-2127-4327 at 4329.

¹⁷ ICC-01/04-02/06-1159, para. 8; *Ruto and Sang* Decision on Expert Witness, para. 12 (“[w]hen determining whether testimony should be received as expert testimony [the Chamber] must ... determine that the anticipated testimony falls within the expertise of the witness”).

unusual that an expert testifies about a specific aspect of a larger issue which does not require the entire spectrum of his expertise".¹⁸

iv. The prospective evidence is relevant and probative

14. As indicated in the Request, the entirety of the subject matter of the prospective expert evidence is *prima facie* relevant to and probative of, issues in this case.¹⁹ The expert evidence covers (i) the tensions resulting from the questionable legitimacy of Bozize's 2011 election causing the emergence of the Seleka coalition which, *inter alia*, contributed to the 24 March 2013 *Coup d'Etat*;²⁰ (ii) the situation after the *Coup* up until the end of 2014, including President Djotodia's resignation, the establishment of the transitional government, and the political and security situation throughout this period;²¹ (iii) the pattern or tactics of the Seleka and the Anti-Balaka to prior transitions of power in CAR historically and the politics of ethnicity in CAR, the crimes (or abuses) involved in those prior transitions and the tradition of political instrumentalisation of collective violence;²² (iv) the emergence of the Anti-Balaka from 2013 onwards in this context, and their exploitation of the sentiment of vengeance against the Seleka and the Muslim population associated therewith;²³ and (v) the *libérateurs* used by Bozize in 2003 to take power and their relationship with the Anti-Balaka.²⁴

15. In the *Ruto and Sang* Decision, the Chamber found:

"The Chamber considers that an understanding of domestic political dynamics is helpful in a case such as the present one involving post-election violence

¹⁸ *Bemba et al* Decision on Expert Witnesses, para. 13.

¹⁹ ICC-01/14-01/18-780-Conf, para. 14; see ICC-01/04-02/06-1159, para. 26 (applying a *prima facie* standard).

²⁰ See CAR-OTP-2127-4289, pp. 4291-4300.

²¹ See CAR-OTP-2127-4289, pp. 4300-4309.

²² See CAR-OTP-2127-4289, pp. 4316-4317.

²³ See CAR-OTP-2127-4289, pp. 4309-4324.

²⁴ See CAR-OTP-2127-4289, pp. 4324-4326.

('PEV'). The Chamber also considers the Kenyan political situation before and during the time relevant to the charges to be sufficiently complex so as to warrant receiving expert testimony regarding it. Accordingly, the Chamber rejects the arguments of the Sang Defence and considers that it would be of assistance for a social and political background expert to testify as to the political environment in which the PEV took place even if other Prosecution witnesses may be able to testify on some of the same facts.”²⁵

16. The proposed expert evidence thus satisfies the requirements of article 69(4) as concerns the evidentiary evaluative criteria.

17. Further, the introduction of the expert evidence is not unfairly prejudicial, nor does the Request advance such claim.

v. YEKATOM's contentions are incorrect and misguided

18. YEKATOM's contentions regarding the supposed lack of necessity and or redundancy of the prospective expert testimony fail.

19. *First*, contrary to his suggestion, there are no meaningful agreed facts concerning any matter on which the proposed expert evidence it to be called. The Defence's reference to an 8 April 2020 email to imply consideration of facts proposed by the Prosecution for agreement,²⁶ without articulating so much as one such fact to which it has agreed in the intervening period — speaks for itself.

20. *Second*, the Defence's arguments concerning the redundancy,²⁷ and/or the expeditious conduct of the proceedings,²⁸ ignore definite and clear legal constraints

²⁵ *Ruto and Sang* Decision on Expert Witness, para. 18.

²⁶ ICC-01/14-01/18-780-Conf, paras. 4-5, 31.

²⁷ ICC-01/14-01/18-780-Conf, para. 11.

²⁸ ICC-01/14-01/18-780-Conf, paras. 29, 36.

delineating the proper scope of testimony regarding fact witnesses, as compared to experts. The Defence's contention — effectively that the two are substitutable — is procedurally flawed, and ignores established jurisprudence.

21. Although a fact witnesses may provide important information concerning matters within their immediate knowledge and experience touching on the subject matter of an expert's testimony, this does not entitle a fact witness to provide the Chamber with insight based upon their considered *opinion*, including to address hypothetical issues. Only an *expert*, due to their specialised knowledge, skill, or training (which is uncontested in the Request) is afforded the latitude to offer opinions within their expertise not based upon first-hand knowledge or experience.²⁹ Thus, “[w]here a Party chooses to call such an individual as a factual, rather than an expert, witness it implicitly makes a choice to limit the witness’ testimony to matters which he personally saw, heard, or experienced.”³⁰ Such is the case in respect of the fact witnesses indicated in the Prosecution’s List of Witnesses.

22. Although a direct participant may clearly have experience in certain issues, they may not necessarily have direct knowledge of the contributing factors leading to the conflict in this case — historical, social, economic — entitling them to speak to any given factor authoritatively. Moreover, the prospective expert here, unlike fact witnesses to whom the Defence refers, is neither politically partisan nor affiliated with any of the combatant groups and/or factions. While such an affiliation does not necessarily diminish the accuracy of evidence, it equally does not supplant the unaffected and considered judgement of an *outsider* and expert.

²⁹ See *Prosecutor v. Popović et al.*, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, Case No. IT-05-88-AR73.2, 30 January 2008, para. 8.

³⁰ *Prosecutor v. Ndindiliyimana et al.*, Decision on the Prosecutor’s Motion Opposing the Testimony of Witness DE4-30 as a Factual Witness, Case No. ICTR-00-56-T, 16 May 2007, para. 9. See also *Prosecutor v. Karemera et al.*, Decision on “Requete de la Defense de M. Ndirumapatse en Retrait de la Deposition du Temoin GFJ et des Pieces Afferentes”, Case No. ICTR-98-44-T, 6 August 2008, para. 4.

23. P-2926's approach to his expertise and evidence concerning the relevant issues derive from a neutral and independent position *vis-à-vis* the conflict itself. This alone sets his expert evidence quite apart from those fact witnesses the Prosecution intends to call, as directly exposed as they may be to certain matters at issue.

24. YEKATOM's contention that fact witnesses can provide testimony of greater value "due to their first-hand experience, and the fact that contrary to P-2926 they are CAR citizens that lived all their lives in the society they are expected to unveil to the Chamber" is misguided. Rather, the two classes of witnesses – experts and fact witnesses – are not fungible, and serve distinct purposes. It bears repeating that a Party has a certain discretion in the manner of presenting its case,³¹ barring the irrelevance of the prospective evidence, undue delay of the proceedings, and/or the usurpation of the Chamber's role.³² None of these restricting factors apply here.

25. *Third*, the Defence's claim that "given [the] high number of witnesses, the Chamber should use its discretionary power and exclude witnesses, such as P-2926, that will not meaningfully provide an understanding of the situation subject to the trial" confounds the discrete issue before the Chamber. Moreover, the Chamber has already approved a maximum of 400 hours for the Prosecution to put its case, which the Prosecution proposes to do in less than that time. By contrast, the Defence's steadfast resistance to agreement on even the most basic facts concerning the conflict at issue,³³ is in no position to assert that excluding witnesses is an appropriate way to expedite these proceedings. The *fair* expedition of the proceedings cannot be achieved at the expense of the Chamber's truth-finding role and the Prosecution's statutory obligation.

³¹ ICC-01/05-01/13-1622, para. 9.

³² *Ntaganda* Decision on Expert Witnesses, para. 8; *Ruto and Sang* Decision on Expert Witness, para. 12.

³³ The Defence teams have agreed on a total of 9 proposed agreed facts under rule 69, and declined agreement on the remaining 164 proposed stipulations.

26. The issue here is straightforward – whether the proposed expert P-2926 may potentially assist the Chamber’s understanding or determination of a matter at issue in this case by virtue of his specialised knowledge, skill, or training. The answer is clearly affirmative.

IV. CONCLUSION

27. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Request in all respects.

A handwritten signature in black ink that reads "James K. Stewart." The signature is written in a cursive, flowing style.

James Stewart, Deputy Prosecutor

Dated this 14th day of January 2021
At The Hague, The Netherlands