



Original: **English**

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

Date: **12 March 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 Ngaïssona Defence Motion to Limit the Scope of P-2926’s Evidence (ICC-01/14-01/18-897-Conf)”,
8 March 2021, (ICC-01/14-01/18-904-Conf)**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri

Mr Thomas Hannis

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Mr Richard Landry Omissé-Namkeamaï

Legal Representatives of Victims

Mr Dmytro Suprun

Mr Abdou Dangabo Moussa

Ms Elisabeth Rabesandratana

Mr Yaré Fall

Ms Marie-Edith Douzima-Lawson

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the NGAISSONA Defence’s Motion to limit the scope of P-2926’s evidence (“Motion”).¹ The contents of P-2926’s report fall squarely within his area of expertise and satisfy the well-established test for admissibility at this Court. Contrary to the Defence submissions, the report does not usurp the Chamber’s role as the trier of fact. The objections advanced regarding P-2926’s impartiality and methodology go to the weight, rather than admissibility of his evidence. The Defence will have a meaningful opportunity to test P-2926’s testimony and report, and the Chamber, in accordance with its truth-seeking function, to evaluate their weight as part of its holistic assessment of evidence when deliberating on the judgment pursuant to article 74(2).

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), this Response is filed as “Confidential”, as it responds to a confidential filing and further concerns matters related to a Prosecution Witness which should not be made public. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. P-2926’s expert report does not usurp the Chamber’s role as the trier of fact

3. The Defence’s assertion that “P-2926’s report usurps the Chamber’s role as the trier of fact and draws conclusions on core elements of the case”² is flawed.

4. *First*, the Chamber has already held that “the subject matter of P-2926’s anticipated testimony and the report seem to fall within his expertise. Moreover, the

¹ ICC-01/14-01/18-897-Conf.

² ICC-01/14-01/18-897-Conf, para. 1.

Chamber considers that they do not take over the functions of the Chamber and may potentially assist the Chamber's assessment of the evidence presented."³ P-2926 is an expert on conflict analysis, peacebuilding, post-conflict reconstruction and governance reforms.⁴ He is well qualified to provide his expert opinion in relation to these areas of the case. Furthermore, his expertise has not been challenged by the Defence.

5. *Second*, contrary to Defence assertions,⁵ P-2926's expert report and anticipated testimony do not go into the 'ultimate issue' at trial. As previously stated,⁶ P-2926 is an "overview / background expert" expected to testify primarily on the causes and circumstances of the *coup d'état* of 24 March 2013, the resignation of Michel Djotodia, and the political and security situation in the Central African Republic ("CAR") during the relevant time period. Thus, P-2926's report and anticipated testimony deal with the circumstances and background of the conflict in CAR, its origins, and who or what may have contributed to it, which are legitimate contextual matters of relevance to the case. P-2926's expected testimony and report do not deal with the Accused's alleged guilt or innocence with respect to the specific crimes charged in this case, nor do they draw any such opinion.

6. The description of NGAISSONA's affiliations, political positioning, and strategy during the relevant period provided in P-2926's expert report forms part of the expertise sought from the Witness regarding the relevant context in this case. It is directly responsive to the instructions provided to him, in particular to explain *"comment le "mouvement" Anti-Balaka a évolué pendant le cours de l'année 2014 en termes de structure et de leadership. Vous exposerez notamment la constitution de la Coordination Nationale Anti-Balaka quels en étaient les responsables et ses revendications politiques"*.⁷ P-

³ ICC-01/14-01/18-881, para. 10 (emphasis added).

⁴ CAR-OTP-2127-4327; ICC-01/14-01/18-881, para. 9.

⁵ ICC-01/14-01/18-897-Conf, para. 24.

⁶ ICC-01/14-01/18-724-Conf-AnxA, p. 40.

⁷ See section 3 of the Letter of Instruction at CAR-OTP-2122-8978, at 8980.

2926's references to the structure of the National Coordination or NGAISSONA's role within that structure, do not exceed his mandate or infringe the Chamber's role as the trier of fact.⁸

7. In support of their submissions, the Defence cite Trial Chamber V(A) in *Ruto and Sang* for the proposition that an expert testimony "should not, directly or indirectly, address the alleged role of the accused, or other key members of the alleged Network, in the [Post-Election Violence]".⁹ However, the context is distinguishable from the circumstances of the present case. The decision quoted by the Defence concerned the Accused's alleged responsibility (guilt or innocence) as arising within the framework of a charged common plan. This is not the case for NGAISSONA. References in P-2926's expert report to NGAISSONA's alleged role within the Anti-Balaka or to the nature of his alleged relationship with François Bozizé and/or other members of Bozizé's inner circle cannot be deemed as going to the 'ultimate issue'. The modes of liability confirmed against NGAISSONA do not require attribution of his acts through other Anti-Balaka members to prove his guilt. Notably, article 25(3)(d) liability is not predicated on the reciprocal attribution of the acts of others.¹⁰

8. *Third*, the Defence's resort to a decision in the *Gbagbo* case where Trial Chamber I reduced the scope of a witness's evidence as a result of Defence allegations that he was "making judicial determinations and giving opinion on ultimate issues of the case"¹¹ is misplaced. Unlike P-2926, the relevant witness in that case was an NGO representative¹² and not an expert. Thus, findings made by Trial Chamber I in the *Gbagbo* case reducing the scope of testimony of a fact witness cannot reasonably be applied in the same way to an expert. Drawing parallels between these two witnesses, with a manifestly different status, is misguided. Moreover, this proposition also

⁸ ICC-01/14-01/18-897-Conf, para. 24.

⁹ ICC-01/09-01/11-844, para. 23.

¹⁰ See ICC-01/14-01/18-723-Conf, para. 240; See also *Katanga* TJ, paras. 1619, 1629.

¹¹ ICC-01/14-01/18-897-Conf, para. 21; ICC-02/11-01/15-539, para. 7.

¹² See ICC-02/11-01/15-539, paras. 6-7.

conflicts with prior jurisprudence, specific to expert testimony, pursuant to which “[i]t would be unduly restrictive to prohibit a social and political background expert from testifying about any facts regarding historical or political background. Such a prohibition would make it effectively impossible to ever receive testimony from this type of experts”.¹³

9. *Fourth*, if P-2926’s expert report and testimony are deemed formally submitted, they will be but a portion of the *overall* evidence presented to the Chamber for its assessment when deliberating on the judgment pursuant to article 74(2). As stated above, the report does not purport to pronounce upon the ultimate issue of the guilt or innocence of the Accused, or usurp the role of the Chamber. At the conclusion of the trial, it will be for the Chamber to assess all of the evidence in the case holistically, including from P-2926. This underpins the rationale of the ‘submission regime’, and is consistent with the Chamber’s express authority “to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69”.¹⁴

B. Objections relating to the impartiality of the Witness and his methodology are matters of weight and may be raised during his testimony

10. The Defence’s request to prevent the admission of portions of P-2926’s report based on allegations of his lack of objectivity or methodology is premature and can be addressed during the Witness’s testimony.

11. *First*, the Defence’s objections in relation to P-2926’s alleged lack of neutrality and impartiality, and regarding his methodology, go to the weight of his evidence, and that assessment should be made by the Chamber at the end of the trial, as foreseen

¹³ ICC-01/09-01/11-844, para. 23.

¹⁴ See rule 63(2) of the Rules of Procedure and Evidence (“Rules”).

by its adoption of the submission regime.¹⁵ In this context, the Chamber already noted that its decision to allow the Prosecution to present this expert's testimony and report as evidence is "without prejudice to its evaluation of the probative value of each item of evidence as part of the Chamber's holistic assessment of evidence or its assessment of the Rule 68(3) Request".¹⁶ Thus, any objections relating to the Witness's impartiality and methodology can be raised during his testimony, where Defence will have a meaningful opportunity to address these issues on cross-examination.

12. *Second*, the Defence's assertion that P-2926's expert report lacks neutrality because of his statements during an interview he gave [REDACTED] regarding NGAISSONA's arrest, is unavailing.¹⁷ During that interview, P-2926 did not state that NGAISSONA should be held responsible for the charges brought against him in this case (and of which he did not know at the time). He merely noted that "[REDACTED]".¹⁸ The assertion that P-2926 stated that NGAISSONA "should be held responsible for the anti-balaka's exactions"¹⁹ during this interview is inaccurate.

13. *Third*, any issues surrounding the sources used or the referencing of P-2926's report²⁰ "are matters that can be addressed during cross-examination and taken into consideration in evaluating the weight of the report, should it be admitted".²¹ On this specific issue, it is important to note that the Court's jurisprudence permits expert witnesses "wide latitude to offer opinions within their expertise and their views need not be based upon first-hand knowledge or experience".²² Furthermore, in relation specifically to challenges relating to the quality of sources used in expert reports, Trial Chamber VII previously held in the *Bemba et al* case that "[t]he fact that the Report

¹⁵ See ICC-01/14-01/18-631, paras. 52-53.

¹⁶ ICC-01/14-01/18-881, paras. 11-12.

¹⁷ ICC-01/14-01/18-897-Conf, para. 35.

¹⁸ [REDACTED].

¹⁹ ICC-01/14-01/18-897-Conf, para. 35.

²⁰ See ICC-01/14-01/18-897-Conf, para. 40.

²¹ ICC-01/04-02/06-1159, para. 16.

²² ICC-01/04-02/06-1159, para. 9.

does not contain any footnotes does not make it *prima facie* unreliable". The same decision emphasised that a party's inability to find parts of the sourced material "is not indicative of its quality and reliability".²³

IV. CONCLUSION

14. For the above reasons, the Motion should be rejected in its entirety.

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 12th day of March 2021
At The Hague, The Netherlands

²³ ICC-01/05-01/13-1653, para. 16.