

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

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

Date: **11 August 2023**

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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public redacted version of the "Response to the 'Common Legal Representative's Joint Request for Leave to Introduce into Evidence P-0925's Additional Report and Associated Material pursuant to Rule 68(3) of the Rules of Procedure and Evidence'", ICC-01/14-01/18-1981-Conf, 14 July 2023

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr. Yekatom (“Defence”) hereby responds to the *Common Legal Representatives of Victims’ Joint Request for Leave to Introduce into Evidence P-0925’s Additional Report and Associated Material pursuant to Rule 68(3) of the Rules of Procedure and Evidence* (“Request”) and opposes the introduction through Rule 68(3) of the Rules of Procedure and Evidence (“Rules”) of the “Additional Report” and “Associated Material” (together “Material”) as requested by the CLRVs.¹
2. The Defence contends that the Additional Report does not meet the requirements for expert evidence as it contains new evidence which the CLRVs are not permitted to present; and further, that it usurps the functions of the Chamber.
3. Finally, the Material is not appropriate in its substance for submission through Rule 68(3).

PROCEDURAL HISTORY

4. On 9 November 2020, P-0925 was indicated as witness number 74 on the LoE² and his expert report, *i.e.* CAR-OTP-2127-6805 (“First Report”), was disclosed.³
5. On 19 January 2021, the Prosecution filed a request for the formal submission notably of P-0925’s expert report into evidence pursuant to Rule 68(3).⁴
6. On 1 February 2021, the Defence responded to the Prosecution’s Request of 19 January 2021, requesting the Chamber to “defer its decision unless and until there is a finding of guilt and a sentencing hearing, if any”⁵ stating that

¹ [ICC-01/14-01/18-1954-Conf](#), Public redacted version : [ICC-01/14-01/18-1954-Red](#).

² [ICC-01/14-01/18-724-Conf-AnxA](#), p. 39.

³ See Pre-Trial INCRIM package 64 09 November 2020.

⁴ [ICC-01/14-01/18-834-Conf](#) ; Public redacted version : [ICC-01/14-01/18-834-Red](#).

⁵ [ICC-01/14-01/18-864-Conf](#) ; Public redacted version : [ICC-01/14-01/18-864-Red](#).

the Defence fails to see the necessity for an intervention by P-0925 during the initial presentation of evidence of the Prosecution as the content of his testimony and report will have no value in the context of determining the guilt or innocence of the accused who is presumed innocent.⁶

7. On 10 March 2021, the Chamber granted the Prosecution's request to submit P-0925's report and associated documents through Rule 68(3) and rejected the Defence's request to postpone its decision.⁷
8. On 24 April 2023, the CLRVs disclosed the Material.⁸
9. On 26 April 2023, the CLRVs filed a joint request seeking the formal submission of the Material.⁹
10. On 12 May 2023, the Defence filed a response requesting Trial Chamber V to reject the Joint Request ("First Response").¹⁰
11. On 29 May 2023, the Chamber issued the Further Directions.¹¹
12. On 23 June 2023, the Chamber rejected the Request *in limine* holding that the Additional Report constitutes a separate report from that of the Prosecution and that the CLRV needed to request leave to present evidence.¹²
13. On 3 July 2023, the CLRVs filed a Request for Leave to Introduce into Evidence P-0925's Additional Report and Associated Material pursuant to Rule 68(3) of the Rules of Procedure and Evidence.¹³

APPLICABLE LAW

⁶ [ICC-01/14-01/18-864-Conf](#), para. 12.

⁷ [ICC-01/14-01/18-907-Conf](#); Public redacted version : [ICC-01/14-01/18-907-Red](#).

⁸ See V44 and V45 Disclosure package 1.

⁹ [ICC-01/14-01/18-1848-Conf](#), Public redacted version : [ICC-01/14-01/18-1848-Red](#).

¹⁰ [ICC-01/14-01/18-1865-Conf](#), Public redacted version : [ICC-01/14-01/18-1865-Red](#).

¹¹ See the "Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence)" (Trial Chamber V), No. [ICC-01/14-01/18-1892](#), 29 May 2023, para. 11 (the "Further Directions").

¹² See the "Decision on the Common Legal Representatives' Joint Request for the Formal Submission of P-0925's Additional Expert Report and Associated Material under Rule 68(3) of the Rules" (Trial Chamber V), No. [ICC-01/14-01/18-1943](#), 23 June 2023 (the "Decision on the Initial Request").

¹³ [ICC-01/14-01/18-1954-Conf](#).

14. Rule 68(3) of the Rules states:

If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

15. Article 69 (3) and (4) of the Rome Statute (“Statute”) states:

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

SUBMISSIONS

16. As a preliminary matter, the Defence reiterates that the Material was disclosed only very recently to the Defence, and that the way by which the CLRVs proceeded in not seeking leave to present the Material is irregular and cannot be cured by the Request which ultimately is filed at a later date than the initially scheduled testimony of P-0925.¹⁴

17. That being said, the Defence contends that the Additional Report does not meet the requirements to be presented by the CLRVs (A); the Additional Report does not meet the requirements of Rule 68(3) (B); and the Additional Report does not otherwise meet the requirements for expert evidence (C).

A. The Additional Report does not meet the requirements to be presented by the CLRVs

18. The requirements for the CLRVs to present evidence which goes to the role of an accused person in the offences is multifold. It is only when the personal

¹⁴ See Email from the Prosecution to the Trial Chamber V, the Parties and Participants, sent on 25 May 2023, at 23.50.

interests of the victims are affected that the Chamber assesses whether the “(i) the presentation is consistent with the rights of the accused; (ii) the hearing of evidence is appropriate and affects the issues in the case; and (iii) the hearing of evidence is necessary for the determination of the truth.”¹⁵ The evidence must also be “relevant to the issues of the case”.¹⁶

19. The CLRVs have not demonstrated how the Additional Report as opposed to the First Report meet those criteria. Indeed, while the Defence does not contest that in his capacity of trauma expert P-0925’s testimony touches upon the personal interests of the victims, the jurisprudence is clear in that the evidence presented by the victims’ representatives should not be repetitive of the evidence presented by the parties.¹⁷
20. The CLRV does not address which elements of the Additional Report are absent from the First Report. In this specific situation, the criteria is not how the testimony of P-0925 meets the criteria of personal interest, relevance, and appropriateness, but how specifically the Additional Report, which is the item they seek to present, meets those requirements rather than being repetitive of the First Report.
21. Indeed, the relevance as identified by the CLRVs is extremely broad and does not provide a real indication as to what within the Additional Report is relevant in opposition with the First Report. To the contrary the relevance identified by

¹⁵ *The Prosecutor v. Dominic Ongwen*, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, [ICC-02/04-01/15-1199-Red](#), para. 17.

¹⁶ Katanga case, [Appeals Chamber: Judgment on the Appeal of Mr. Katanga against the Decision of Trial Chamber II of 22 January 2010 entitled Decision on the Modalities of Victim Participation at Trial](#) (16 July 2010) at para. 114; Banda case, [Trial Chamber: Decision on the Participation of Victims in the Trial Proceedings](#) (20 March 2014) at para. 25; see also *The Prosecutor v. Dominic Ongwen*, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, [ICC-02/04-01/15-1199-Red](#), para. 36.

¹⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims](#)”, 22 February 2012, ICC-01/05-01/08-2138, para. 24(c).

the Prosecution for this witness is to assess the harm and damages caused to the victims¹⁸ for the same charges as the one identified by the CLRVs.¹⁹

22. The same applies with regard to the criteria of determination of the truth, even more so in light of the fact that the Additional Report contains untested and low probative value evidence consisting of extract of victims' application forms.
23. When evaluation the consistency criterion, "the Chamber is required to be vigilant that any presentation of evidence by the victims is in conformity with the rights of the accused."²⁰ Yet, the submission of the Additional Report would be wholly inconsistent with the rights of the accused and a fair and impartial trial.
24. It emanates from the jurisprudence of the Court that "the Legal Representatives should not attempt to 'elicit evidence which aims to prove the elements of the crimes charged or [the Accused]'s role in their commission'".²¹ Yet, and contrary to the CLRVs assertion,²² the Additional Report contains extracts of victims application forms, which themselves contain information going to Mr. Yekatom's alleged "role in the offence" in a way which is prejudicial and contrary to the rights of Mr. Yekatom.
25. The Additional Report contains extracts of victim application forms which are specifically going the Mr. Yekatom's role in the commission of the crime charged against him. As submitted in extenso in the First Response, some of the chosen extracts go far beyond the description of harm suffered by the alleged victims, and instead consist of elements of a crime with which Mr. Yekatom is

¹⁸ [ICC-01/14-01/18-907-Conf](#).

¹⁹ [ICC-01/14-01/18-1954-Conf](#), paras. 18 and 26.

²⁰ *The Prosecutor v. Dominic Ongwen*, Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, [ICC-02/04-01/15-1199-Red](#), para. 16.

²¹ *Le Procureur c. Dominic Ongwen*, [Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation](#), 26 avril 2018, ICC-02/04-01/15-1248, para. 13.

²² [ICC-01/14-01/18-1954-Conf](#), para. 23.

charged, and/or specifically go to the acts and conduct of Mr. Yekatom as charged: “[REDACTED]”²³

26. Allowing such evidence to enter the record would not be consistent with the rights of Mr. Yekatom for two reasons.
27. Firstly, by submitting the Additional Report, those extracts would enter the evidentiary record as testimonial evidence without the Defence having any opportunity “to examine, or have examined, the witnesses against”.²⁴ These victims application forms were provided to P-0925 by the CLRVs, without having to meet an appropriate threshold of reliability.²⁵ P-0925 himself was not in a position to evaluate the reliability of the victims’ account when including them in his report and will not be in a position to answer any question of the Defence testing the reliability of these accounts.
28. Secondly, these victims’ account cannot be tested or verified by other avenues as the identity of the victims whose form were used to inform P-0925 are redacted, preventing any meaningful investigations into the allegations contained therein and meaningful examination by the Defence. This is an infringement on Mr. Yekatom’s right to have adequate time and facilities to prepare his defence as provided for in Article 67(1)(b) of the Rome Statute.
29. Meanwhile, there are example in this case of participating victims who either denied having filled a victim application form²⁶ or changed the account they had provided in their application.²⁷
30. In light of this, it is clear that the Additional Report’s submission into evidence is inconsistent with the rights of the accused.

²³ CAR-V44-00000001, p. 056, Victim a/15434/20.

²⁴ Article 67 (1)(e) of the Statute.

²⁵ [ICC-01/14-01/18-338](#), para. 28.

²⁶ See P-2620: CAR-OTP-2123-0057-R03, para. 73.

²⁷ See P-2583: CAR-OTP-2123-0003-R02, paras 190, 192, 193.

B. The Material is not appropriate for submission through Rule 68(3)

31. A Chamber's assessment as to whether prior recorded testimony may be introduced under Rules 68(3) should be made on a case-by-case basis where the factors to be considered may vary per witness.²⁸
32. A Chamber must carry out an individual assessment of the evidence sought to be introduced under Rule 68(3), based on the circumstances of each case, which includes analysing the importance of this evidence in light of the charges and other evidence presented or intended to be presented; this assessment is part and parcel of the analysis a Chamber must undertake in determining whether it is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally, to allow for the evidence in question to be introduced under Rule 68 (3).²⁹
33. In conducting this analysis, a Chamber may take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.³⁰
34. The prejudice which would arise from the admission into evidence of the Additional Report greatly outweighs its relevance or probative value, and a number of factors militate against its submission pursuant to Rule 68(3).
35. In conducting its analysis under Rule 68 (3), the Chamber may take into account a number of factors, including the following: (i) whether the evidence relates to

²⁸ *Prosecutor v Gbagbo and Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, [ICC-02/11-01/15-744](#), para. 69.

²⁹ *Ibid*, para. 71.

³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, [ICC-01/05-01/08-1386](#), para 78.

issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.³¹

36. The portions of the Additional Report which pertain to the conclusion of the expert in relations to P-2475's testimony,³² and the ones which contain excerpts of witness application forms³³ concern issues materially in dispute, concerning core issues of the case, and directly referring to the acts and conducts of Mr. Yekatom. While, the Chamber has previously granted requests for introduction under Rule 68(3) of witnesses' statements which went to the act and conduct of the accused, and for which the Defence objected, emphasising that the Defence would be able to explore the issues with the witness in Court.³⁴ In this instance however, the Defence will not have such opportunity. The witness will not be in a position to comment on the victims application form extract. The Defence would be extremely limited in examining the witness on these very portions and a real prejudice would arise.
37. Indeed, in the present circumstances the possibility by the Defence to examine P-0925 do not alleviate in anyway the prejudicial nature of the Additional Report's content which goes to core issues of the case materially in dispute. As P-0925 is not the primary source of those testimonies, the Defence is deprived of its possibility to confront the witness on their credibility.
38. Finally, the CLRVs argue that the submission of the Material would allow to substantially reduce the time for CLRVs of the witness, yet they fail to provide the time estimations.³⁵ Since, the Defence will have to extensively question the

³¹ *Prosecutor v. Bemba Gombo*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence"](#), 3 May 2011, ICC-01/05-01/08-1386, para 78.

³² See para. 62 above.

³³ See para. 57 above.

³⁴ See for example [ICC-01/14-01/18-1317-Conf](#), para. 17; [ICC-01/14-01/18-1783-Conf](#), para. 13, Public redacted version : [ICC-01/14-01/18-1783-Red](#).

³⁵ [ICC-01/14-01/18-1954-Conf](#), para. 27.

witness regarding the reliability of the victims application forms extract and the status of P-2475, any time gained by the CLRVs, if any, will not result in the efficiency and expeditiousness of the proceedings. In any event, this factor alone simply cannot prevail over each and every other considerations.

39. The Defence recalls that Rule 68 is an exception to the principle of orality consecrated by Article 69(2) of the statute; due to this exceptional nature Rule 68(1) provides that the Chamber must ensure that this submission is not prejudicial to or inconsistent with the rights of the accused. The Defence submits that the absence of any meaningful examination of P-0925 on those issues by the Defence constitute an infringement to Mr. Yekatom's trial rights, and as such warrants the rejection of the CLRV's request.

C. The Additional Report does not meet the admissibility criteria as an expert report

40. In the *Ruto* case, Trial Chamber V(A) ruled the following:

When admitting expert reports into evidence, the same admissibility criteria as for any other kind of evidence must be satisfied. In this connection, this Chamber will examine the admissibility of evidence by assessing its relevance, determining its probative value and weighing this probative value against its potentially prejudicial effect.³⁶

41. Firstly, expert P-0925 is meant to testify on trauma. In this context, the relevance of his testimony is limited to an area which is not meant to assist the Chamber in the determination of the guilt or innocence of the accused. In the *Ongwen* case, this same expert testified during the presentation of evidence by the LRVs and Trial Chamber IX stated in the Trial Judgment that

The Chamber notes his evidence, but also observes that it does not directly underlie any part of the Chamber's analysis as to whether the facts alleged in the charges are established.³⁷

³⁶ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Sang Defence Application to Exclude Expert Report of Mr. Herve Maupeu](#), 7 August 2013, ICC-01/09-01/11-844, para. 14.

³⁷ *The Prosecutor v. Dominic Ongwen*, [Trial Judgment](#), 4 February 2021, ICC-02/04-01/15-1762-Red, para. 600.

42. With regard to the probative value of the Report, the CRLVs and P-0925 failed to provide the method of selection of the 63 victim applications used for the purpose of the report. The Additional Report even contains an odd reference stating that “*we* collected statements [...] from 63 applications forms for participation.”³⁸ Considering that the Defence does not have in its possession victim applications other than a handful of the dual status victims and could not oppose the recounting of other participating victims, this lack of transparency is highly affecting the probative value of the Additional Report.
43. In addition, the names on the 63 victims applications are redacted and not available to the Defence. So long as this information remains confidential and the Defence is prevented from investigating the victims’ applications due to redactions and/or late disclosure, the probative value of a report based on and containing excerpts of these applications is outweighed by its prejudicial effect.³⁹ Any meaningful investigations start with the identity of the individual, without which the Defence cannot verify any claims whatsoever made by that individual. In this case, the identify which is also the source of the expert, is redacted on each and every application.
44. Also, one of the criteria an expert has to comply with is that “at all times, the expert is obliged to testify with utmost neutrality and objectivity.”⁴⁰ The Defence contends that the pre-selection of the victims application forms by the CLRVs affect P-0925’s ability to testify with neutrality and objectivity.⁴¹ Further, his use of P-2475’s testimony to contextualise his report⁴² and provide factual conclusion unrelated to his expertise are also indicative in relation to the required neutrality and objectivity.

³⁸ CAR-OTP-V44-00000001, p. 011 [emphasis added].

³⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the confirmation of charges](#), 30 September 2008, ICC-01/04-01/07-717, para. 141.

⁴⁰ *The Prosecutor v. Bosco Ntaganda Situation*, [Decision on defence preliminary challenges to prosecution’s expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 9.

⁴¹ See CAR-V44-00000063-001.

⁴² See CAR-V44-00000001, p. 7 and 37.

45. Secondly, the Defence takes issue with the fact the Additional Report contains factual and legal conclusion regarding P-2475's testimony. The Additional Report goes beyond "understanding or determining an issue of a technical nature that is in dispute",⁴³ and it usurps the function of the Chamber.
46. The Additional Report usurped the function of the Chamber by emitting legal and factual conclusions using witness testimony. However, it is the jurisprudence of the Court that "the content of the proposed expert report or testimony must not usurp the functions of the Chamber as the ultimate arbiter of fact and law."⁴⁴
47. Yet, the Report contains the expert's factual and legal conclusions on P-2475's live testimony, qualifying P-2475 multiple times as [REDACTED], e.g. "[REDACTED]"⁴⁵ or "[REDACTED]",⁴⁶ "[REDACTED]", "[REDACTED]".⁴⁷ Some conclusions are prejudicial as they consist of alleged underlying facts or elements of crimes charged against Mr. Yekatom, e.g. "[REDACTED]",⁴⁸ "[REDACTED]",⁴⁹ "[REDACTED]".⁵⁰
48. These factual conclusions assume the credibility of the witness,⁵¹ which is inadequate and is one of the reasons for which an expert cannot substitute his opinion to the one of Chamber.

CONFIDENTIALITY

⁴³ *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 7.

⁴⁴ *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 8; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on the Sang Defence Application to Exclude Expert Report of Mr. Herve Maupeu](#), 7 August 2013, ICC-01/09-01/11-844, para.13.

⁴⁵ CAR-V44-0000001, p. 035.

⁴⁶ CAR-V44-0000001, p. 062.

⁴⁷ CAR-V44-0000001, p. 035.

⁴⁸ CAR-V44-0000001, p. 036.

⁴⁹ CAR-V44-0000001, p. 007.

⁵⁰ CAR-V44-0000001, p. 007.

⁵¹ See *The Prosecutor v. Bosco Ntaganda*, [Decision on defence preliminary challenges to prosecution's expert witnesses](#), 9 February 2016, ICC-01/04-02/06-1159, para. 31.

49. The present response is filed on a confidential basis corresponding to classification of the Request it responds to. The Defence does not oppose the reclassification as public.

RELIEF SOUGHT

50. In light of the above, the Defence respectfully requests Trial Chamber V to:

REJECT the Request.

RESPECTFULLY SUBMITTED ON THIS 11th DAY OF AUGUST 2023



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