

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **11 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 Request for the Appointment of Duty
Counsel pursuant to Rule 74", 11 January 2021,
ICC-01/14-01/18-805-Conf**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Trial Chamber V (“Chamber”) to direct the Registry to identify and appoint, as necessary, qualified counsel to advise 21 witnesses on self-incrimination,¹ pursuant to the ‘Initial Directions on the Conduct of the Proceedings’² and rule 74 of the Rules of Procedure and Evidence (“Rules”).

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this Request as *Confidential* because it contains information that should not be made public.³ A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

3. The Prosecution expects that the 21 Witnesses’ prospective testimony will raise issues of self-incrimination⁴ and advises the Chamber accordingly.⁵ With the exception of one witness, their interviews took place in accordance with the Prosecution’s founded belief that they had contributed to the commission of crimes within the Court’s jurisdiction under article 55(2) and rule 112, or rule 111 in the case of waiver. The Prosecution’s belief concerning the involvement of the remaining witness [REDACTED] in the commission of crimes arose after his interview, and upon further analysis of other information.

¹ Hereinafter, “21 Witnesses”.

² ICC-01/14-01/18-631, paras. 37-39.

³ See rule 74(8) (“[w]here the Prosecutor is aware that the testimony of any witness may raise issues with respect to self-incrimination, he or she shall request an in camera hearing and advise the Chamber of this, in advance of the testimony of the witness”).

⁴ [REDACTED].

⁵ See rule 74(8) (“[w]here the Prosecutor is aware that the testimony of any witness may raise issues with respect to self-incrimination, he or she shall ... advise the Chamber of this, in advance of the testimony of the witness”). See also ICC-01/14-01/18-724-Conf-AnxA.

4. The 21 Witnesses' testimony provides several objective reasons for concern regarding possible self-incrimination. *First*, they are, or were members of the Anti-Balaka situated in BANGUI and/or in the western Provinces of the Central African Republic ("CAR"). During the relevant period,⁶ they served in different capacities within the group: as elements, ComZones, members of the (*de facto*) Coordination, National Coordination, and/or representatives of the group in the CAR government. *Second*, they directly or indirectly contributed to the criminal policy or purpose of the group, whether by participating in the planning, preparation, and/or execution of Anti-Balaka crimes, including by attending or directing meetings to that effect, or through their involvement in the organisation, structuring, or leadership of the group or of elements committing crimes.

5. The standard of potential 'self- incrimination' does not require that all of the underlying elements of a given mode of liability are satisfied. Here, although the assignment of Duty Counsel does not require it, the prospective testimony of the 21 Witnesses would in most cases support their individual criminal responsibility minimally, under article 25(3)(d).

6. As their statements suggest, the prospective testimony of the 21 Witnesses establish *any* 'contribution' made by act or omission to the Anti-Balaka's commission of crimes either directly or indirectly, and with knowledge (a) of the *group's* intention to commit these types of crimes, or (b) in furtherance of the *group's* criminal purpose or activity. This would effectively establish accessorial criminal liability under article 25(3)(d), particularly given that it attaches where the contribution affects any aspect of the *commission* of a crime – (*i.e.*, at any stage — conception, preparation, attempt, *or* execution), including its subjective *or* objective elements.⁷

⁶ I.e. from September 2013 to December 2014: *see* ICC-01/14-01/18-403-Conf, paras. 70, 72, pp. 105, 107, 109, 111.

⁷ *See* ICC-01/04-01/07-3436, paras. 1635-1636; ICC-01/04-01/10-465-Red, para. 287. By analogy to article 25(3)(c), *see also* ICC-01/05-01/13-2275-Red, para. 1399: In this case, the principal perpetrator committed the

7. Here, any question eliciting the 21 Witnesses' knowledge of ongoing Anti-Balaka activities (*i.e.*, the group's crimes or intention to commit them), or any testimony establishing or bearing on the witness's own actions (or omissions) in respect of their knowledge of the group's 'commission' of crimes or its criminal policy during the relevant period especially, is incriminating. The assignment of Duty Counsel in advance of the 21 Witness's testimony is appropriately justified, and will obviate potential disruption or delay during trial.⁸

8. Should the Chamber grant the Request, the Prosecution considers the following is further in line with the Court's practice: (1) it is incumbent on the Registry to make the necessary arrangements to appoint a qualified and non-conflicted lawyer to provide independent legal advice to the 21 Witnesses regarding their potential self-incrimination during testimony;⁹ (2) the Prosecution will provide Duty Counsel with the witnesses' statements and/or transcripts of their interviews as well as any other relevant material upon notice of their appointment by the Registry, as appropriate; and (3) Duty Counsel should be directed to inform the witnesses of the offence defined in article 70(1)(a), in accordance with rule 66(3).¹⁰

crime, knowing that he or she would receive assistance in the aftermath; ICC-01/04-01/10-465-Red, Diss. Op. Judge Monageng, paras. 82, 87, 99-101. *See also* more generally ICC-01/14-01/18-723-Conf, paras. 243-246.

⁸ *See* rule 74(10) (“[i]f an issue of self-incrimination arises in the course of the proceedings, the Chamber shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule”).

⁹ ICC-01/09-01/11-847-Corr, para. 29; ICC-01/04-02/06-619, para. 44.

¹⁰ ICC-01/04-02/06-619, para. 46.

IV. CONCLUSION

9. Based on the foregoing, the Chamber should direct the Registry to identify and appoint, as necessary, qualified counsel to advise the 21 Witnesses on self-incrimination, pursuant to rule 74.



James Stewart, Deputy Prosecutor

Dated this 11th of January 2021
At The Hague, The Netherlands