

ANNEX 19

Public Redacted

From: Trial Chamber VI Communications
Sent: 19 February 2024 13:49
To: OTP CAR IIA Communications
Cc: D33 Said Defence Team; Said LRV Team OPCV; OTP CAR IIA Prosecution Team; Trial Chamber VI Communications; Associate Legal Officer-Court Officer
Subject: Re: Prosecution Response- to Defence Request : 240130 - Provision of the schedule of witness appearance

[ICC] RESTRICTED

Dear Prosecution,

The Chamber has considered your response and has noted that the schedule proposed in paragraph 22 differs considerably from the Schedule of Witness Appearance that was sent to the Chamber and the parties on 15 February at 12:03. It is not clear to the Chamber whether the proposed changes to the schedule were discussed with the Defence and/or the Victims and Witnesses Unit (the 'VWU').

Under these circumstances, it is not clear whether or not the Prosecution's assertion that there is enough time to hear all scheduled witnesses within the available time is feasible or not. Accordingly, the Chamber instructs the Prosecution to submit an updated Schedule of Witness Appearance for the block starting on 26 February, after consultation with the Defence and the VWU. In light of the imminent start of the next block, the Prosecution is ordered to provide the updated Schedule no later than Wednesday, 21 February noon.

Kind regards,
 Trial Chamber VI

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From: Makwaia, Holo [REDACTED]
Sent: Monday, February 19, 2024 11:15:33 AM
To: Trial Chamber VI Communications <[REDACTED]>
Cc: D33 Said Defence Team <[REDACTED]> Said LRV Team OPCV [REDACTED]
 cpi.int>; Trial Chamber VI Legal Team [REDACTED] OTP CAR IIA Prosecution Team
 <[REDACTED]>
Subject: Prosecution Response- to Defence Request : 240130 - Provision of the schedule of witness appearance

[ICC] RESTRICTED

Dear Trial Chamber VI,

INTRODUCTION

1. The Prosecution respectfully submits that the Defence requests ("Request") should be rejected. This is because: i) the Defence has had adequate notice, time and facilities to prepare since they have been in possession of material relating to witnesses P-2251 and P-0884 since 2021; ii) the Defence has already considered material relating to witnesses P-2251 and P-0884 in order to respond to the Prosecution's applications to introduce evidence under Rule 68(3) of the Rules of Evidence and Procedure ("Rules"); and iii) P-2251's availability and circumstances mean that it is not proportionate to delay his evidence to another date.
2. In addition, the Defence Request is unjustified. Mr Said's trial was suspended for more than a year (between 18 January 2023 and 29 January 2024) and the Chamber expressly directed the parties [REDACTED]

SUBMISSIONS

Inter-Partes discussions

3. On 9 February 2024, the Chamber adjusted the court schedule and directed Parties to have *inter partes* consultations (*see* Chamber's E-mail dated 09 February 2024 at 16:27).
4. The Prosecution acknowledges, respects and intends to adhere to the Chamber's directive. However, in this particular instance, witness management and scheduling of witness preparation and testimony limited the Prosecution's ability to conduct meaningful *inter partes* consultations. In the three days between the Chamber's directives and the e-mail of the Defence on 12 February 2024, the Prosecution was confirming the availability of witnesses and waiting for the authorization from the CAR authorities of several trial witnesses including P-2251.
5. The Prosecution further prioritised the Chamber's directive to ensure continuity of testimony. In this regard, the Chamber indicated its desire "that there will be no gaps between witnesses and that the next witness will be available to commence testifying as soon as the previous one has finished. To this end, the calling party shall, to the extent possible and in close consultation with the VWU, identify alternative witnesses in the Witness Schedule to ensure that no unnecessary gaps are created by last minute cancellations or early conclusion of a witness's testimony." (*see* Chamber's E-mail dated 09 February 2024 at 16:27 citing paragraph 11 of the Additional Directions on the Conduct of Proceedings (#479)).
6. The Prosecution respectfully submits that, the limited opportunity for *inter-partes* engagement on this occasion, does not detract from the fact that the Defence has had adequate notice and time to prepare witnesses P-2251 and P-0884. There is further no basis to delay their testimony or alter the sequence in which the Prosecution proposes to call them.

I. The Defence has been provided with adequate notice and time to prepare

7. Article 67(1)(b) of the Rome Statute ("Statute") expressly provides, as a fundamental right, that an Accused is entitled "to have adequate time and facilities for the preparation of [his/her] defence." This right must be construed reasonably and applied fairly. The Defence submission in this case is neither.
8. The Defence has had the evidence relating to witnesses P-2251 and P-0884 for more than two years following disclosure under Rule 76 of the Rules by the Prosecution. The chronology of disclosure is as follows:
9. With respect to P-2251:
 - On 12 July 2021, P-2251's statement CAR-OTP-2093-0045 was disclosed (*see* Pre-Confirmation INCRIM package 036).
 - On 06 October 2021, P-2251's court testimony transcripts T-043 and T-044 in *Yekatom & Ngaissona* were disclosed through Record Manager (*see* Court Management-Transcripts dated 06 October 2021 at 12:20).
 - On 10 June 2022, the Prosecution listed P-2251 in its List of Prosecution witnesses (*see* ICC-01/14-01/21-354-Conf-AnxA).
 - On 05 September 2022, the Prosecution listed P-2251 as #37 witness in an updated order of appearance (*see* ICC-01/14-01/21-470-Conf-AnxA).
 - On 12 December 2022, the Chamber granted the Prosecution's application under rule 68(3) for P-2251 (*see* ICC-01/14-01/21-571-Conf, para. 57).

- On 15 February 2024, the Prosecution listed P-2251 as #25 witness and testimony on 7 March 2024 in an amended schedule of witness appearance (see Prosecution's E-mail dated 15 February 2024 at 12:03).

10. With respect to P-0884:

- On 14 April and 21 June 2021, P-0884's transcribed statements were disclosed (see Pre-Confirmation INCRIM packages 002 and 024).
 - On 06 October 2021, P-0884's court testimony transcripts T-054 and T-058 in the *Yekatom & Ngaissona* were disclosed through Record Manager (see Court Management-Transcripts dated 06 October 2021 at 12:20).
 - On 10 June 2022, the Prosecution listed P-0884 in its List of Prosecution witnesses (see ICC-01/14-01/21-354-Conf-AnxA).
 - On 05 September 2022, the Prosecution listed P-0884 as #36 witness in an updated order of appearance (see ICC-01/14-01/21-470-Conf-AnxA).
 - On 12 December 2022, the Chamber granted the Prosecution's application under rule 68(3) for P-0884 (see ICC-01/14-01/21-571-Conf, para. 52).
 - On 15 February 2024 the Prosecution listed P-0884 as #28 witness and testimony is scheduled for 27-28 March 2024 (see Prosecution's E-mail dated 15 February 2024 at 12:03).
11. Taking the Defence argument at its highest, the Defence has also been on notice as early as 5 September 2022 that witnesses P-2251 and P-0884 would be called as #36 and #37. This means that both witnesses were in any event due to provide their testimony in the next two block of evidence if the Trial had not been adjourned.
12. The Defence cannot reasonably suggest, therefore, that they are caught by surprise and that they have not had adequate time to prepare. The Defence's position is further undermined by the fact that 20 witnesses have already testified and they are aware that the pace of proceedings has progressed quicker than anticipated since the Trial resumed.
13. The Defence is also aware that witnesses availability may and have changed for a variety of reasons. They are aware that alternative witnesses may be brought forward or pushed back within reasonable limits and that flexibility is required to respond to changes so as to ensure that trial proceedings progress and Mr Said's right to an expeditious trial is preserved.
14. The Prosecution submits that its proposal in relation to witnesses P-2251 and P-0884 is reasonable. The Defence has been provided with P-0884's order of appearance 42 days in advance. This is beyond the Chamber's advised 30 day period (see ICC-01/14-01/21-479, para. 10). The Defence has also been provided with 21 days advance notice of P-2251 being called.
15. In the circumstances, the notice and time provided to the Defence to prepare for the testimony of P-2251 and P-0884 is "adequate" within the meaning of Article 67(1)(b) of the Statute. More importantly it is also fair.

II. The Defence has already considered material relating to these witnesses

16. The Prosecution submits that the Defence's reference to the number of pages associated with P-2251 and P-0884 is an inappropriate benchmark to assess the time needed to prepare for their testimony. First, page numbers alone are not indicative of complexity or the time that may be required to adequately prepare.
17. The Defence has already considered the material of witnesses P-2251 and P-0884 when it responded (see Defence consolidated response ICC-01/14-01/21-417-Conf dated 22 July 2022) to the Prosecution's request that evidence of these witnesses be introduced under Rule 68(3) of the Rules.

The Defence Request fails to acknowledge this or explain why their previous preparation is now invalid.

III. P-2251's availability and circumstances

18. The Prosecution accepts that the sequence in which witnesses may be called may be varied. However, the Defence's Request to call P-2251 at the end of Block 2 is not feasible.
19. P-2251's availability to testify is dependent on him receiving authorisation from the CAR authorities. For this purpose, on 02 February 2024, an RFA was sent to the CAR authorities seeking such authorisation between 28 February and 10 March 2024. On 13 February 2024, the Prosecution received the requested authorisation dated 12 February 2024.
20. Any change of schedule now would require additional RFAs to be sent. At the time of the RFA request the sitting schedule after 28 March 2024 had not been issued, in efforts to provide alternative witnesses the Prosecution listed P-2251.
21. The Prosecution submits that P-2251 is available to testify in the next Block so any change of schedule now would require an additional RFA to be sent and would be subject to his availability [REDACTED].
22. The Prosecution further submits that the sitting hours for this block is sufficient to hear all the eight witnesses by 28 March, contrary to the Defence assertions. On 12 February 2024, the Defence sent an e-mail *inter partes* to the Prosecution giving an estimated duration for their cross-examination of two sessions for witnesses P-2179, P-1524 and P-2263, eight hours for P-0291 and four hours for P-2504. Based on the anticipated number of sessions scheduled by the Chamber on 09 February 2024 and number of hours given by the Defence on 12 February 2024, the Prosecution submits that P-2179 would testify on 26 and 27 February 2024 (estimated 3,5 hours), P-1524 would testify on 27 and 29 February 2024 (estimated 3,5 hours), P-2263 would testify on 29 February and 1 March 2024 (estimated 3,5 hours), P-0622 would testify on 1 and 4 March 2024 (estimated 3,5 hours), P-2251 would testify on 4 and 6 March 2024 (estimated 3,5 hours), P-0291 would testify on 19-21 March 2024 (estimated 10 hours), P-2504 would testify on 21-22 and 25 March 2024 (estimated 8 hours), and P-0884 would testify on 26 March 2024 (estimated 3,5 hours).

Conclusion

- For the above reasons, the Prosecution respectfully requests the Chamber to reject the Defence's Request to cancel P-0884's testimony and to call P-2251 as the last witness in Block 2.

Respectfully submitted,



Holo Makwaia
Senior Trial Lawyer
Prosecution Pillar B
Office of the Prosecutor

