

Annex 4

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From: Trial Chamber VI Communications
Sent: 07 October 2024 21:07
To: OTP CAR IIA Communications; D33 Said Defence Team; Said LRV Team
 OPCV
Cc: Associate Legal Officer-Court Officer; Trial Chamber VI Communications;
 Chamber Decisions Communication, [REDACTED]
Subject: Decision on the Prosecution's request pursuant to regulation 35 to add
 Four items to its list of evidence (ICC-01/14-01/21-868-Conf)

Dear Parties and participants,

Procedural History

On 3 October 2024, the Prosecution filed the 'Prosecution's request pursuant to regulation 35 to add Four items to its list of evidence' (ICC-01/14-01/21-868-Conf). Therein it requested to add 4 photographs to its list of evidence (the 'Request'). On the same day it disclosed courtesy copies of the relevant photographs (Email dated 03.10.24 at 13:22)

On 7 October 2024, the Defence responded to the Request, submitting that it should be rejected (ICC-01/14-01/21-872-Conf) (the 'Response').

Submissions

In the Request, the Prosecution requests to add CAR-OTP-2033-6946, CAR-OTP-2033-6948, CAR-OTP-2033-6955 and CAR-OTP-2033-6979 to its List of Evidence ('LoE'). The Prosecution makes reference to regulation 35 of the Regulations of the Court and notes that there is good cause to admit these items as P-3112 was only able to identify the four photographs during his witness preparation session. The Prosecution notes that in the Decision on the Prosecution's Applications for Submission of Documents from the Bar Table, the Chamber drew the Prosecution's attention to inaccuracies between the description of certain items in the Prosecution's fifth bar table application and the description of the same items in P-3112's reports. The Prosecution further notes that during P-3112's witness preparation session he identified the aforementioned items as the correct photographs he refers to as photographs 254, 255, 256 and 257 in his expert report (CAR-OTP-2062-0743).

The Prosecution submits that the four photographs sought to be added to the LoE are relevant, reliable and authentic because they provide a detailed view of the cells within the OCRB compound and corroborate the accounts of Prosecution witnesses who have attested to the layout of the OCRB. The Prosecution further notes that their addition is in the interests of justice because they will also assist the Chamber in its determination of the truth and there is no prejudice to the Defence.

In the Response, the Defence notes that over several months it has requested the Prosecution to provide it with all the photographs referenced in the expert reports of P-3112, making reference to the correspondence between the Defence and the Prosecution on disclosure of these items. The Defence indicates specifically, that when the Request was filed, it was not aware of the relevant photographs.

The Defence submits that the Request should be rejected. First, the Defence notes that the Chamber's Decision on the Prosecution's Applications for Submission of Documents from the Bar Table was issued several months ago and it should have made a request to add these items to the LoE long before now. The Defence further submits that P-3112, being a Prosecution staff member, could have entered witness preparation earlier and therefore a request to add items to the LoE could have also taken place much earlier.

In respect of the Prosecution's submissions to the effect that these photographs corroborate the accounts of other witnesses, the Defence notes that the Prosecution has not identified specifically how this is the case. The Defence submits in this regard that there are contradictions between witnesses and these photographs cannot corroborate these witnesses' accounts.

Last, in respect of prejudice, the Defence submits that it is for the Prosecution to prepare its case and to abide by the relevant time limits set by the Chamber, which are set in order to protect the Defence from prejudice. The Defence notes that to allow the Prosecution to add this evidence after the deadline has passed is not in the interests of justice and there is prejudice to the Defence because the Prosecution considers this evidence important for its case. In this regard, there is no justification for the Prosecution to try and correct errors made in the investigation at this stage of the case.

Analysis

At the outset, the Chamber would like to briefly address a recurring issue in these proceedings which it believes warrants clarification in order to ensure the continued efficiency of hearings. The issue in question relates to the addition to the Prosecution's List of Materials of items of evidence that were not previously listed on its List of Evidence. The Chamber is of the view that this issue has led to unnecessary litigation and should therefore be resolved. Accordingly, the Chamber issues the following instructions:

1. Prior to finalising and sharing its List of Materials with the Defence, the Prosecution must verify that the material included in said List is indeed on its List of Evidence.
2. If an item is not on the Prosecution's List of Evidence, the Prosecution must seek the Chamber's authorisation to add the item to the list of evidence while also providing the reasons for which the item was not included in the original List of Evidence when it was disclosed. In this regard, the Chamber recalls that it previously laid out this requirement in paragraph 26 of its Decision on Setting the Commencement Date of the Trial and Related Deadlines (Decision No. 243), where it stated that 'evidence may be added to the list after the deadline *only* with the leave of the Chamber'. The Chamber notes that regulation 35 of the Regulations of the Court does not apply in such cases because the List of Evidence was already submitted within the deadline previously set by the Chamber, and the Prosecution would therefore only be requesting an addition to the list as opposed to an extension of the applicable time limit. This has been the position of this Chamber in previous decisions, both written and oral, including for example, in Decision number 801.
3. For clarity, the standard the Chamber applies to requests to use items in court that were not previously included in the List of Evidence is whether adding the item of evidence would be prejudicial to the accused. This assessment shall take into consideration the rights of the accused under article 67(1) of the Statute and other factors including the extent to which the

requested addition is opposed by the Defence, the time when the addition was sought and the reasons for the delay, the nature and amount of the material concerned and when it was disclosed, the intended purpose of the Prosecution's requested reliance on such material, and its prospective significance in light of the charges brought against the accused and the rest of the available evidence.

Turning to the specific items sought to be added to the LoE, the Chamber notes that the four items appear to depict various cells in the OCRB and are referenced in P-3112's report which has already been formally submitted on the record through witnesses P-0547 and P-0787 (see CAR-OTP-2118-3750). The Chamber further recalls its earlier Decision on the Prosecution's Applications for Submission of Documents from the Bar Table (ICC-01/14-01/21-694, paras 90-91) in which it noted that there were various inconsistencies in the report and P-3112 could be in a position to provide useful evidence on, *inter alia*, these inconsistencies. The Chamber notes that, indeed, pursuant to its instructions, the Prosecution has sought to clarify these inconsistencies with P-3112 (see Annex to witness preparation log for P-3112).

Whilst the Chamber takes note of the Defence's submissions regarding prejudice, the Chamber can see no prejudice to the Defence to allow these items onto the List of Evidence at this stage. First, the material sought to be added is limited in nature, namely only four photographs. Second, although such photographs were disclosed late, the Chamber notes that P-3112 was only able to clarify which were the correct photographs during witness preparation which took place last week. Third, the Chamber finds that the significance of these items, in light of the evidence already on the record, does not bar their introduction at this stage. Indeed, the Chamber notes, as the Defence also observes, that a number of photographs of the inside of the OCRB are already formally submitted on the record. Furthermore, the Chamber also considers it necessary for the clarity of the record and P-3112's report (which has already been formally submitted) that these photographs are allowed to be added at this stage.

Accordingly, the Chamber rejects the Defence's submissions and grants the Request. The Prosecution is ordered to file an updated list of evidence in line with the present decision as soon as possible.

Kind regards,
Trial Chamber VI