

ANNEX 1

PUBLIC

From: Trial Chamber V Communications
Sent: 02 July 2021 14:07
To: [REDACTED] Trial Chamber V Communications
Cc: D29 Yekatom Defence Team; D30 Ngaissona Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team; OTP CAR IIB Case Management; OTP CAR IIB Operations; Associate Legal Officer-Court Officer; [REDACTED] Chamber Decisions Communication; Trial Chamber V Communications
Subject: Decision on Submitted Materials for P-2841
Attachments: Yekatom Defence Documents to be submitted through P-2841
Follow Up Flag: Follow up
Flag Status: Flagged
Categories: Yekatom and Ngaissona

Dear Counsel,

The Chamber takes note of the emails on the submission of evidence following the examination of P-2841 by the Yekatom Defence (see attached email from the Yekatom Defence, 11 May 2021, at 17:55) and the Prosecution (see below email from the Prosecution, 11 May 2021, at 18:28); as well as of the Defence's responses to the Prosecution's email (see below email from the Yekatom Defence, 18 May 2021, at 20:25; email from the Ngaissona Defence, 19 May 2021, at 10:55).

As concerns items CAR-OTP-2066-3003, CAR-OTP-2100-3674, CAR-OTP-2101-8599, CAR-OTP-2101-9451, CAR-OTP-2102-3799, CAR-OTP-2102-8436 and CAR-OTP-2102-9862, consisting of seven Facebook conversations (the 'Facebook Conversations'), the Chamber notes the Defence teams' objections to the submission of those pages containing messages not shown to nor discussed with the witness. In light of the nature and scope of these items, compared to the extent to which they were used during P-2841's questioning, the Chamber is of the view that it would be more appropriate to seek their formal submission through a bar table application. Therefore, without prejudice to its ruling on any bar table request, the Chamber rejects the Prosecution's request to formally submit the Facebook Conversations by email through P-2841.

Likewise, and with regard to item CAR-OTP-2102-6174, consisting of another Facebook conversation in respect of which the Yekatom Defence only requests the submission of pages 6204-6206, the Chamber considers that it would be more appropriate to seek its formal submission through a bar table application for the same reasons as set out above. Accordingly, without prejudice to its ruling on any bar table request, the Chamber rejects the Yekatom Defence's request to formally submit item CAR-OTP-2102-6174 by email through P-2841.

In this regard, the Chamber clarifies that, without prejudice to the general rule of submission of items of evidence as a whole, it cannot be excluded that there may be circumstances warranting that only part(s) of a single item be submitted into evidence. Such requests will be assessed by the Chamber on a case-by-case basis.

With regard to item CAR-OTP-2101-9735, the Chamber notes that it has already been introduced under Rule 68(3) of the Rules, as confirmed below, and that it is not necessary to re-submit items that have already been submitted.

In light of the above, the Chamber recognises as formally submitted the following items submitted by the Prosecution:

- CAR-OTP-2112-1538
- CAR-OTP-2130-3379

With regard to item CAR-OTP-2130-4475, consisting of the observations or corrections made by the witness to his prior witness statement (CAR-OTP-2127-4238 and CAR-OTP-2130-1538 [French translation]), the Chamber grants the Prosecution's request to introduce this item as part P-2841's prior recorded testimony under Rule 68(3) of the Rules (see transcript of hearing, ICC-01/14-01/18-T-029-CONF-ENG, p. 6, lines 11-13).

The Chamber confirms that the requirements of Rule 68(3) of the Rules have been met for the following items:

- CAR-OTP-2101-8109
- CAR-OTP-2101-9735
- CAR-OTP-2124-0899
- CAR-OTP-2124-0900
- CAR-OTP-2124-0903

- CAR-OTP-2127-4238
- CAR-OTP-2130-1538
- CAR-OTP-2130-4475

The Registry is directed to proceed in accordance with paragraph 63(v) of the Initial Directions, ICC-01/14-01/18-631.
Kind regards, TC V

From: [REDACTED]
Sent: 19 May 2021 10:55
To: [REDACTED] <[REDACTED]>; Trial Chamber V Communications <[REDACTED]>
Cc: D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team <[REDACTED]>; V44 LRV Team OPCV <[REDACTED]>; V44 LRV Team <[REDACTED]> V45 LRV Team [REDACTED] >; OTP CAR IIB Case Management [REDACTED]; OTP CAR IIB Operations [REDACTED] Associate Legal Officer-Court Officer [REDACTED]; [REDACTED]
[REDACTED]

Subject: Re: OTP List of the documents to be submitted through P-2841

Dear Trial Chamber V,

Dear All,

The Defence for Mr Ngaissona fully joins the objections made by the Defence for Mr Yekatom. Allowing the Prosecution to proceed as such, by formally submitting volumes of facebook communications which were not shown to the witness or which bear no link whatsoever to the witness, would be unduly prejudicial to Mr Ngaissona's fair trial rights.

Moreover, such an approach would in essence circumvent the submission regime established by the Chamber, namely paragraph 63(i) of the Initial Directions on the Conduct of the Proceedings which provides that the tendering participant may submit items *used during a hearing*, as well as the procedure and safeguards established by the Chamber for Bar Table applications (paragraph 62 of the Initial Conduct of the Proceedings).

The Defence thus respectfully joins the Defence for Mr Yekatom to reject the formal submission of documents #1-7 in the first list as it concerns Witness P-2841.

Kind regards,

[REDACTED]
Legal Assistant, Defence for Mr Ngaissona

From: [REDACTED]
Sent: 18 May 2021 20:25
To: [REDACTED]; Trial Chamber V Communication [REDACTED]
Cc: D29 Yekatom Defence Team [REDACTED] >; D30 Ngaissona Defence Team [REDACTED] >; V44 LRV Team OPCV [REDACTED] >; V44 LRV Team [REDACTED] V45 LRV Team [REDACTED] >; OTP CAR IIB Case Management [REDACTED]; OTP CAR IIB Operations [REDACTED]; Associate Legal Officer-Court Officer <[REDACTED]>; [REDACTED]
[REDACTED]

Subject: RE: OTP List of the documents to be submitted through P-2841

Dear Trial Chamber V,

The Defence for Mr Yekatom hereby responds to the Prosecution's email of 11 May seeking the formal submission of 17 documents in relation to P-2841.

The Defence takes no position on the documents submitted under Rule 68(3) as listed at #1-8 on the second list, in light of the Chamber's Decision of 22 April (ICC-01/14-01/18-964-Conf).

Likewise, the Defence takes no position on the documents listed at #8 and #9 of the first list, without prejudice.

The Defence respectfully opposes the formal submission of the documents (comprising Facebook messenger conversations) listed at #1-7 of the first list, to the extent that the Prosecution seeks submission of these

documents in their entirety. The Defence would not oppose formal submission of those pages containing messages to which the witness was specifically taken and upon which he gave evidence.

First, the Prosecution has not established the *prima facie* relevance of the messages to which the witness was not taken during his testimony ('Messages'), contrary to Article 69(3).

These documents combined comprise over one thousand pages of digital conversations taking place over a period of multiple years; and even on a conservative estimate, the total number of messages contained therein would be upwards of five or six thousand. Allowing wholesale formal submission of these Messages would clutter the trial record with a significant quantity of irrelevant material. More importantly, it would lead to prejudice to the Defence, which would be required to review and analyse each of these Messages, without any indication as to their relevance and the manner in which the Prosecution intends to rely on them against Mr Yekatom, if at all. This prejudice would be compounded in the submission system adopted by the Chamber, as limited Defence resources would likely need to be diverted for the purpose of preparing submissions on these Messages in the highly-pressurised final arguments phase – again, with no certainty as to whether such submissions would even be necessary.

Moreover, to the extent that the Defence will have been deprived of the opportunity to cross-examine P-2841 in relation to any Messages that the Prosecution may subsequently seek to rely on against Mr Yekatom, their formal submission would be contrary to Mr Yekatom's statutory right to examine witnesses brought against him, under Article 67(1)(e). Nor can it be argued that the inclusion of these documents in the Prosecution's list of material constitutes sufficient notice in this regard. It would be contrary to fairness to oblige the Defence to review vast quantities of such listed material in the five days prior to a witness's appearance, and to expend its limited allocated cross-examination time (not to mention the time of the Chamber), all while having to second-guess the purpose for which the material will be relied on during a witness's testimony and/or in final submissions – again, if at all. In this regard, the Defence submits that allowing formal submission of these lengthy documents in their entirety would be inconsistent with the spirit of the requirement, as set out in the Initial Directions (ICC-01/14-01/18-631, para. 41), that a calling party indicate in their list of material, specific passages of lengthy documents intended to be relied upon.

Further, and in line with the above: in relation to the document listed at #6 (CAR-OTP-2102-8436) of the first list, the Defence opposes its formal submission in any form. The witness was not taken to a single message contained in this conversation, nor asked any questions regarding its content (T-029, 56:9-57-9). If the document is being submitted merely to establish that P-2841 was in contact with the [REDACTED] Facebook profile, and/or the identity of the user behind that profile, this information is already sufficiently reflected in the transcript and trial record (T-029, 56:9-57-4).

In addition, the Prosecution has not established the *prima facie* reliability of the Messages on which P-2841 was not provided the opportunity to comment. This is especially so in relation to those documents which comprise conversations to which P-2841 was not party (i.e. documents #2-5). In this respect, P-2841's suggestion that much of the information and messages exchanged during the relevant period was not 'verified' (T-030, 9:15-23); and more broadly, his responses to the line of questioning pursued by the Ngaissona Defence regarding the veracity of information and messages contained in various Facebook messenger conversations further militate against their formal submission.

Lastly, the Defence respectfully submits that granting formal submission of these Messages would create a procedural backdoor, whereby a party could tender significant quantities of digital messages between non-witness third parties, through only the most tenuous link with a witness on the stand – for instance, by taking a witness to a single message in which he or she might be mentioned, or to a message relating to a well-known event on which the witness might be in a position to provide vague and indirect evidence. It would allow tendering parties to circumvent their obligations as regards meeting the statutory and jurisprudential criteria for admissibility/formal submission, and effectively nullify such safeguards.

Denying the Prosecution request in relation to the Messages would not cause undue prejudice. The Prosecution can put those messages forming part of its case to appropriate witnesses and subsequently tender those messages. Likewise, nothing impedes the Prosecution from tendering these conversations via the bar table, in accordance with the statutory and jurisprudential framework in place.

Best regards,

Legal Assistant, Yekatom Defence

From: [REDACTED]
Sent: 11 May 2021 18:28
To: Trial Chamber V Communications [REDACTED]
Cc: D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV <[REDACTED]>; V44 LRV Team <[REDACTED]>; V45 LRV Team [REDACTED]>; OTP CAR IIB Case Management <[REDACTED]>; OTP CAR IIB Operations [REDACTED]>; Associate Legal Officer-Court Officer [REDACTED]>; [REDACTED]

Subject: OTP List of the documents to be submitted through P-2841

Dear Trial Chamber V,

In accordance with paragraph 63(i) of the Initial Directions of the Conduct of the Proceedings (ICC-01/14-01/18-631), the Prosecution submits the documents listed below relating to the testimony of witness P-2841. The Prosecution requests that they be recognised as formally submitted.

(i) Documents discussed with the witness during the course of his direct examination :

Count	Doc ID	WIT - Used through	Type	EVD - Date
1	CAR-OTP-2066-3003	CAR-OTP-P-2841	Report	7-May-2021
2	CAR-OTP-2100-3674	CAR-OTP-P-2841	Communication - E-message	7-May-2021 10-May-2021
3	CAR-OTP-2101-8599	CAR-OTP-P-2841	Communication - E-message	7-May-2021 10-May-2021
4	CAR-OTP-2101-9451	CAR-OTP-P-2841	Communication - E-message	7-May-2021
5	CAR-OTP-2102-3799	CAR-OTP-P-2841	Communication - E-message	7-May-2021 10-May-2021
6	CAR-OTP-2102-8436	CAR-OTP-P-2841	Communication - E-message	7-May-2021
7	CAR-OTP-2102-9862	CAR-OTP-P-2841	Communication - E-message	7-May-2021
8	CAR-OTP-2112-1538	CAR-OTP-P-2841	Call Data Records (CDR)	7-May-2021
9	CAR-OTP-2130-3379	CAR-OTP-P-2841	Communication - E-mail	7-May-2021

(ii) Documents submitted under Rule 68(3) at the start of P-2841's testimony (ICC-01/14-01/18-964-Conf, paras. 29-35, p. 11-13; ICC-01/14-01/18-T-029 ENG RT, p. 7, Ins. 1-3) :

Count	Doc ID	WIT - Used through	Type	EVD - Date
1	CAR-OTP-2101-8109	Rule 68(3)	Communication - E-message	7-May-2021
2	CAR-OTP-2101-9735	Rule 68(3)	Communication - E-message	7-May-2021 10-May-2021
3	CAR-OTP-2124-0899	Rule 68(3)	Communication - E-mail	7-May-2021
4	CAR-OTP-2124-0900	Rule 68(3)	Communication - E-mail	7-May-2021
5	CAR-OTP-2124-0903	Rule 68(3)	Communication - E-mail	
6	CAR-OTP-2127-4238	Rule 68(3)	ICC Statement - General	7-May-21
7	CAR-OTP-2130-1538	Rule 68(3)	ICC Statement - Translation - FRA	7-May-2021 10-May-2021
8	CAR-OTP-2130-4475 (to be uploaded to Ecourt tomorrow, 12 May 2021)	Rule 68(3)	ICC Statement - General	7-May-21

Kind regards,

[REDACTED]
 OTP Case Manager

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From: [REDACTED]
Sent: 11 May 2021 17:55
To: Trial Chamber V Communications
Cc: D30 Ngaissona Defence Team; OTP CAR IIB Case Management; OTP CAR IIB Managers; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team; D29 Yekatom Defence Team
Subject: Yekatom Defence Documents to be submitted through P-2841

Dear Trial Chamber V,

In accordance with paragraph 63(i) of the Initial Directions of the Conduct of the Proceedings (ICC-01/14-01/18-631), the Defence for Mr Yekatom respectfully seeks the formal submission of the following listed pages of documents used during the cross-examination of P-2841.

Count	Doc ID	Pages submitted	Title	EVD - Date Used
1	CAR-OTP-2102-6174	6204-6206	Facebook Messenger Conversation between [REDACTED] 27 July 2013 to 12 October 2015)	10 May 2021
2	CAR-OTP-2101-9735	9890, 9790	Facebook Messenger Conversation between [REDACTED] 3 March 2013 to 16 January 2015)	10 May 2021

Best regards,

[REDACTED]
 Legal Assistant, Yekatom Defence

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