

Annex 1

Public

From: Trial Chamber V Communications
Sent: 14 June 2021 12:24
To: [REDACTED] Vanderpuye, Kweku; [REDACTED]; Trial Chamber V Communications
Cc: D29 Yekatom Defence Team; D30 Ngaïssona 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 Office [REDACTED]; Chamber Decisions Communication
Subject: RE: Prosecution Submission of evidence following the examination of P-1847
Follow Up Flag: Follow up
Flag Status: Flagged
Categories: Yekatom and Ngaïssona

Dear Counsel,

The Chamber takes note of the below Prosecution's email on the submission of evidence following the examination of P-1847 (email from the Prosecution, 31 March 2021, 16:50), the Ngaïssona Defence's response thereto (email from the Ngaïssona Defence, 1 April 2021, 16:56), the Prosecution's reply to the Ngaïssona Defence's response (email from the Ngaïssona Defence, 2 April 2021, 15:51), as well as the Yekatom Defence's response (email from the Yekatom Defence, 4 April, 2021, at 19:13).

The Prosecution requests to submit a total of seven items used during its examination of P-1847, including the witness's statements of 2017 and 2020 and corresponding translations (items 3, 5 and 6 on the list in its submission email, collectively, the 'Statements'). The Prosecution submits that it tenders the Statements 'as prior inconsistent statements on the basis of [P-1847's] oral testimony'.

The Ngaïssona Defence objects to the submission of the Statements, arguing that (i) the Prosecution should not be permitted to 'impermissibly circumvent the requirements of Rule 68(3)' because the witness's live testimony did not go as expected; (ii) the Prosecution had 'ample opportunities' to question the witness on any inconsistencies based on the Statements, which is sufficient for the Chamber to assess his credibility; (iii) allowing introduction of the Statements would 'force the Chamber into the artificial exercise of having to assess the [S]tatements for purposes of credibility, while at the same time ignoring their substantial content for the purpose of assessing the truth', which is 'clearly prejudicial' to Mr Ngaïssona's rights because the Statements largely relate to Mr Ngaïssona's alleged acts and conduct; and (iv) admitting the Statements without the Defence having had the opportunity to examine the witness on their entirety would cause prejudice to Mr Ngaïssona.

The Prosecution argues that the Ngaïssona Defence's objections should be rejected, on the basis that Rule 68(3) does not apply in the context of a prior inconsistent statement, particularly when made by 'an adverse or hostile witness'. It further argues that formal submission of the Statements (i) establishes the extent of the inconsistencies with P-1847's testimony as regards Mr Ngaïssona's involvement in the planning, structuring, financing, directing, ordering, and liaising with key figures among the Anti-Balaka, including regarding military operations, 'which were not delved into in every respect on direct examination given the length and detail of his prior statements for several reasons, including judicial economy'; (ii) contextualises the particular inconsistencies which arose during questioning by the Prosecution and the Chamber; (iii) bears upon the veracity and accuracy of the witness's testimony elicited on cross-examination; (iv) demonstrates the cohesiveness of the Statements in contradiction to the witness's claims during his testimony; and (v) is relevant to the completeness of the record regarding also the circumstances under which the Statements were made. Lastly, the Prosecution submits that although the Statements are recognisable under Article 69 of the Statute, it 'expressly reserves the right to reclassify the basis of its submission under rule 68(2)(d), pending further confirmation of interference in respect of its preliminary investigation'.

The Yekatom Defence opposes the submission of the Statements, arguing that (i) to the extent that portions were discussed with the witness during his testimony, those portions, and P-1847's comments thereon, are adequately reflected on the record; (ii) the Prosecution's failure to discuss certain portions of the Statements cannot be justified

by ‘several [unspecified] reasons or judicial economy’; (iii) the Chamber has previously held that testimonial evidence is inadmissible when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court’s applicable law are not met; (iv) the Appeals Chamber has found that the suggested distinction between testimonial evidence submitted for the truth of its content and evidence submitted for impeachment purposes ‘has no statutory foundation’; (v) the Prosecution’s reliance on the *lex generalis* of Article 69(4) is misplaced in light of the *lex specialis* of Rule 68 for submission of prior recorded testimony; (vi) the conditions under Rule 68 are not met; and (vii) noting that the Prosecution has not examined the witness on the acts and conduct of Mr Yekatom, formal submission of the Statements including information on these matters would be contrary to Mr Yekatom’s right to examine witnesses against him.

At the outset, the Chamber notes that the Statements constitute a record of the interviews conducted by the Prosecution’s investigators with P-1847 and that the witness was informed that his interviews could be used in the context of the proceedings before the ICC. The witness agreed to answer the questions and tell the truth, and the Statements are therefore testimonial in nature.

In this regard, the Chamber recalls its previous finding that ‘[e]vidence which is testimonial in nature is [...] inadmissible [...] when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court’s applicable law are not met’ (Initial Directions on the Conduct of the Proceedings, 28 August 2020, ICC-01/14-01/18-631, para. 56).

Rule 68(3) allows for the introduction of the prior recorded testimony of a witness who is present before the Trial Chamber, under the condition that the Prosecution, the Defence and the Chamber ‘have the opportunity to examine the witness during the proceedings’ and that the witness ‘does not object to the submission of the previously recorded testimony’. Noting that P-1847 distanced himself from parts of his statements, the latter condition is presently not satisfied. Accordingly, Rule 68(3) is not a proper avenue for submission of the Statements.

As regards the Prosecution’s submission that the Statements are not submitted ‘for the truth of their content’ but as ‘prior inconsistent testimony’ for an ‘adverse or hostile witness’ for the purpose of assessing the witness’s credibility, the Chamber notes that the Appeals Chamber has found that such distinction has ‘no statutory foundation’, as it is neither supported by Rule 68 nor any other provision in the legal framework of the Court (*see The Prosecutor v. Jean-Pierre Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, 8 March 2018, ICC-01/05-01/13-2275-Red, footnote 693).

Accordingly, the Chamber rejects the Prosecution’s request in this regard. This is without prejudice to consideration of any request under Rule 68(2) that may be submitted in compliance with the applicable requirements.

In light of the above, and noting the absence of grounds precluding the submission of the remaining items submitted by the Prosecution, the Chamber recognises as formally submitted the following items submitted by the Prosecution (items 1, 2, 4 and 7 in the email from the Prosecution, 31 March 2021, at 16:50):

CAR-OTP-2000-0630

CAR-OTP-2060-0678

CAR-OTP-2069-3544

CAR-OTP-2124-0852

The Registry is directed to proceed in accordance with paragraph 63(v) of the Initial Directions on the Conduct of the Proceedings, ICC-01/14-01/18-631.

Kind regards,
TCV

From: [REDACTED]

Sent: 04 April 2021 19:13

To: Vanderpuye, Kweku [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

In any event, the Defence submits that conditions under Rule 68 are not met; in this regard the Defence highlights that i) the Documents contain evidence going to the acts and conduct of Mr Yekatom (see e.g. CAR-OTP-2061-1534-R01, para. 120; and CAR-OTP-2122-8251-R01, para. 137); ii) the Documents are not accompanied by Rule 68(2)(b)(ii)-(iii) declarations; and iii) the Prosecution has failed to comply, in multiple respects, with the Chamber's directions as regards seeking relief under Rule 68 (see, ICC-01/14-01/18-631, paras 32-35). As regards the latter, the Defence recalls that the applicable Rule 68(2)/(3) deadlines were set by the Trial Chamber expressly in consideration of Defence preparation for trial and the rights of the Accused (ICC-01/14-01/18-685, paras 15-18).

(Without prejudice to the Defence's position as regards the applicability of Rule 68(3) in the circumstances) the Defence further notes that the Prosecution did not attempt to tender the Documents while P-1847 was before the Chamber, pursuant to Rule 68(3). The Prosecution's strategic decision in this regard, coupled with the contours of the evidence actually elicited during the testimony of P-1847 in relation to Mr Yekatom, necessarily informed the Defence's decision not to cross-examine the witness. In this regard, the Defence notes that while the Prosecution included allegations regarding the acts and conduct of Mr Yekatom in its 'Summary of P-1847's Expected Testimony' (see e.g. para. 66), this evidence was not elicited from P-1847, nor was the topic of Mr Yekatom even broached in any meaningful way. Simply put, had P-1847's evidence regarding the acts and conduct of Mr Yekatom been tendered during his testimony, the Defence would have cross-examined him thereon. Formal submission of the Documents at this stage would therefore be contrary to the fairness of these proceedings, and especially Mr Yekatom's fundamental right to examine witnesses brought against him, under Article 67(1)(e).

More broadly, allowing formal submission of the Documents would open the door to wholesale ex post facto tendering of prior recorded testimony by the calling party where a witness's *viva voce* evidence diverged from the latter, without requiring the party to provide the witness the opportunity to clarify or explain the divergence, and in circumvention of the procedural safeguards inherent in the Court's applicable law regarding this category of evidence. It would thus lead to considerable procedural and strategic uncertainty that would damage the integrity of these proceedings.

Lastly, the Defence notes that the Prosecution has reserved its right to resubmit the Documents in future, under Rule 68(2)(d). The Prosecution's intentions in this regard render its reliance on Article 69(4) all the more inappropriate. Rule 68(2)(d)(i) contains a number of preconditions that act to ensure that evidence tendered under this rule does not unduly prejudice an accused – including, notably, that 'reasonable efforts have been made [...] to secure from the witness all material facts known to the witness'. In the circumstances therefore, tendering the Documents through the *lex generalis* of Article 69(4) would allow the Prosecution to unduly circumvent these procedural safeguards to the prejudice of Mr Yekatom, as no reasonable efforts were made to secure from P-1847 evidence regarding Mr. Yekatom.

Should the Chamber so require, the Defence stands ready to file formal submissions on this matter.

Best regards,



Legal Assistant, Yekatom Defence

From: Vanderpuye, Kweku [REDACTED]
Sent: 02 April 2021 15:51
To: [REDACTED] <[REDACTED]>; Trial Chamber V Communications <[REDACTED]>
Cc: D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPC [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: RE: Prosecution Submission of evidence following the examination of P-1847

Dear Trial Chamber V,

The Defence contentions opposing the formal submission of P-1847's Statements of 2017 and 2020 ("Prior Inconsistent Statements") are unavailing. They should be rejected.

First, rule 68 does not apply in the context of a prior inconsistent statement, particularly when *made by an adverse or hostile witness*. Followed to its logical extension, the Defence's argument would preclude introducing a written inconsistent statement of an Accused for instance, unless the Accused also "does not object to [its] submission" under 68(3). The result is manifestly inconsistent with the Chamber's statutory duty to search for the truth and corresponding right to the free assessment of evidence.

The introduction of a prior inconsistent statement of an adverse or hostile witness (similar to that of an Accused) falls outside rule 68(3) for the very reason that the applicable criteria cannot be satisfied given that such witness has by virtue of the inconsistency distanced themselves from their prior statement. Thus, they are properly recognisable as formally submitted under article 69(4) (*see generally*, ICC-02/04-01/15-985-AnxXVI, pp. 6-7; ICC-01/05-01/13-1478-Red-Corr, para. 34; ICC-01/05-01/13-1524, para. 17; ICC-01/04-01/06-2595-Red-Corr, para. 50; ICC-01/05-01/08-1028, para. 12; ICC-01/05-01/08-1471, para. 9; *Simba v. Prosecutor*, ICTR-01-76-A, Judgement, 27 November 2007, para. 20; and *see also Prosecutor v. Gotovina, et al.*, Case No. IT-06-90-T, Guidance on the Admissibility into Evidence of Unattested Parts of Rule 92ter Statements as Previous Inconsistent Statements, 30 March 2010, para. 8-10; and *see Prosecutor v. Stanisic and Simatovic*, Case No. 17-03-69-T, Decision on admission into evidence of prior testimony, statement and related documents concerning Witness JF-052, 28 January 2011, para. 6 (noting that prior inconsistent statements may also be admitted for their truth); *Prosecutor v. Popovic et al.*, Case No. IT-OS-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, 1 February 2008, paras. 31 and 32.

Second, P-1847's testimony unequivocally sought to distance his prior statements regarding NGAISSONA, and particularly the Accused's involvement in the planning, structuring, financing, directing, ordering, and liaising with key figures among the Anti-Balaka, including regarding military operations. The formal submission of P-1847's Prior Inconsistent Statements in whole (1) establishes the extent of his inconsistencies concerning these categories of his testimony – which were not delved into in every respect on direct examination given the length and detail of his prior statements for several reasons, including judicial economy; (2) contextualises the particular inconsistencies which arose during questioning by the Prosecution and the Chamber; (3) bears upon the veracity and accuracy of the witness's testimony elicited on cross-examination; (4) demonstrates the cohesiveness of the Prior Inconsistent Statements in contradistinction to the witness's claims not to have stated certain facts, errors which were not addressed, or his assertion that Prosecution investigators included extraneous information; and (5) is relevant to the completeness of the record regarding not only what the witness said previously, but the circumstances under which the Prior Inconsistent Statements were made initially, adopted, and indeed repeated, among the two distinct statements in 2017 and 2020.

Lastly, although P-1847's Prior Inconsistent Statements are presently submitted on the basis of their inconsistency and formally recognisable as such under article 69, particularly given his 'adverse' nature, the Prosecution *expressly* reserves the right to reclassify the basis of its submission under rule 68(2)(d), pending further confirmation of interference in respect of its preliminary investigation.

Kind regards,

Kweku Vanderpuye

From: Giudici, Chiara [REDACTED]
Sent: 01 April 2021 16:56
To: [REDACTED]; Trial Chamber V Communications [REDACTED]
Cc: D29 Yekatom Defence Team [REDACTED]; D30 Ngaïssona 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]
Subject: Re: Prosecution Submission of evidence following the examination of P-1847

Dear Trial Chamber V,

The Defence of Mr Ngaïssona ("Defence") objects to the Prosecution's request to tender the witness' prior statements (items 3, 5 and 6 of the Prosecution's list). The Defence respectfully submits that, had the Prosecutor wanted to introduce P-1847's written testimony, it could have done so by submitting a formal request pursuant to Rule 68(3) of the Rules of Procedure and Evidence and the Decision on the Initial Directions on the Conduct of the Proceedings (ICC-01/14-01/18-631, para. 56). However, the Prosecution chose not to do so. At this stage, the Prosecution should not be permitted to impermissibly circumvent the requirements of Rule 68(3) and the Chamber's Directions because the witness' live testimony did not go as the Prosecution expected. Furthermore, the Defence notes that the Prosecution appears to suggest that the purpose of the tendering would be limited to assessing inconsistencies between the witness' prior statements and his live testimony. However, the Defence submits that the Prosecution had ample opportunities to put the inconsistencies to the witness based on his prior statements during the witness' examination. Therefore, the Chamber has - based on the transcript of the live testimony - sufficient information before it to assess the credibility of the witness. The submission of the full statement outside the boundaries of Rule 68(3) is thus not necessary for this assessment. Moreover, the Defence respectfully submits that allowing the introduction of the written statements for the sole purpose of assessing the witness' credibility would force the Chamber into the artificial exercise of having to assess the statements for purpose of credibility, while at the same time ignoring their substantial content for the purpose of assessing the truth. Such an artificial exercise is clearly prejudicial to Mr Ngaïssona's rights, insofar as the witness' written testimony largely relates to Mr Ngaïssona's alleged acts and conduct. Lastly, the Defence submits that the admission of P-1847's written statements as requested by the Prosecution would result in a situation whereby the statements would be admitted in full, without the Defence having had the opportunity to examine the witness on the entirety of his statements and address other inconsistencies, which were not addressed by the Prosecution. Indeed, had the Defence known that it was the Prosecution's intention to tender the statements post-testimony, it might have made different strategic choices during its cross-examination. The witness' testimony now being over, the prejudice caused by the belated submission cannot be cured.

For these reasons, the Prosecution's request to tender the prior written statements of P-1847 should be rejected.

Cordially Yours,

[REDACTED]
Case manager - on behalf of the Defence team of Mr Patrice-Edouard Ngaïssona

From: [REDACTED]
Sent: Wednesday, March 31, 2021 4:50 PM
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: Prosecution Submission of evidence following the examination of P-1847

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-1847. The submitted documents were discussed with the witness during the course of his direct examination. In respect of the witnesses prior statements, the Prosecution tenders these as prior inconsistent statements on the basis of his oral testimony (*see e.g.*, ICC-01/05-01/13-1478-Red-Corr, para. 34). The Prosecution, therefore, requests that they be recognised as formally submitted.

Count	Doc ID	WIT – Used through	Type	EVD - Date	EVD – Participant Tendering	Request Submission
1	CAR-OTP-2000-0630	CAR-OTP-P-1847	Audio / Video Material	26-Mar-2021	OTP	Yes
2	CAR-OTP-2060-0678	CAR-OTP-P-1847	Translation - FRA	26-Mar-2021	OTP	Yes
3	CAR-OTP-2061-1534	CAR-OTP-P-1847	ICC Statement - General	29-Mar-2021	OTP	Yes
4	CAR-OTP-2069-3544	CAR-OTP-P-1847	Correspondence - Letter	29-Mar-2021	OTP	Yes
5	CAR-OTP-2107-0102	CAR-OTP-P-1847	ICC Statement - Translation - ENG	29-Mar-2021	OTP	Yes
6	CAR-OTP-2122-8251	CAR-OTP-P-1847	ICC Statement - General	29-Mar-2021	OTP	Yes
7	CAR-OTP-2124-0852	CAR-OTP-P-1847	Contract / Agreement	29-Mar-2021	OTP	Yes

Kind regards,

[REDACTED]
OTP Case Manager

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