

ANNEX 25

PUBLIC

From: Trial Chamber V Communications
Sent: 20 August 2021 10:16
To: Vanderpuye, Kweku; [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; Chamber Decisions Communication; Associate Legal Officer-Court Officer
Subject: RE: Rule 68 statements and public hearings
Follow Up Flag: Follow up
Flag Status: Flagged
Categories: Yekatom and Ngaissona

Dear Counsel,

Noting the numerous communications already received on the matter, the Chamber considers that it is fully informed about the Prosecution's concerns and sees no need to spend any valuable hearing time on discussing these further.

The Chamber further considers that the issues raised in the Prosecution's latest submissions (*see emails below*) do not warrant any reconsideration of its decision of 3 June 2021, at 15:58 regarding the publishing of prior recorded testimonies as such.

However, in light of the issues raised, the Chamber is willing to allow further flexibility regarding the deadline for the publishing (*see also* email from the Chamber on 18 June 2021, at 18:14). In this regard, it notes that the Prosecution's core concern appears to be the publishing of the prior recorded testimonies during the course of its case. Accordingly, the Chamber amends the imposed deadline of the calling participant to propose redacted versions of the written records of the prior recorded testimonies to 30 days after the last day of the last witness's testimony. That notwithstanding, the Chamber expects that the Prosecution will publish prior recorded testimonies already before this deadline whenever this is possible for a specific witness.

Kind regards, TC V

From: Vanderpuye, Kweku [REDACTED]
Sent: 23 July 2021 16:21
To: [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]
Subject: RE: Rule 68 statements and public hearings

Dear Trial Chamber V,

All,

In respect of the provision of proposed public redacted versions of its Rule 68 witness statements, the Prosecution would again reiterate its request to be heard on the matter. If this is not feasible, we would like to add the following for the Chamber's consideration.

When the Prosecution interviews a witness and takes his/her statement, the witness is informed that their statement is *confidential*, disclosable only to the Parties, Participants, and the Chamber (as is reflected in the Court's longstanding practice, and the introductory paragraphs of each statement). The public dissemination or archiving of these statements now without the consent of the witness therefore raises an ethical issue, in the sense that this was never a condition made known to the witness in *advance* of providing their cooperation. At a minimum, the Prosecution seeks that the Chamber limit the publication of statements to those witnesses for whom express consent may be obtained.

Additionally, the Prosecution stresses that witness statements usually contain confidential information. This includes information about third parties or information obtained from third parties, who in turn provided that information to a given witness confidentially (for example, P-0287's statement contains information obtained from individuals he interviewed). Publicising that information now without the consent of the individuals concerned jeopardises not only future investigations (i.e., when individuals realise that what they tell ICC investigators in relative confidence may be made *public*), but also jeopardises cooperation with organisations who collect information from third parties (e.g. the UN, HRW, etc.). The Prosecution's cooperation with such entities would undoubtedly end if they would come to realise that we cannot guarantee confidentiality of the information they provide vis-a-vis the public.

Finally, at the national level, in high-level cases or large scale crimes (such as 'mafia cases'), the public dissemination of confidential statements is virtually never realised in light of clear security risks and often ongoing investigations. Clearly, the publicity of the proceedings is important. However, we believe that the principle should not end, or significantly hamper the Prosecution's ability to conduct investigations and/or collect information confidentially in the discharge of its statutory mandate, present risks to witnesses whose continued cooperation is necessary to those ends, or chill prospective witnesses from involving themselves with the Court.

As previously indicated, providing redacted versions of the summaries of witnesses' anticipated testimony would best balance the Prosecution's concerns while also adequately addressing the publicity of the proceedings. Alternatively, the Prosecution seeks that the Chamber's directive apply only to those witnesses who provide their express consent to the publication of their statements, as appropriately redacted.

In the interim, the Prosecution is discharging the Chamber's directive to the best of its ability, and intends to make proposed redacted versions of the current rule 68(3) statements available at the earliest. We have discussed this with the Defence, who are not opposed to a limited extension of time for the Prosecution to do so. That said, we believe that we can make available the first group of statements subject to the Chamber's directive by Monday next. We maintain our position with respect to the non-publication of such statements on the Court's website as a matter of policy, particularly during the course of the Prosecution's case, but will endeavour to work with the Parties and Participants on a viable way forward. Thank you.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: 08 July 2021 12:46
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]
Subject: Rule 68 statements and public hearings

Dear Trial Chamber V,

Thank you for your consideration of this matter and the acknowledgement of the time and resource constraints associated with discharging the Chamber's Direction on making rule 68 statements public. Although the revision of

the timelines attendant to the original direction is helpful, the Prosecution respectfully requests an opportunity to be heard regarding the requirement, time allotments, and the feasibility of implementing the direction.

Applying redactions to rule 68 materials such that they can be made public is far more burdensome and time-consuming than, for example, applying standard redactions to materials in the context of *inter partes* disclosure. As the public cannot be bound by protocols or rules which serve as a safeguard against inadvertences, the dissemination of witness materials requires flawless review and scrutiny. There is simply no margin for error, and this applies not only vertically – within a given statement and its associated exhibits concerning information about witnesses, family members, and innocent third parties; but also, horizontally – across them to related witnesses. Moreover, this extends to the redaction of information concerning identifying circumstances and events. Done correctly, it entails a complex and massive undertaking.

Given the permanence of publishing information on the Court's website, an omission or mistake in the implementation of redactions that may reveal information potentially harmful to witnesses cannot be fully corrected. Because of this, the level of scrutiny must be heightened and multiple layers of quality control implemented, requiring the allocation of significant Prosecution staff and resources, that are not currently available. The Prosecution is highly concerned about the revelation of witness statements publicly during the course of its case-in-chief, and considers that this introduces a potential avenue for further interference with witnesses at a relatively early stage of the proceedings.

We consider that an opportunity to be heard on this issue, would further allow for the Chamber's consideration of perhaps alternative solutions to accommodate the interests of 'publicity', considering the substantial burden imposed. For instance, at the ad hoc Tribunal's, Chambers have accepted public summaries of the witness's intended testimony as a suitable means of ensuring publicity, while maintaining the integrity of the proceedings in the context of the equivalent of rule 68(3) Statements. Utilising redacted summaries would be particularly effective in this case, where lengthy transcripts may be tendered under the rule. Such a device would be more manageable and efficient to apply – albeit, it not comprise 'prior testimony', as such.

In any case, the Prosecution believes that the Chamber may reasonably benefit from receiving a full exposition of precisely what is required for the Prosecution to meet its statutory obligations pursuant to article 68 in view of the Chamber's article 67(1) concerns. This issue may seriously impact the prospective safety, security, and well-being of victims and witnesses in this case, and particularly in view of the prevalent security situation attendant to these proceedings in CAR, which must be specifically assessed and balanced per article 67(1) and 68(2).

As has been the case throughout these proceedings, it goes without saying that the Prosecution will do its best to meet the Chamber's expectations should the Chamber maintain its assessment of the balance of competing statutory interests and attendant burdens upon a full airing of the relevant factors and considerations by the Parties and Participants.

Thank you again for your consideration.

Kind regards,

On behalf of
Kweku Vanderpuye