

# Annex 36

**From:** Trial Chamber V Communications  
**Sent:** 29 September 2021 10:00  
**To:** [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 Officer; [REDACTED]  
**Subject:** [REDACTED] Chamber Decisions Communication  
 RE: OTP request to add P-0306's Annexes to List of Evidence

Dear counsel,

The Single Judge takes note of the Prosecution's request to add four items to its List of Evidence (ICC-01/14-01/18-724-Conf-AnxC-Corr) (the 'Request'), and the Yekatom and Ngaïssona Defence's objections thereto (see emails below).

The Single Judge recalls that while the Chamber ordered the Prosecution to provide its List of Evidence 90 days before the commencement of the trial, 'containing the materials which the Prosecution intends to submit as evidence during trial', it accepted that materials could be added after the expiration of the time limit with the Chamber's leave (see ICC-01/14-01/18-589, paras 14, 16, p. 10). He further recalls the applicable law for requests to add items to the List of Evidence, as set out in previous decisions (see ICC-01/14-01/18-989-Conf, paras 5-6; ICC-01/14-01/18-1080-Conf, para. 7).

With regard to the Prosecution's submission that the items were neither disclosed nor added to its List of Evidence on 9 November 2020 '[d]ue to an administrative oversight linked to the unique nature of this witness's security situation, and redactions applied to his identity', the Single Judge considers that such errors are unfortunate and should be avoided. However, the Single Judge is mindful that at times errors may occur and, insofar as made in good faith and in the absence of any indication of abuse, do not constitute an impediment to adding items to the List of Evidence. The Single Judge recalls that it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any circumstances, be used by the Prosecution at trial if not included in the List of Evidence three months before the trial commences.

In addition, the Single Judge notes that the Prosecution disclosed the items in question on 2 July 2021, and included them in the list of documents which was sent to the participants on 21 September 2021. Accordingly, the Defence was aware of the existence and content of these items almost three months in advance of P-0306's testimony, and knew of their inclusion into the Prosecution's list of documents almost one week before this testimony. Moreover, the Single Judge notes the limited volume of the documents (comprising five pages in total).

Further considering that the items seem to bear prospective significance to the proceedings, that their addition to the Prosecution's List of Evidence is in the interest of the Chamber's determination of the truth and that the Chamber could rely on them *proprio motu*, the Single Judge grants the Request.

Finally, the Single Judge instructs the Prosecution to thoroughly review its List of Evidence for completeness. He expects that, going forward, all documents to be relied upon during the hearings are included in the List of Evidence and that any additions thereto are sought on an exceptional basis and in a timely manner in advance of the hearing to avoid wasting valuable court time.

Kind regards, TC V

**From:** [REDACTED]  
**Sent:** 29 September 2021 09:53  
**To:** [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
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[REDACTED]  
[REDACTED]  
**Subject:** RE: OTP request to add P-0306's Annexes to List of Evidence

Dear Trial Chamber V,

Dear all,

The Defence for Patrice-Edouard Ngaïssona fully supports and joins in the arguments made by the Yekatom Defence in its response.

Kind Regards,

[REDACTED]  
Legal Assistant for the Defence of Patrice-Edouard Ngaïssona

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**From:** [REDACTED]

**Sent:** 28 September 2021 17:56

**To:** [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 Officer; [REDACTED]

**Subject:** RE: OTP request to add P-0306's Annexes to List of Evidence

Dear Trial Chamber V,

While, as conceded earlier, the prejudice to Mr Yekatom remains very limited, the Defence would nonetheless object to the late addition of these documents on the basis of the lateness of the Prosecution's request, and its failure to show good cause for this late addition (see, ICC-01/14-01/18-989-Conf, para 5).

It is submitted that administrative oversight does not comprise good cause in the circumstances. The Prosecution has had these documents in its possession since [REDACTED]. In this regard, it is notable that while the transcripts of P-0306's [REDACTED] interview (during which the Documents were discussed) do in fact appear in the List of Evidence (see, CAR-OTP-2118-4791 and CAR-OTP-2118-4813).

Further, the Prosecution could have sought their addition to the List of Evidence at any point since the 9 November 2020 deadline, but most notably: i) when the documents were first disclosed to the Defence (on 2 July 2021); ii) when the Prosecution tendered these documents in its Rule 68(3) request in relation to P-0306 (ICC-01/14-01/18-1057-Conf, filed on 9 July 2021); and iii) when the Prosecution included these documents in its List of Material, circulated on 21 September 2021. It is noted that the Prosecution has previously expressly sought leave for late amendments to its List of Evidence through formal filings on two occasions to date (see, ICC-01/14-01/18-1042-Conf and ICC-01/14-01/18-958-Conf). The Defence further submits that the fact that P-0306 was subject to delayed disclosure orders does not comprise good cause for late addition, not least given the Chamber's 13 November 2020 order that lesser redacted versions of P-0306's transcripts be disclosed (ICC-01/14-01/18-728-Conf-Red).

Should the Chamber be minded to grant the request, the Defence would respectfully request that the Chamber issue a direction to the effect that a calling party is responsible for systematically checking that documents included on each witness-specific list of material duly feature on that party's List of Evidence. It is submitted that such a direction is necessary so as to ensure that amendments can be sought and litigated in a timely manner in accordance with the established procedure; that valuable court time is not unduly expended litigating such matters; and that reliance on non-listed documents during a witness's testimony is not justified by the mere fact that the documents appear on the list of material and thereby presented as a fait accompli.

The above notwithstanding, the Defence is of course recognisant of the Chamber's power to rely on these documents *proprio motu*, as alluded to by the Presiding Judge earlier today.

Kind regards,

[REDACTED]

Legal Assistant, Yekatom Defence

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**From:** [REDACTED]  
**Sent:** 28 September 2021 17:37  
**To:** 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]  
**Subject:** OTP request to add P-0306's Annexes to List of Evidence

Dear Trial Chamber V,

The Prosecution seeks the authorisation to add P-0306's following four annexes to its List of Evidence:

- CAR-OTP-2120-0598
- CAR-OTP-2120-0599
- CAR-OTP-2120-0600
- CAR-OTP-2120-0601

Due to an administrative oversight linked to the unique nature of this witness's security situation, and redactions applied to his identity, the Annexes were not disclosed or added to the Prosecution's List of Evidence filed on 9 November 2020. These Annexes were nevertheless disclosed, as incriminating evidence, to the Defence on 2 July 2021, following the lifting of identity redactions to the witness. They were also included in the Prosecution's List of Documents for the Examination of Witness P-0306. Therefore Defence had sufficient notice of the Prosecution's intended use of this material with P-0306.

Kind regards,

On behalf of OTP Trial Team

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