

ANNEX 1

PUBLIC

From: Trial Chamber V Communications
Sent: 03 November 2021 14:52
To: Vanderpuye, Kweku; [REDACTED]
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; [REDACTED] Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: RE: OTP Request to add to List of Exhibits of P-2843

Dear Counsel,

The Single Judge takes note of the below emails regarding the Prosecution's request to add four items to its list of materials for the examination of P-2843.

The Single Judge notes, as also highlighted by the Ngaissona Defence, that these four items are not included in the Prosecution's List of Evidence.

In this regard, the Single Judge recalls that he had previously instructed the Prosecution to thoroughly review its List of Evidence for completeness and indicated that '[h]e 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'.

Accordingly, the Single Judge instructs the Prosecution to submit a request to add the items in question to its List of Evidence, should this be its intended course of action.

Kind regards, TC V

From: Vanderpuye, Kweku [REDACTED]
Sent: 02 November 2021 19:39
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]
Subject: RE: OTP Request to add to List of Exhibits of P-2843

Dear Trial Chamber V,

Dear All,

The Prosecution does not seek to belabour this issue. However, we underscore that the material at issue is limited in volume and scope and further disclosed some months ago, save the publicly leaked document, which has been readily available from even a basic Google search under the witness's name. Undoubtedly, the Defence would have done so in preparing their respective examinations - particularly given the concerted previous efforts to preclude his appearance altogether.

Although the material disclosed under rule 77 was not designated as 'INCRIM' per the Court's practice, the rule itself expressly encompasses the same (*i.e.*, 'intended for use by the Prosecutor as evidence for the purposes of ... trial'). To suggest that, failing the additional designation here causes undue prejudice given the period of disclosure, is at best

untenable. Moreover, in view of the circumstances attendant to this particular witness and the restrictions on the Prosecution's investigative activities, it cannot reasonably be expected to divine what material may be necessary to elicit his complete and truthful testimony concerning the matters at issue.

The Defence is not disadvantaged. If anything, it has always been better disposed to engage the witness in advance of his testimony than the Prosecution has, given (a) the prior relationship between the Witness and Accused Ngaissona; and (b) that there has never been any *legal* impediment to the Defence investigating directly with the witness what he may know. As noted, the Defence's tactical decision to avoid engaging the witness, belies the claim now advanced.

The Prosecution remains at the Chamber's disposal, should it require further information or explanation. Thank you.

Kind regards,

Kweku Vanderpuye

From: [REDACTED]
Sent: 02 November 2021 19:11
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]
 [REDACTED]
Subject: RE: OTP Request to add to List of Exhibits of P-2843

Dear Trial Chamber V,
 Dear All,

The Defence for Mr Yekatom ('Defence') respectfully supports the Ngaissona Defence submissions.

In addition, the Defence respectfully submits that the Request is insufficiently detailed as regards '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' (see, ICC-01/14-01/18-989-Conf, para. 5) such that the Defence is not in a position to determine the extent to which the sought amendments might cause undue prejudice. Notwithstanding the fact that it is 'difficult to anticipate' what evidence the witness might provide as regards these documents, the Prosecution necessarily has an idea as to their intended purpose and prospective significance going beyond the fact that they 'may prove useful to his examination, including to refreshing recollection'; the Request would not have been made otherwise. The Prosecution's failure to provide the Defence with this information should militate against the granting of the request.

As regards the Prosecution's failure to provide even the most cursory explanation for their addition at this late stage, the Defence notes especially that the documents (with the exception of the previously undisclosed document CAR-OTP-2130-1031) had been disclosed under Rule 77. It thus appears that the request is motivated by a late change in the Prosecution case as regards the purpose and significance of these documents and the anticipated evidence of this witness, which is fundamentally opposed to the very purpose of the final deadline for the List of Evidence - itself further cause to deny the Request.

Best regards,

[REDACTED]
 Legal Assistant, Yekatom Defence

From: [REDACTED]
Sent: 02 November 2021 17:26
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]
[REDACTED]
Subject: RE: OTP Request to add to List of Exhibits of P-2843

Dear Trial Chamber V,
Dear All,

The Defence for Mr Ngaïssona objects to the late addition of the four documents to the Prosecution's list of material for witness P-2843.

These four documents are not included in the Prosecution's list of evidence (LoE), nor did Prosecution seek to have them added to its LoE. CAR-OTP-2130-1031 has yet been disclosed to the Defence, despite it having been leaked, it seems [REDACTED]

As held by the Chamber, "it must be determined in the concrete circumstances whether reliance by the Prosecution on items additional to those included in the initial list of evidence causes undue prejudice to the procedural rights of the Defence. Factors to be considered in this determination include, *inter alia*, the extent to which the requested addition is opposed by the Defence, the time when the addition was sought, the nature and amount of the material concerned, 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." (ICC-01/14-01/18-989-Conf, para. 5)

First, the timing of the request at such a late stage to both the LoE and the Prosecution's examination list – a mere two and a half days before the start of the witness testimony – is prejudicial to the Defence, especially given the Prosecution has not substantiated the "intended purpose of [its] (...) reliance on such material", nor "its prospective significance in light of the charges", as held by the Chamber. Rather, apart from the brief comment in its email that CAR-OTP-2133-7314 would be used for the phone attribution, the Prosecution merely makes general statements about the alleged relevance of the documents (ie. "the material below may prove useful to his examination").

Second, the Prosecution could have sought their addition to the List of Evidence at any moment since the 9 November 2020 deadline, and in particular, when the documents were first disclosed to the Defence, in February, June and July 2021 respectively, and again, when the Prosecution filed its examination list for P-2843. As it concerns the document which the Prosecution has not yet disclosed (CAR-OTP-2130-1031), it appears this document was published online [REDACTED] The Prosecution provides no information as to why this document was not previously disclosed to the Defence, let alone to support the absence of a prior request to amend its LoE to include this document. The Prosecution provides no information to explain how it came into possession of this document, and at which stage. There is no reason which would justify its late disclosure and reliance at trial for Witness P-2843.

Third, the Defence recalls the Chamber's recent specific instructions to the Prosecution, that it "thoroughly review its List of Evidence for completeness" and 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" (email from the Trial Chamber V, 9 September 2021, 10:00).

For these reasons, the Defence for Mr Ngaïssona respectfully requests the Chamber to reject the Prosecution's request.

Kind regards,

Legal Assistant, Defence for Mr Ngaissona

From: [REDACTED]
Sent: 02 November 2021 14:16
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];
 [REDACTED]
Subject: RE: OTP Request to add to List of Exhibits of P-2843

Dear Trial Chamber,
 Dear All,

Please note that the list of Exhibits is related to the upcoming witness P-2843

The Prosecution seeks the addition of the following documents to its Examination List. With the exception of CAR-OTP-2130-1031 (a publicly leaked document [REDACTED] a courtesy copy is attached) which remains available on the internet), all have been previously disclosed by the Prosecution, albeit characterised under rule 77.

Of course, is difficult to anticipate what this Witness may commit to say in the circumstances of his calling. However, we consider that the material below may prove useful to his examination, including to refreshing recollection, and may further assist and advance the Chamber's evaluation of his evidence and determination of the truth.

The Prosecution remains at the disposal of the Chamber should it require any further information or explanation. Thank you.

- CAR-OTP-2130-5493 [CAF Directory for the phone attribution which is also publicly available at <https://docplayer.net/51470676-Caf-standing-committees-2015.html> : Trial Rule 77 package 55, 30 July 2021
- CAR-OTP-2133-7314 [REDACTED] – for the phone attribution]- Trial Rule 77 package 49, 04 June 2021
- CAR-OTP-2130-3372: Pre-Trial Rule 77 package 28, 10 February 2021

Kind regards,

On behalf of OTP Trial Team

From: [REDACTED]
Sent: 02 November 2021 14:05
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];
 [REDACTED]
Subject: OTP Request to add to List of Exhibits

Dear Trial Chamber,

Dear All,

The Prosecution seeks the addition of the following documents to its Examination List. With the exception of CAR-OTP-2130-1031 (a publicly leaked document [REDACTED] a courtesy copy is attached) which remains available on the internet), all have been previously disclosed by the Prosecution, albeit characterised under rule 77.

Of course, is difficult to anticipate what this Witness may commit to say in the circumstances of his calling. However, we consider that the material below may prove useful to his examination, including to refreshing recollection, and may further assist and advance the Chamber's evaluation of his evidence and determination of the truth.

The Prosecution remains at the disposal of the Chamber should it require any further information or explanation. Thank you.

- CAR-OTP-2130-5493 [CAF Directory for the phone attribution which is also publicly available at <https://docplayer.net/51470676-Caf-standing-committees-2015.html> : Trial Rule 77 package 55, 30 July 2021
- CAR-OTP-2133-7314 [REDACTED] for the phone attribution]- Trial Rule 77 package 49, 04 June 2021
- EMAIL – [REDACTED]
[REDACTED] CAR-OTP-2130-3372: Pre-Trial Rule 77 package 28, 10 February 2021

Kind regards,

On behalf of OTP Trial Team

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.