

ANNEX 8
Public Redacted
Version

From: Trial Chamber V Communications
Sent: 15 November 2023 14:51
To: OTP CAR IIB; D29 Yekatom Defence Team; D30 Ngaissona Defence Team; 'V44 LRV Team'; V44 LRV Team OPCV; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber V Communications
Subject: Decision on Yekatom Defence Request for Extension of Page Limits

[ICC] RESTRICTED

Dear Counsel,

The Single Judge takes note of the Prosecution's and CLRV's responses to the Yekatom Defence's request below, as well as the latter's reply.

Having considered the submissions by the participants, the Single Judge is of the view that, irrespective of the merits of a prospective request, given the extent of the issues that the Yekatom Defence expects to raise, there exist exceptional circumstances pursuant to Regulation 37(2) of the Regulations of the Court warranting a certain extension of the page limit. The Single Judge thus grants an extension **of up to 50 pages**.

The same extension is granted to the rest of participants, should they file any response.

Kind regards,

TC V

From: [REDACTED]
Sent: 15 November 2023 12:33
To: Suprun, Dmytro [REDACTED]; OTP CAR IIB [REDACTED] Trial Chamber V Communications [REDACTED]; D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team [REDACTED] V44 LRV Team [REDACTED]; V44 LRV Team OPCV [REDACTED] V45 LRV Team [REDACTED]
Cc: Associate Legal Officer-Court Officer [REDACTED] Chamber Decisions Communication [REDACTED]
Subject: Re: Order on Yekatom Defence Request for Extension of Page Limits

[ICC] RESTRICTED

[ICC] RESTRICTED

Dear Trial Chamber V,

Dear all,

The Defence for Mr Yekatom respectfully seeks leave to reply on one discrete point which could not have been anticipated in its request for an extension of page limits – namely whether there is a procedural bar from seeking to exclude evidence at this juncture.

In opposing the extension request, the Prosecution and the CLRV mischaracterise the Exclusion Request – without having seen it – as an attempt to impugn the credibility of the Witnesses. This is inaccurate on two points.

First – the Exclusion Request is premised entirely on the Prosecution’s investigative failures which amount to violations of articles 54 and 67. Submissions concerning the Prosecution’s conduct do not concern witness testimony and indeed, it would have been inappropriate to have raised such arguments with the witnesses directly. This is not therefore an attempt to have a ‘running commentary on witnesses’ credibility’ – rather it is an assessment of the Prosecution’s failure to meet its investigative duties and powers as set out in the statutory framework.

Second – and relatedly, article 69(7) exists for the very purpose of expunging evidence which is substantially unreliable and/or is antithetical to and would seriously damage the integrity of the proceedings. The article exists to protect both the accuracy and reliability of the Court’s fact-finding as well safeguarding the moral integrity and the legitimacy of the proceedings by requiring that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial.

Given the importance of these protections to the judicial process, an article 69(7) application may be filed as warranted by the facts. This is consistent rule 64(1) which provides for the ability to raise issues concerning the admissibility of evidence after the point of submission and “generally at the first opportunity” as set out in paragraph 61 of the Initial Directions on the Conduct of Proceedings (ICC-01/14-01/18-631).

The current circumstances fall within this exception in that it is only having reviewed the full scope of the Prosecution’s investigative failures – some of which was only apparent following the CLRV1’s case and during the course of Defence investigations ahead of the commencement of its case - that the Defence was in a position to take the decision to seek exclusion of the evidence. Indeed, evidence of investigative violations continues to come to light but the Defence has assessed that there is at this point an overwhelming basis to support the Exclusion Request and that this is the first meaningful opportunity to proceed. Accordingly, given the seriousness of the conclusions made in the Exclusion Request, the Defence felt it necessary to ensure that it had a solid evidential basis to demonstrate the existence of the violations rather than prematurely proceed and file a frivolous motion. The Defence should not be penalised for this position.

Again, the Defence is not seeking to repeat arguments concerning the collusion *per se* – rather it is the role of the Prosecution within the totality of the collusion which is the subject of the Exclusion Request. The Defence respectfully submits that the alarming nature of the Prosecution’s investigative failures warrants the Trial Chamber’s consideration at this stage and not at some subsequent stage in the future.

It is the extent of these prosecutorial and investigative violations which necessitate the extension of the page limits of up to 80 pages so as to allow the Defence a sufficient opportunity to fully set out the violation as well as the detrimental impact on Mr Yekatom's rights and the integrity of these proceedings within the context of article 69(7).

Kind regards

From: Suprun, Dmytro [REDACTED]
Sent: Wednesday, November 15, 2023 9:16 AM
To: OTP CAR IIB [REDACTED] Trial Chamber V Communications [REDACTED]
 D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team
 [REDACTED]; V44 LRV Team [REDACTED]; V44 LRV Team OPCV
 [REDACTED]; V45 LRV Team [REDACTED]
Cc: Associate Legal Officer-Court Officer [REDACTED] Chamber Decisions
 Communication [REDACTED]
Subject: RE: Order on Yekatom Defence Request for Extension of Page Limits

[ICC] RESTRICTED

[ICC] RESTRICTED

Dear Trial Chamber V,

The Common Legal Representatives of the Victims jointly also oppose the Yekatom Defence's Request for Extension of Page Limits for the reasons put forward by the Prosecution in its Email correspondence dated 15 November 2023 at 09:01.

Kind regards,
 Dmytro Suprun (CLR1) and Paolina Massidda (for the CLR2 team)

From: OTP CAR IIB [REDACTED]
Sent: Wednesday, November 15, 2023 09:01
To: Trial Chamber V Communications [REDACTED] D29 Yekatom Defence Team
 [REDACTED] D30 Ngaissona Defence Team
 [REDACTED] OTP CAR IIB [REDACTED] 'V44 LRV Team'
 [REDACTED] V44 LRV Team OPCV [REDACTED]; V45 LRV Team
 [REDACTED]
Cc: Associate Legal Officer-Court Officer [REDACTED]; Chamber Decisions
 Communication [REDACTED]
Subject: RE: Order on Yekatom Defence Request for Extension of Page Limits

[ICC] RESTRICTED

Dear Trial Chamber V,

Dear Counsel,

The Prosecution opposes the Yekatom Defence's requested extension of page limits, pursuant to Regulation 37(2). The Request is unfounded given the nature of the prospective filing, namely "the exclusion of evidence of P-2475, P-2018, P-1974, P-0001 and P-0002" ("Witnesses"). Clearly, the threshold and dispositive factor in determining the propriety of a request for an extension of page limits is whether the intended filing is in the first instance (a) legally grounded, and (b) procedurally proper. The intended filing demonstrates neither. Consequently, the requested extension fails.

First, the exclusion of the Witnesses' testimonies — already received in the trial record — presupposes certain legally untenable assumptions: (1) that their evidence, obtained at trial under the direct supervision of the Chamber, was somehow elicited in violation of the Statute — or some other internationally recognised right; (2) that the receipt of the Witnesses' testimonies in those circumstances (i.e., in the course of trial) is per se antithetical to, and seriously damages, the integrity of the proceedings; (3) on that further assumption, the exclusion of the Witnesses' testimony post facto is authorised under the Statute or is otherwise sanctioned as a remedy; and (4) that the Court recognises a 'bright-line' exclusionary rule under article 69(7) — such as the "fruit of the poisonous tree doctrine". As noted, none of these assumptions applies. And, there is no legal basis for the intended article 69(7) filing, as such. Accordingly, the request for the extension of page limits fails to minimally establish a plausible ground on which the prospective filing may be submitted — much less, necessitate its elaboration.

Second, the prospective filing is designed as a vehicle to extrinsically impugn the credibility of the Witnesses in advance of closing submissions. While assailing the credibility of witnesses is entirely appropriate within the context of their trial testimony which, as noted, has already been challenged and received by the Chamber in this case — doing so after the fact is appropriate only when authorised procedurally, expressly or implicitly. This may occur in the context of a rule 68(2)(d) application or a so-called 'no case to answer' proceeding, for instance. Likewise, it may be particularly provided for in the Chamber's conduct of proceedings Decision. Here, the prospective filing is not procedurally grounded. Instead, it seeks (through an untenable application of article 69(7)) that the Chamber gives no weight to the Witnesses' trial testimony. However, the opportunity to raise such arguments or submissions under the statute during the course of trial proceedings is only provided for in the context of the submission approach with respect to the Parties' and Participants' final briefs and/or submissions. The Defence may not invoke article 69(7) — particularly where the request for the page extension only rather demonstrates its inapplicability — in an attempt to have two bites at the apple.

The statutory framework is clear. A running commentary on witnesses' credibility during the course of a trial through collateral is not permissible or proper. As the Chamber has recently recalled in a different context, "the Defence raised on multiple occasion its attention to the existence of an alleged collusion scheme, both in oral and written submission" (ICC-01/14-01/18-2195-Conf, para. 10). To the extent the Defence wishes to challenge the credibility of the Witnesses' and the weight to be accorded their evidence, it has a procedural avenue established in these proceedings in which to raise such issues, namely through its closing submissions and final brief.

The Prosecution considers that the Request fails to present any plausible basis for the Chamber to depart from the 20-pages which the Regulations provide for, and that no prejudice attaches. Thank you.

Kind regards,

On behalf of Kweku Vanderpuye

De : Trial Chamber V Communications [REDACTED]

Envoyé : lundi 13 novembre 2023 11:17

À : D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team

[REDACTED]; OTP CAR IIB [REDACTED] 'V44 LRV Team'

[REDACTED]; V44 LRV Team OPCV [REDACTED] V45 LRV Team

[REDACTED]

Cc : Associate Legal Officer-Court Officer [REDACTED]; Chamber Decisions

Communication [REDACTED] Trial Chamber V Communications
[REDACTED]

Objet : Order on Yekatom Defence Request for Extension of Page Limits

[ICC] RESTRICTED

Dear Counsel,

The Single Judge takes note of the request for an extension of page limit below.

He instructs the participants to provide their responses, if any, by Wednesday 15 November 2023, COB.

Kind regards,

TC V

From: [REDACTED]

Sent: 13 November 2023 10:47

To: Trial Chamber V Communications [REDACTED]

Cc: OTP CAR IIB [REDACTED]; D30 Ngaissona Defence Team [REDACTED];
V45 LRV Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; Associate Legal
Officer-Court Officer [REDACTED]; D29 Yekatom Defence Team

[REDACTED]; V44 LRV Team [REDACTED]

Subject: Request for extension of page limits - Request for the exclusion of evidence of P-2475, P-2018, P-1974, P-0001 and P-0002

[ICC] RESTRICTED

Dear Trial Chamber V,

Dear all,

The Defence for Mr. Yekatom kindly requests an extension of page limits in accordance with regulation 37(2) in respect of its forthcoming 'Request for the exclusion of evidence of P-2475, P-2018, P-1974, P-0001 and P-0002' ('Exclusion Request').

The Defence considers that an extension of up to 80 pages is exceptionally necessary in light of the distinct nature of the request for the exclusion of fabricated evidence concerning Count 29. The Defence submits that such evidence was gathered by the Prosecution as a result of its investigative failures which amounts to violations of articles 54 and 67 of the Statute.

In particular, the extension will allow the Defence to provide the requisite elaboration on:

- the exceptional scale of the conspiracy amongst and between at least 14 individuals who colluded with one another with the intent to falsify evidence to be used (and that has been used) against Mr. Yekatom,
- the large body of documentary and testimonial evidence which demonstrates proof of the fabricated evidence,
- the contours of the Prosecution's investigative powers and duties under the statutory framework, and
- the specific instances and circumstances in which the Prosecution failed to execute its investigative obligations.

The current 20-page limit will undoubtedly hinder the clarity of the Defence's arguments and the substantiation of how the article 69(7) standard is met and the criteria fulfilled. This includes the Defence's submissions setting out

the causal link between the cited violations and the evidence gathered by the Prosecution as well as demonstrating that the fabricated evidence is substantially unreliable, and its exclusion is required by the Chamber in order to preserve the integrity of these proceedings.

The Defence emphasises that the request is critical to the rights of Mr Yekatom and assures the Trial Chamber that it will provide direct and concise argumentation to bring together, for the first time, all the evidence as elicited either in cross-examination and/or review of the Prosecution's disclosure, and gathered in the course of Defence investigations, including Facebook evidence collected by the Defence following the Chamber's granting of its cooperation request to Ireland (ICC-01/14-01/18-1531-Conf-Red);, in a single comprehensive request. The Defence will also for the first time, present a thorough overview of the investigative failures dating back to the Prosecution's initial investigative leads in 2018.

The introduction of falsified evidence as a result of investigative shortcomings in these proceedings is undoubtedly an alarming matter with substantial repercussions. The Defence recalls in this regard substantive parallels with the Lubanga case noting further that in those proceedings, the Defence was granted an extension of 100 pages to set out its arguments concerning the fabrication of evidence through the use of intermediaries and the Prosecution's failure to verify the evidence collected by intermediaries (see ICC-01/04-01/06-2690-Red2 fn. 1).

Finally, the Defence considers that an extension of page limits would serve the interests of all parties and participants in these proceedings as it will allow for a complete understanding of the full scope of the Defence's submissions noting in particular the seriousness of the arguments therein. A single motion, in contrast to several requests for exclusion per identified witness, will therefore facilitate responses and expedite proceedings. Accordingly, the Defence would not oppose the extension of page limits for the remaining parties and participants in response to the Exclusion Request.

Kind regards

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