

# **ANNEX 13**

## **PUBLIC**

**From:** Trial Chamber V Communications  
**Sent:** 25 November 2021 18:54  
**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; [REDACTED]; Chamber Decisions Communication; Associate Legal Officer-Court Officer  
**Subject:** Decision pertaining to the OTP list of material for P-1521  
**Attachments:** RE: OTP Examination list P-1521 and Summary

Dear Counsel,

The Single Judge recalls the Chamber's numerous directions in relation to the procedure for adding items to the list of material for the examination of a witness (*see*, for instance, T-073-CONF-ENG, p. 3, lines 5-15; email decision, 3 November 2021, at 14:52; email decision, 29 September 2021, at 10:00).

In accordance with these directions, and noting that the items in question (CAR-OTP-0080-0678, CAR-OTP-2099-0481 and CAR-OTP-2130-2018) are not on the Prosecution's List of Evidence, the Prosecution is not permitted to use them during its examination of witness P-1521.

Kind regards, TC V

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**From:** Vanderpuye, Kweku [REDACTED]  
**Sent:** 24 November 2021 15:11  
**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]  
**Subject:** RE: OTP Examination list P-1521 and Summary

Dear Trial Chamber,

Dear Counsel,

*First*, referencing of documents in the Examination List and their intended use during the examination (i.e., whether intended for formal submission or not) are distinct notions. Nothing prevents the Prosecution from *listing* documents before seeking leave from the Chamber to *use* them as may be appropriate during the course of the examination, particularly where the issue has been specifically flagged in advance – as we have done.

*Second*, the publicity of documents and material – as was recently pointed out in Court during the examination of P-2232 – relates to the question of their *accessibility* to the Defence and correspondingly, the impact on their 'preparedness' to conduct a given examination. Here, particularly – in the case of NGAISSONA [REDACTED] [REDACTED] it means that it is less likely that the Defence is unaware of the information at hand. *Third*, this fact, together with other duly and timely disclosed information and documents in the case also belie any reasonable claim of prejudice. No plausible argument is made nor can be advanced by the Defence that it is unaware of the information contained in the three documents. *Fourth*, the Defence has, in this case, almost never fully complied with the Chamber's directions in respect

of the timely listing of documents for the examination of Prosecution witnesses. The Prosecution has not objected in those circumstances, notwithstanding the often specious arguments advanced to justify routine delays. The Defence are not without 'unclean hands' here.

The Prosecution further wishes to address head-on what it sees has become a concerted and calculated effort – begun by the Defence during the Pre-Trial phase – to “rack up points” on technical procedural issues, rather than to advance matters of genuine substance and consequence to the case (*see e.g., Prosecutor v. Karadžić*, Case No. IT-95-5/18, Decision on Accused’s 104th and 105th Disclosure Violation Motions, para.35).

We urge the Chamber to focus its attention on the ‘materiality’ and substance of the matter, which here concerns handful of pages regarding information which the Defence already patently know.

Kind regards,

Kweku Vanderpuye

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**From:** [REDACTED]  
**Sent:** 24 November 2021 13:12  
**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]  
**Subject:** RE: OTP Examination list P-1521 and Summary

Dear Trial Chamber V,  
 Dear parties and participants,

The Defence for Mr Ngaïssona ('the Defence') objects to the use of items no. 3, 28 and 36 in the OTP's List of materials during the examination of P-1521 by the calling party.

As correctly pointed out by the Yekatom Defence team, these items are not listed in the Prosecution List of evidence, were never disclosed to the Defence and are not available on e-court or ringtail.

The Defence recalls paragraphs 40 and 41 of the Chamber's "Initial Directions on the Conduct of the Proceedings" (ICC-01/14-01/18-631) according to which

“40. The participants may only use material which has been disclosed. Otherwise, leave of the Chamber must be sought. The participant intending to use any documents shall ensure that electronic, searchable copies of the documents have been uploaded into e-court prior to their use.

41. At least five days before a witness commences testifying, the calling participant shall provide the Chamber and other participants with a list, via email, of any material(s) to be used during its examination of that witness (...).”

The aforementioned paragraphs set clear rules regarding the deadline for the disclosure and the availability of the materials that the calling party intends to use on eCourt. In the case at hand, however, none of these rules were respected. The Prosecution did not timely disclose these three items nor requested leave from the Chamber to use them during the examination of witness P-1521.

The Prosecution's argument regarding two of the three documents, i.e. that they are publicly available, should be rejected. Paragraph 40 of the Chamber's Initial Directions makes no distinction and requires that all items, public or not, must be disclosed prior to the witness's examination. Furthermore, the information provided by the Prosecution as to why these document were not timely disclosed to the Defence is insufficient. According to the Prosecution "Two of the three documents (CAR-OTP-2099-0481, CAR-OTP-2130-2018) concern *publicly available*

material and information obtained after the disclosure deadline". In that case, the Prosecution should have asked for leave to add these three documents in their List of Evidence instead of simply including them in their List of Materials.

As far as the third item (CAR-OTP-0080-0678), the Prosecution argues that [REDACTED] "a fact which is not in dispute and contained in several previously disclosed items, including material otherwise on the Examination List (CAR-OTP-2053-0692; CAR-OTP-0080-0689)". Such an argument however falls short in explaining why it this document was not disclosed earlier, how the Prosecution came into its possession, and at which stage. Consequently, there is no reason which would justify their late disclosure and reliance at trial for Witness P-1521.

The Defence further recalls the Chamber's oral decision on 05 November 2021 (ICC-01/14-01/18-T-073-CONF-ENG ET) regarding the Prosecution's request to add four Items to the List of Materials for Witness P-2843 one day before the witness's examination. The Chamber stated that it "will not tolerate that the Prosecution ignores this procedural step, which is essential to safeguard the procedural rights of the Defence. The Chamber expects the Prosecution to do better in this regard in the future." and rejected the addition of one out of four items which was disclosed to the Defence a day before the witness's examination by the calling party (see (ICC-01/14-01/18-T-073-CONF-ENG ET, page 3, lns 13-15 and page 4, lns 13-18).

The aforementioned decision was not the first time the Chamber warned the Prosecution about its duty to disclose documents ahead of time and to thoroughly review the list of evidence, an example of which is the Chamber's 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 all of the above reasons, the Defence respectfully objects to the use of the aforementioned items.

Sincerely,

[REDACTED]

On behalf of the Defence team for Mr Ngaïssona

[REDACTED]

[REDACTED]

International Criminal Court (ICC)

Telephone number: [REDACTED]

[www.icc-cpi.int](http://www.icc-cpi.int)

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**From:** [REDACTED]

**Sent:** 24 November 2021 12:02

**To:** 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]

[REDACTED]

**Subject:** RE: OTP Examination list P-1521 and Summary

Dear Trial Chamber V,

Dear Colleagues,

Please find attached the hyperlinked list of Exhibits for P-1521.

The Prosecution attaches courtesy copies of three ERNs: CAR-OTP-0080-0678, CAR-OTP-2099-0481, CAR-OTP-2130-2018 on its Examination List for P-1521 that were inadvertently overlooked, and not previously disclosed. We consider that the material *may* comprise rule 77 information and will be formally disclosed at the earliest. The Prosecution notes the Yekatom Defence's objections.

Two of the three documents (CAR-OTP-2099-0481, CAR-OTP-2130-2018) concern *publicly available* material and information obtained after the disclosure deadline. The third (CAR-OTP-0080-0678) [REDACTED] – a fact which is not in dispute and contained in several previously disclosed items, including material otherwise on the Examination List (CAR-OTP-2053-0692; CAR-OTP-0080-0689).

Although the Prosecution may reference this information in its examination of the witness (if necessary), it has no present intention to tender these materials for formal submission.

Please be further advised that the Examination List will be available soon this afternoon in the Ecourt database. To view the materials in e-Court database, please select in the field "CB OTP – PICK" - the value "P-1521". To sort the material in the proper order, please add the field 'CB OTP – 005 tab' to your view and click on the arrow to sort it.

Kind regards,

[REDACTED]  
OTP Case Manager

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**From:** [REDACTED]  
**Sent:** mardi 23 novembre 2021 22:29  
**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 Examination list P-1521 and Summary

Dear Trial Chamber V,  
Dear Colleagues,

The Prosecution attaches its list of materials for Prosecution Witness CAR-OTP-P-1521 and summary. A courtesy copy of the Examination list is attached, as our technical staff are presently working on the hyperlinking and the electronic binder.

Please note that, in principle, the areas that the Prosecution intends to discuss in private session are highlighted in grey in the summary.

Kind regards,

[REDACTED]  
OTP Case Manager

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**From:** [REDACTED]  
**Sent:** 24 November 2021 11:03  
**To:** [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; [REDACTED]  
**Subject:** RE: OTP Examination list P-1521 and Summary

Dear [REDACTED]  
Dear Prosecution,

Many thanks for your e-binder. However the Yekatom Defence hereby notes that in the OTP Examination List of P-1521, three documents are not listed in the Prosecution List of evidence, were never disclosed to the Defence and are not available on e-court or ringtail, *ie.* CAR-OTP-0080-0678, CAR-OTP-2099-0481 and CAR-OTP-2130-2018, respectively numbers 3, 28 and 36 of the OTP Examination List.

The Yekatom Defence would therefore object to the use of these documents during OTP examination.

Best regards,

[REDACTED]  
Legal Assistant, Yekatom Defence

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**From:** [REDACTED]  
**Sent:** 23 November 2021 22:29  
**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 Examination list P-1521 and Summary

Dear Trial Chamber V,  
Dear Colleagues,

The Prosecution attaches its list of materials for Prosecution Witness CAR-OTP-P-1521 and summary. A courtesy copy of the Examination list is attached, as our technical staff are presently working on the hyperlinking and the electronic binder.

Please note that, in principle, the areas that the Prosecution intends to discuss in private session are highlighted in grey in the summary.

Kind regards,

[REDACTED]  
OTP Case Manager

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