

Annex C

From: Trial Chamber VI Communications

Sent: 17 September 2019 11:27

To: 'Bourgon, Stephane'; Samson, Nicole; Trial Chamber VI Communications

Cc: Yirgou, Selamawit; Solano, Julieta; Rabanit, Marion; van der Werf, Hendrik Rens; Gosnell, Christopher; Portier, Margaux; Daria Mascetti; Pellet, Sarah; Suprun, Dmytro; Grabowski, Anne; Kiss, Alejandro; Tchidimbo, Patrick; Bossette, Caroline

Subject: RE: Prosecution Request for Disclosure of Witness D-0305's Statement

Dear Counsel,

The Chamber hereby issues its decision on yesterday's request by the Prosecution for disclosure of a statement of Witness D-0305. The outcome of the request will be placed on the record during today's hearing, and the Chamber will file the parties' email submissions and the present ruling into the record in due course.

Best regards,

On behalf of Trial Chamber VI,

Rogier Bartels

Decision on Prosecution request for disclosure of a statement of Witness D-0305

On 16 September 2019, the Prosecution requested, by email, disclosure of a statement of Witness D-0305, taken by the Defence in May 2019. It argued that, although the statement was not physically shown to the witness during the witness preparation session, its substance was reviewed at some length during this session and therefore, the Prosecution is entitled to review its contents for the purpose of assessing the witness's credibility and reliability. The Prosecution further argued that the Chamber's past decisions on the disclosure of evidence indicate that Defence witness statements shall be disclosed whenever they are available.

The Defence responded on 17 September 2019, by email, opposing the request. It argues that the statement was neither used nor referred to during the witness' preparation session and that therefore, the Defence does not have an obligation to disclose Witness D-0305's statement pursuant to the Statute and the Rules. The Defence specifically points out the difference in the wording of the Defence's disclosure obligations under Rules 78 and 79 of the Rules, as compared to those of the Prosecution set out in Rules 76 and 77 and argues that the Rules do not impose on the Defence any obligation to disclose witness statements unless they are to be tendered as evidence and avers that, once the Chamber determined that the evidence of, *inter alia*, D-0305, was to be proffered *viva voce*, rather than pursuant to Rule 68(3) of the Rules, the statement provided by the witness was no longer 'intended for use' and, accordingly not subject to disclosure under Rule 78. It further argues that the Chamber has not imposed on the Defence any broad disclosure obligations deviating from the framework set out in the Rules.

The Chamber recalls Rules 77-19 and 84 of the Rules of Procedure and Evidence ('Rules'). It notes that the Prosecution avers that it 'is entitled to review the contents of the first meeting for the purpose of assessing the credibility and reliability of Witness D-0305'. Contrary to, for example, the rules of procedure and evidence of the ICTY/IRMT (see Rule 72(A) of the IRMT RPE), the Court's legal framework does not give such an entitlement to the Prosecution. The obligation to disclose all witness statements to be called only relates to the Prosecution, and the corresponding entitlement to such statements only to the Defence. Rule

79 does not include an obligation on the Defence similar to the one imposed on the Prosecution in Rule 76(1) of the Rules.

Furthermore, the Chamber's previous decisions do not create such an obligation. On 30 January 2017, in relation to the conduct of proceedings during the presentation of evidence by the Defence, the Chamber has instructed the Defence to ensure that the information made available to the Chamber, Prosecution, and Legal Representatives, is 'sufficiently detailed [...] to enable the parties, participants and Chamber to prepare meaningfully'. The Defence was permitted to provide this information by way of a summary of the anticipated evidence *or* a witness statement. The Chamber did not impose any disclosure obligation beyond those contained in Rules 78-79 of the Rules. Provided the statement is not 'intended for use by the defence as evidence [...] at trial', no disclosure obligation arises from the aforementioned Rules.

Pursuant to Rule 84 of the Rules, the Chamber may 'make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence'. However, at this stage, the Chamber does not consider it appropriate to make any order for further disclosure. Naturally, the Prosecution is free to explore the Defence's May 2019 meeting with the witness during its cross-examination.

In light of the foregoing, the Chamber rejects the Prosecution's request.