

From: Trial Chamber V Communications
Sent: 05 February 2021 09:39
To: [REDACTED]
Cc: [REDACTED]

Subject: RE: List of Material to be used by Prosecution in the course of the Opening Statement

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Counsel,

The Chamber takes note of (i) the Prosecution's 'list of material that it intends to use during the presentation of its opening statement' (the 'Initial List') (emails from the Prosecution, 2 February 2021, at 01:44 and 08:46); (ii) the Prosecution's request to 'use the three e-mails attached during its Opening Statement' (the 'Request') (email from the Prosecution, 4 February 2021, at 11:46); (iii) the 'Amended list of Material to be used by Prosecution in the course of the Opening Statement' (the 'Amended List') (email from the Prosecution, 4 February 2021, at 12:21); (iv) the Ngaïssona Defence's response to the Request (email from the Ngaïssona Defence, 4 February 2021, at 13:58); and (v) the Yekatom Defence's objections (email from the Yekatom Defence, 4 February 2021, at 16:13) and the Ngaïssona Defence's objections (email from the Ngaïssona Defence, 4 February 2021, at 19:16) to the Initial List and Amended List, both pursuant to the Initial Directions on the Conduct of the Proceedings (ICC-01/14-01/18-631) (the 'Initial Directions').

A. Preliminary remarks

The Initial Directions, para. 14, stipulate that '[t]he participants are directed to indicate by email any material they intend to use in the course of their opening statements to the Chamber and other participants eight days prior to the commencement of trial'. Considering that the trial is set to begin on 9 February 2021, the deadline was thus 1 February 2021.

At the outset, the Chamber notes that the Prosecution did not comply with this deadline twice. First, it provided its Initial List only on 2 February 2021 (see emails from the Prosecution on 2 February 2021, at 01:44 and 08:46). Second, it now, 3 days *after* the deadline, requests to complement this Initial List with the email communications subject to the Request (the 'Emails'). The Chamber notes with particular concern that in doing so, the Prosecution misled the Chamber and the other participants by basing its Request on 3 items, while the Amended List in fact contains 6 additional items. These additional items not accounted for are CAR-OTP-2118-5633, CAR-OTP-2093-0010 and CAR-OTP-2081-0237 (the 'Additional Items').

The Chamber expresses its concerns and dismay regarding the Prosecution's lack of diligence. The Chamber also notes that this is not the first time that the Prosecution has displayed such lack of diligence, *inter alia* noting the numerous requests pertaining to inadvertent disclosure received by this Chamber.

The Chamber cautions the Prosecution to henceforth strictly observe the deadlines and directions given by the Chamber. The Chamber will not tolerate avoidable oversights, particularly if they are detrimental to the rights of the accused, and it will certainly not accept any behaviour suggesting that the Prosecution may be acting in bad faith.

B. The Chamber's determinations regarding the items to be used during the Prosecution's opening statement

With respect to the Initial List, the Chamber considers that the delay was limited and notes that neither one of the Defence teams raised objections in this regard. For these reasons, the Chamber exceptionally accepts the delayed provision of the Initial List.

However, the Chamber notes the Yekatom and Ngaïssona Defence's objections to the Initial List. In light of the issues raised, the Chamber orders the Prosecution to disclose the following items by **COB today**:

- CAR-OTP-2068-0014;
- CAR-OTP-2088-3122; and
- any statements, screening notes or other relevant materials for P-2018.

Should the Defence have any further objections to the Initial List, it shall inform the Chamber by **Monday, 8 February 2021, at 12:00**.

The Chamber takes note of the Yekatom Defence's submissions on a 'possible disclosure violation'. Should the Defence be of the view that such violation indeed occurred, it is instructed to file a motion on the case record.

With respect to the Request, the Chamber notes that, while the Prosecution did not indicate any legal basis, the Request essentially seeks an extension of time pursuant to Regulation 35(2) second sentence of the Regulations of the Court. The Chamber considers that the Prosecution has failed to demonstrate that it was unable to bring this matter to the attention of the Chamber prior to the expiry of the 1 February 2021 deadline for reasons outside of its control. Notably, the Chamber observes that the Prosecution received the Emails on 20 January 2021, *i.e.* well in advance of the 1 February 2021 deadline, and gives no reasons as to the tardiness of the Request. In this context, the Chamber also reminds the Prosecution again that its investigations should have been largely completed at the stage of the confirmation of charges hearing (see transcript of hearing, 9 July 2020, ICC-01/14-01/18-T-012-ENG, p. 12, lines 17-23; Decision on the Prosecution Request for Extension of Time Limit to Disclose certain Transcripts and Translations, 18 November 2020, ICC-01/14-01/18-734, para. 11).

Moreover, the Chamber considers that the use of the Emails during the Prosecution's opening statement would be prejudicial to the rights of the Defence. Accordingly, the Request is rejected.

Finally, the Chamber notes the Ngaïssona Defence's objection with regard to the Additional Items and observes that the Prosecution has made no request to amend its Initial List with regard to these items. Accordingly, the Chamber does not permit the Prosecution to use the Additional Items during its opening statements.

Kind regards, TC V

From: [REDACTED]
Sent: 04 February 2021 19:16

[REDACTED]

Subject: RE: List of Material to be used by Prosecution in the course of the Opening Statement

Dear Trial Chamber V,

On behalf of the Defence for Mr Ngaïssona, we wish to join the objections raised by the Defence team for Mr Yekatom, and wish to express our objections to the additional 3 documents which the OTP has added to its list of materials but has not included in its request from earlier today, based on the same grounds conveyed to the Chamber by our team earlier, at 13:58.

Respectfully Yours,

From: Dimitri, Mylene [REDACTED]
Sent: 04 February 2021 16:13

Subject: RE: List of Material to be used by Prosecution in the course of the Opening Statement

Dear Trial Chamber V,

The Yekatom Defence takes note of the Prosecution's email titled "List of Material to be used by Prosecution in the course of the Opening Statement" and sent on 02 February 2021 at 01:44:01 with its attachment "Prosecution List of Material to be used during its Opening Statement". The Defence also takes notes of the amended list "Amended Prosecution List of Material to be used during its Opening Statement – 03-02-2021" sent at 12:21 hours and containing six new items ("the Prosecution's List").

After a careful review of the Prosecution's List and pursuant to paragraph 14 of the "Initial Directions on the Conduct of the Proceedings" ICC-01/14-01/18-631 the Yekatom Defence objects to the use of the followings items:

First, the Defence objects to the use of CAR-OTP-2068-0014 - [REDACTED] (#77 of the Prosecution's List) and CAR-OTP-2088-3122 - [REDACTED] (#124 of the Prosecution's List). The two items haven't been disclosed to the Defence neither by the Disclosure deadline, nor thereafter. Given that the Defence is not in possession of the two items listed above, the Defence objects to their use by the Prosecution during its Opening Statement.

Second, the Defence objects to the use of CAR-OTP-2115-0369 (#209 on the Prosecution's List). The item disclosed appears to be incomplete and to suffer from a possible disclosure violation. According to the metadata on eCourt, the item consists of [REDACTED]. The [REDACTED] was provided by witness P-2018 to the Prosecution on 16 July 2019. However, P-2018 was met by the Prosecution between 6 and 12 of March 2018, see CAR-OTP-2071-0259. There is no statement, no investigator's note nor investigation report that was ever provided to the Defence containing the substance of the apparent meeting between the Prosecution and P-2018 leading to the production [REDACTED]. The Defence is unable, at this stage, to understand to what or which groups [REDACTED] contained therein belong to, nor is the Defence able to anticipate the Prosecution opening statement remarks regarding that [REDACTED]. The Defence raised the matter of disclosure of any statement, investigator notes or investigation report in relation to that [REDACTED] on 22 January 2021 and twice on the 3rd February 2021 during *inter partes* correspondence. The Defence understands that the Prosecution is still looking into the matter. However, given the disclosure deadline and the deadline set for objections regarding the material to be used for the opening statements, the Defence has no other choice than raising its objections now.

Third, the Defence notes that the Prosecution filed its Amended Prosecution's List after the deadline set by the Chamber. The Amended Prosecution's List contains 6 new items. Only 3 items were addressed by the Prosecution (CAR-OTP-2130-3296, CAR-OTP-2130-3298, CAR-OTP-2130-3297) in its email sent on the 4 February 2021 at 11:46. In relation to those 3 items the defence defers and supports the objections raised by the Ngaïssona Defence through an email sent on 4th February 2021 at 13:58.

As for the 3 additional items also appearing in the Amended Prosecution's List namely CAR-OTP-2118-5633 (Mort de Dido - French translation), CAR-OTP-2093-0010 (Witness Statement of [REDACTED] (October 2018 statement) and CAR-OTP-2081-0237 (Final report of the Panel of Experts on the Central African Republic extended pursuant to Security Council resolution 2339 (2017) S/2017/1023), the Defence defers to the Chamber's discretion.

If the Chamber so wishes we stand ready to file the present objection through a formal filing.

Please advise at your earliest convenience as to how you would like us to proceed.

Kind regards,

Mylène Dimitri

From: [REDACTED]
Sent: 04 February 2021 13:58

Subject: RE: List of Material to be used by Prosecution in the course of the Opening Statement

Dear Trial Chamber V,

The Defence respectfully requests the Chamber to reject the Prosecution's request to rely on undisclosed new documents for the purpose of the opening statement, for the following reasons.

First and foremost, the Prosecution's request is extremely prejudicial to Mr Ngaïssona's fair trial rights in light of the timing of this request.

The Prosecution was well aware of the judicial deadlines imposed by the Chamber, which have been issued with a view of safeguarding the fair conduct of the proceedings, namely the 9 November final disclosure deadline and the 1 February deadline to provide a list of all materials upon which parties intend to rely on for the opening statement.

Second, the Prosecution's request to rely on these new documents at the opening statement significantly and negatively impacts the Defence's preparations for the opening statement, due to begin next week. Contrary to the Prosecution's assumption, the Defence was not aware of these documents and has only now been apprised of them for the first time. Allowing the Prosecution to rely on these documents at the opening statement would prevent the Defence from having time to adequately investigate these documents and respond adequately to them in the Opening Statement now that the prosecution apparently intends to refer to them in their Opening statement. The Defence is well aware that these documents are not yet evidence; however the Defence should have sufficient time and facilities to anticipate any document on which the other party relies upon at the Opening Statement. This notion is also the rationale of the imposed deadlines by your Chamber.

Moreover, the Prosecution's investigation and disclosure cannot continue indefinitely. The Chamber has ordered a final disclosure date, to protect the integrity of the proceedings, including Mr Ngaïssona's right to have adequate time and facilities to prepare, and to preserve the efficiency of proceedings. The Defence notes the documents have been in the Prosecution's possession for at least **two weeks**. Its request to rely on this material for the opening statement, made at the eleventh hour, is prejudicial to defence preparations, and wholly unjustifiable.

Third, on its face the documents appear to relate to new allegations, of which again, the Defence was not aware of and is not in a position to adequately prepare for, given the imminence of the opening of trial next week. The Prosecution wrongfully assumes that the Defence was aware of the documents and would therefore not be prejudiced.

Fourth, the Prosecution's request to introduce new documents at the eve of trial should be presented by way of a formal filing, stating the relevant factual and legal basis. Without such filing the Opening Statement should not be subjected to documents on which the Court did not make any official ruling in terms of the acceptance thereof within the context of regulation 35 or any other legal provision.

Kind regards,

[REDACTED]

On behalf of Mr Geert-Jan Knoops

From: [REDACTED]

Sent: 04 February 2021 11:46

[REDACTED]

Subject: RE: List of Material to be used by Prosecution in the course of the Opening Statement

Dear Trial Chamber V,
Dear Parties and Participants,

The Prosecution seeks the Chamber's authorisation to use the three e-mails attached during its Opening Statement.

We are mindful of the timing of the request. However, the e-mails were transferred to the Prosecution electronically by the [REDACTED] authorities only on **20 January 2021**, pursuant to an RFA sent on 5 March 2020. The RFA processing and response by the competent [REDACTED] authorities had been severely delayed because of the limited operation and closure of national Courts as a result of COVID-19 measures. The material was transmitted by means of an authorisation and password to access, and immediately forensically downloaded. While the Prosecution is still in the process of analysis, we consider the attached emails of significance to our case and opening statement. They have been registered this morning and are in the process of formal disclosure today.

The attached emails concern three short exchanges between [REDACTED] and Mr NGAISSONA in [REDACTED]. Given that Mr NGAISSONA's would be fully aware of their subject matter and content, and their obvious relevance to the facts and circumstances of the case, their use during the Opening Statement — which are not *evidence* in any event — would not cause unfair prejudice. The Prosecution will proceed in due course with a proper request for the formal submission of these and other e-mails, as necessary.

Kind regards,

[REDACTED]

On behalf of Kweku Vanderpuye

From: [REDACTED]

Sent: mardi 2 février 2021 01:44

[REDACTED]

Subject: List of Material to be used by Prosecution in the course of the Opening Statement

Dear Trial Chamber V,

Dear All,

The Prosecution provides the list of material that it intends to use during the presentation of its Opening Statement, pursuant to the Initial Directions on the Conduct of the Proceedings, ICC-01/14-01/18-631. Thank you.

Kind regards,



OTP Case Manager

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.