

Annex 16

Public Redacted

From: Trial Chamber X Communications
Sent: 13 July 2020 15:34
To: Dutertre, Gilles; [REDACTED] Taylor, Melinda;
 [REDACTED]
 Doumbia, Seydou; Nsita Luvengika, Fidel; Kassongo, Mayombo; [REDACTED]
Cc: Trial Chamber X Communications
Subject: Decision on Defence objections to materials to be used in the course of the opening statements

Follow Up Flag: Follow up
Flag Status: Flagged

Categories: Red Category

Dear counsel

The Chamber has taken note of the Defence objections (Objections) to the Prosecution's list of material to be used in the context of the opening statements (List) and the Prosecution's response thereto (Response).

At the outset, the Chamber notes the Defence's submissions on the format of the Prosecution's List, and notably the fact that it only lists a large number of items with their evidence reference numbers which does not assist an efficient review. The Chamber agrees with this observation and therefore directs the Prosecution, for the purpose of its future lists of material, to include for each item, references to redacted versions, where applicable, as well as titles or brief descriptions, and, where available, dates.

Following, the Chamber deals with the other matters raised by the Defence in its Objections.

1. First, the Defence raises two related objections concerning matters which are *sub judice* and will be put to future witnesses, namely the reliability of witness identification evidence on various issues, and matters related to the Prosecution's proposed table of Islamic Judgments. Its concern appears to be that public description and explanation of evidence in the opening statements could influence the future testimony of victims and witnesses.
2. The Chamber notes that the purpose of the opening statements is for the Prosecution to explain its case to the Chamber, which may include presenting its case theory, and highlighting evidence intended to be submitted in support of allegations. Within this framework, the Chamber considers the Defence arguments on this point speculative and without foundation. These two objections are accordingly dismissed.
3. Second, the Defence submits that, in line with the presumption of innocence, it would object to any 3D recreation/reconstruction of events that purports specifically to show Mr Al Hassan, as the defendant, engaging in acts and conduct linked to the commission of crimes. Acknowledging that the Chamber is composed of professional judges, the Defence submits that the prejudice stems from the public dissemination of reconstructed images or events, without accompanying testimony that could provide context to the public on the reliability and accuracy of the processes used to devise such images.
4. In line with the Chamber's comments in paragraph 2, the Chamber agrees with the Prosecution's submission in the Response that the presumption of innocence remains unaffected by the Prosecution explaining its case against the accused as reflected in the evidence that it has collected. The Chamber notes that referencing items in an opening statement does not make them evidence in this case. These items still require formal submission for them to be considered by the Chamber, and the Defence will have its opportunity to make its anticipated arguments on the platform's reliability and accuracy, at that point. This objection is therefore dismissed.

5. In relation to the Defence's related concern expressed about the use of visual aids or information in the absence of a clear intention to tender and authenticate such materials through a witness at trial, the Chamber considers this concern is misplaced. As noted in the Prosecution Response, the Prosecution has already indicated that it will introduce evidence from the witnesses [REDACTED].
[REDACTED] Accordingly, this objection is dismissed.
6. Finally, the Defence objects to the use, reliance, and public dissemination of the contents of evidence that is the subject of the pending Defence request to terminate these proceedings, including notably interviews conducted with Mr Al Hassan. It submits there is a risk of creating error when a party shows an exhibit during an opening statement which is not subsequently admitted as evidence. The Defence submits that there should apply a presumption of restraints as concerns the use, and public dissemination of evidence that has been identified as being subject to challenges.
7. The Chamber is fully aware of the allegations that have been made in the context of the termination request and recalls that a timetable for litigation of that request has been set. As the Defence acknowledges, this Chamber is composed of professional judges; as such the Chamber is capable of distinguishing between audio-visual aids used during an opening statement and the evidence submitted during the trial which will be discussed and analysed in depth. The Chamber therefore dismisses this objection.

Regards,

[REDACTED] on behalf of Trial Chamber X

From: Dutertre, Gilles

Sent: 10 July 2020 17:57

To: Trial Chamber X Communications

Cc: [REDACTED] Doumbia, Seydou; Kassongo, Mayombo; [REDACTED] Nsita
Luvengika, Fidel; [REDACTED]
[REDACTED] Taylor, Melinda

Subject: RE: Decision on Defence request for variation of time limit for filing objections to materials to be used in the course of the opening statements

Dear Trial Chamber X,

Please find the Prosecution response in attachment.

Respectfully,

Gilles Dutertre

From: Trial Chamber X Communications

Sent: 10 July 2020 15:18

To: Dutertre, Gilles

Cc: [REDACTED] Doumbia, Seydou; Kassongo, Mayombo; [REDACTED] Nsita
Luvengika, Fidel; [REDACTED]
[REDACTED] Taylor, Melinda; [REDACTED]

Subject: RE: Decision on Defence request for variation of time limit for filing objections to materials to be used in the course of the opening statements

Importance: High

Dear Counsel,

With reference to the Defence objections to materials to be used in the course of the opening statements, the Chamber hereby directs the Prosecution to please submit any response via email by the end of the day today, 10 July 2020.

Kind regards,

On behalf of Trial Chamber X

From: Taylor, Melinda

Sent: 10 July 2020 11:55

To: Trial Chamber X Communications; Dutertre, Gilles

Cc: [REDACTED] Doumbia, Seydou; Kassongo, Mayombo; [REDACTED]; Nsita Luvengika, Fidel; [REDACTED]

[REDACTED] Decision on Defence request for variation of time limit for filing objections to materials to be used in the course of the opening statements

Dear Trial Chamber X, Dear Colleagues,

In addition to the authority set out in footnote 1 to our observations, we further note the concern, expressed in the *Lubanga* case, concerning the use of visual aids or information, in the absence of a clear intention to tender and authenticate such materials through a witness at trial.

<https://www.legal-tools.org/doc/032a0f/pdf>

16 Jan 2009, pp. 44 et seq

The next issue is (C), is a request for leave to use an 10 additional visual aid during opening statements. 11 Now, Mr. Sachdeva, this, I think, should be dealt with in 12 conjunction with your filing of yesterday where you've raised a further 13 two or three visual aids for use. Now, we want to know more, please, 14 about what these visual aids are, who made them, and whether the person 15 who made the visual aid is going to be called as a witness during the 16 trial. So shall we take the one first in your consolidated motion. 17 MR. SACHDEVA: The four visual aids that we now seek leave to add 18 or use during the opening are video excerpts. They're not technically 19 visual aids. We are going to tender them during the trial, accordingly, 20 if the criteria are satisfied, and I think -- I believe that one or two 21 of them are going to be authenticated by a witness who is coming to 22 testify in this trial. 23

PRESIDING JUDGE FULFORD: I'm very worried at the suggestion that 24 some of the visual aids you wish to use during your opening may not be authenticated by witnesses who are coming give evidence, Mr. Sachdeva.

MR. SACHDEVA: I'll ask Ms. Struyven to -- 2

PRESIDING JUDGE FULFORD: Now, Ms. Struyven, it may be 3 that I'm -- because I've taken this without warning, you need more time 4 to prepare this or are you ready to advance submissions on this? 5

MS. STRUYVEN: Your Honour, I can provide you with a short answer 6 on your first question. There's three visual aids -- well, there's three 7 groups of visual aids. The first one is -- the first and the second one 8 are infographics. They were made by a member of the Office of the 9 Prosecutor. They combine evidence that was disclosed, and basically in 10 short, they are maps that indicate on the one hand side the attacks that 11 were -- that occurred in Ituri between 2002 and 2003; on the other hand, 12 they provide for an overview of the places of recruitment and -- and use 13 of the children that we are calling as trial witnesses. These are the 14 first two visual aids. 15

PRESIDING JUDGE FULFORD: No, no, don't go on. I want to have a 16 look at those. First of all, have those visual aids, these maps I'm going to describe them as being, have

they been given to the Defence and 18 the participants in the form in which you wish to use them during the 19 opening? 20

MS. STRUYVEN: No, your Honours, but we believe that according to 21 the decisions of the Trial Chamber of the 2nd of December we had seven 22 days prior to the use of those visual aids at trial to disclose them to 23 the parties and the participants, so we intend to disclose them on 24 Monday. 25

PRESIDING JUDGE FULFORD: Fine. Well, we're not going to renege on the order that we've made. Disclose them on Monday. Make sure copies 2 are provided to the Judges via the usual channels, and we will make a 3 decision on Thursday as to whether or not you are to be allowed to rely 4 on them. 5 It is absolutely right that we have authorised the use of visual 6 aids, that is correct. We want to make sure that the visual aids that 7 you are intending to rely on are appropriate. So there's no objection in 8 principle to the use of visual aids, but given that the Defence have 9 raised a question about this, we want to ensure that there is nothing 10 either impermissible, inadmissible or unfair about the aids which are 11 proposed. So for safety's sake, service, please, no later than Monday, 12 provision to us and, if necessary, we will address this on Thursday 13 morning. And if anybody wishes to raise any objections on Thursday, this 14 must -- objections must be set out in writing prior to midday on 15 Wednesday.

Kind regards
Al Hassan Defence

From: Taylor, Melinda
Sent: 10 July 2020 11:50
To: Trial Chamber X Communications; Dutertre, Gilles
Cc: [REDACTED] Doumbia, Seydou; Kassongo, Mayombo; [REDACTED]; Nsita Luvengika, Fidel; [REDACTED]
Subject: RE: Decision on Defence request for variation of time limit for filing objections to materials to be used in the course of the opening statements

Dear Trial Chamber X, Dear Colleagues,

The Defence respectfully attaches its observations concerning the materials, which the Prosecution proposes to use in its opening statements.

Kind regards
Al Hassan Defence

From: Trial Chamber X Communications [mailto:TrialChamberXCommunications@icc-cpi.int]
Sent: 09 July 2020 11:01
To: Dutertre, Gilles; Taylor, Melinda
Cc: [REDACTED] Doumbia, Seydou; Kassongo, Mayombo; [REDACTED] Nsita Luvengika, Fidel; [REDACTED] Trial Chamber X Communications; [REDACTED]
Subject: Decision on Defence request for variation of time limit for filing objections to materials to be used in the course of the opening statements

Dear Counsels,

Having had regard to the Prosecution's list of materials it intends to use in the course of their opening statements, and pursuant to Regulation 35 of the Regulations of the Court, the Chamber partially grants the below request and authorises the **Defence** to file any objections by 10 July 2020 at 12:00.

In accordance with paragraph 16 of ICC-01/12-01/18-789-AnxA, such objections shall be sent via email.

To facilitate the Defence's review of the materials, the Chamber encourages the **Prosecution** to provide necessary assistance, including by providing an updated list, should it become aware that some of the materials indicated in its list will no longer be relied upon during its opening statement.

The Chamber also notes that the **Defence** and the **LRVs** were required, in accordance with paragraphs 15-16 of ICC-01/12-01/18-789-AnxA, to either: (i) inform the Chamber their intention to give their opening statements prior to their presentation of their evidence, rather than during trial commencement, by 30 June 2020; or (ii) should they choose to give their opening statements during trial commencement, submit a list of materials they intend to use during their opening statements by 6 July 2020.

Since no notice under (i) above was provided, the Chamber requests that the **Defence** and the **LRVs** to confirm as soon as possible, and in any event no later than the above deadline on objections, whether they will give their opening statements during trial commencement.

Kind regards,

On behalf of Trial Chamber X

From: Dutertre, Gilles

Sent: 09 July 2020 09:56

To: [REDACTED]; Trial Chamber X Communications

Cc: [REDACTED] Doumbia, Seydou; Kassongo, Mayombo; [REDACTED]; Nsita Luvengika, Fidel; [REDACTED] Taylor, Melinda; [REDACTED]

Subject: RE: Request - Objections to the use of materials

Dear Trial Chamber X,

The Prosecution opposes the Defence request.

In accordance with the Conduct of Proceedings decision, the Prosecution "indicate[d] by email any materials [it intends] to use in the course of [its] opening [statement] to the Chamber and the other party and participants by no later than eight days prior to the commencement of trial" (ICC-01/12-01/18-789AnxA, para. 16).

Any metadata associated with these materials are readily available to the Defence in eCourt.

No additional details are required to be provided to the Defence and therefore its request should be denied.

Further, as indicated to the Defence, the Prosecution will soon provide the lists with hyperlinks to eCourt to facilitate access to these items.

Kind regards,

Gilles Dutertre

PS:

The lists are further updated by deleting the following 12 items, as the Prosecution no longer intends to rely on them.

From: [REDACTED]
 Sent: 08 July 2020 21:19
 To: Trial Chamber X Communications
 Cc: Dutertre, Gilles; [REDACTED] Doumbia, Seydou; Kassongo, Mayombo;
 [REDACTED] Nsita Luvengika, Fidel; [REDACTED] Taylor, Melinda; [REDACTED]
 Subject: Request - Objections to the use of materials

Dear Honourable Trial Chamber X,

On 06 July, the Prosecution communicated by email two tables citing the materials they intend to use in the course of the opening statement: 1) material for the opening of the trial and 2) rapports de la PI et Jugements du TI. One of these two tables (material for the opening of the trial) lists 714 items and it simply provides the ERN numbers for each, without any indication of the details of those materials. Given that the opening statement is only supposed to last 4 hours, it is not clear whether all evidential items will be referred to, and the particular section or component of the item that will be cited to.

On 07 July, the Defence asked the Prosecution via email whether, given the number of documents and the short response deadline, they would provide a more detailed table with hyperlinks, especially as in some other cases the OTP has provided more details, namely the Doc ID, Main Date, Type, Title and Package. On 08 July, the Defence sent a follow up email to which the OTP responded that they would send a hyperlinked version that day. However, the Defence haven't yet received the new version of the abovementioned tables yet.

In accordance with paragraph 16 of Annex A to Trial Chamber X's "Decision on the conduct of proceedings" (ICC-01/12-01/18-789-AnxA), any objections to the use of materials should be provided via email no later than five days prior to the commencement of trial, which means that the Defence must provide any objections to these materials tomorrow, Thursday 09 July.

Given the significant number of materials that the Defence need to examine, the fact that no details regarding these materials have been provided and there has been no indication on which extracts and pages the Prosecution will rely in the course of the opening statements, the Defence hereby respectfully request the Honourable Trial Chamber X to authorise the filing of their objections on Friday, 10 July.

Kind regards,
Defence Al Hassan

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