

Annex 13

Public

From: Trial Chamber X Communications
Sent: 21 January 2021 10:44
To: D28 Al Hassan Defence Team; Al Hassan Prosecution Team
Cc: Chamber Decisions Communication; Trial Chamber X Communications
Subject: Decision on Defence Request for re-designation of OTP Investigator at Defence Interview

Dear counsel,

The Single Judge takes note of the Defence's request for the Chamber to order the Prosecution to designate a 'suitable alternative member of its staff to be present at the interview of [REDACTED]' (Request), and the email response from the Prosecution.

The Single Judge considers the Defence argument based on Rule 140(3) of the Rules of Procedure and Evidence to be misconceived, for the reasons stated by the Prosecution.

In relation to the alleged violation of paragraph 38 of the Contact Protocol (674-Anx2), the Single Judge considers the Defence argument that '[REDACTED]'s previous presence at OTP interviews of [REDACTED] may unduly influence the freedom and voluntariness of [REDACTED]'s answers' to be entirely speculative.

Furthermore, the Single Judge has noted the Prosecution's statement that [REDACTED] 'clearly insisted upon [REDACTED] being present during the interview as he knew her already - [REDACTED]'.
[REDACTED].

For these reasons, it appears reasonable that [REDACTED] should remain as the designated investigator for the interview, and the Single Judge rejects the Defence Request.

Kind regards,

[REDACTED] on behalf of the Single Judge of Trial Chamber X

From: Dutertre, Gilles

Sent: 20 January 2021 19:18

To: [REDACTED]; Trial Chamber X Communications

Cc: Taylor, Melinda; D28 Al Hassan Defence Team; [REDACTED]
[REDACTED]

Subject: RE: Request for Redesignation of OTP Investigator at Defence Interview

Dear Trial Chamber X,

The Defence has not provided any valid justification for the OTP to designate an alternative member of its staff other than [REDACTED] to be present during [REDACTED]'s interview.

First, this issue is premature given that it is not yet known whether Ms Sutherland will be able to extend her mission in order to interview [REDACTED].

Second, contrary to the Defence's contention, Rule 140 (3) – which falls under the heading

Directions for the conduct of proceedings and testimony - does not apply to the present situation. [REDACTED]

[REDACTED] will not be present during *the testimony of another witness* (in Court) but will only be present in the context of a Witness interview by the Defence pursuant to the [Protocol](#).

Third, the Defence's claim that "[REDACTED]'s previous presence at OTP interviews of [REDACTED] may unduly influence the freedom and voluntariness of [REDACTED]'s answers" and would thus violate paragraph 38 of the applicable [Protocol](#) is speculative and without merit. As is the claim that "*the presence of [REDACTED] would preclude the proper conduct of the Defence's interview*".

The Prosecution would have normally designated an alternative Investigative officer so as to avoid unnecessary litigation on this matter.

However the Witness clearly insisted upon [REDACTED] being present during the interview as he knew her already - [REDACTED].

Consequently, mindful of the Witness' psychological welfare, and given the lack of any justification by the Defence, [REDACTED] should remain as the designated Investigator for the interview.

Respectfully,
Gilles Dutertre

From: [REDACTED]

Sent: 20 January 2021 17:31

To: Trial Chamber X Communications <[TrialChamberXCommunications](#) [REDACTED]>

Cc: Taylor, Melinda <[REDACTED]>; D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#) [REDACTED]>; Dutertre, Gilles [REDACTED]; [REDACTED]

Subject: Request for Redesignation of OTP Investigator at Defence Interview

Dear Trial Chamber X,

The Defence seeks to interview [REDACTED] during Ms Sutherland's mission [REDACTED]. The Prosecution maintains that [REDACTED] requests its presence and has indicated that an investigator, [REDACTED] will attend in person, and a lawyer remotely.

The Defence has requested that the Prosecution propose an alternative investigator on the basis that the Defence wishes to interview and examine [REDACTED] as a witness of fact concerning the circumstances of previous interviews and the voluntariness thereof, and it is thus not appropriate for her to be present during the Defence's interview of [REDACTED].

The Prosecution has refused to designate an alternative investigator. It is clear that the Prosecution has other investigators already or able to be in [REDACTED] as it has proposed a different investigator to be present during the Defence's interview of [REDACTED].

The principle that investigators due to be examined as witnesses of fact shall not be present during the testimony of other witnesses is enshrined in Rule 140(3), which stipulates: *Unless otherwise ordered by the Trial Chamber, a witness other than an expert, or an investigator if he or she has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying. When a witness testifies after hearing the testimony of others, this fact shall be noted in the record and considered by the Trial Chamber when evaluating the evidence.* This principle has, additionally, been upheld by other international criminal chambers (e.g. [Delalic et al](#)).

The argument that [REDACTED] may in any event access records of the Defence interview of [REDACTED] is not sufficient to derogate from this Rule, as the fact of [REDACTED]'s previous presence at OTP interviews of [REDACTED] ([REDACTED]) may unduly influence the freedom and voluntariness of [REDACTED]'s answers. This would violate paragraph 38 of the applicable [Protocol](#).

Paragraph 38 of the applicable Protocol provides: *The representative of the calling party or participant present at the interview shall not prevent or dissuade the witness from answering questions freely. In the event that the calling party or participant objects to any part of the procedure followed or any particular line or manner of questioning of the witness, it shall raise the issue with the party or participant conducting the interview outside the presence of the witness. The disagreement shall be recorded and shall not impede or unduly disrupt the interview. The party or participant conducting the interview may, in the event of repeated interference by the calling party or participant, adjourn the interview and apply to the Chamber for leave to conduct it without the present of the representative of the calling party.*

While the proposed presence of [REDACTED] engages Paragraph 38, the Defence requests a lesser remedy, namely the designation of an alternative member of the Prosecution's staff. A lawyer from the Prosecution will be present remotely, and the Prosecution has other investigators. The Defence request in no way diminishes its intended presence.

The Defence hereby respectfully requests that the Chamber order the Prosecution to designate a suitable alternative member of its staff to be present at the interview of [REDACTED].

Since the presence of [REDACTED] would preclude the proper conduct of the Defence's interview, the Defence respectfully requests the urgent resolution of this matter such that it may proceed with its logistical preparations.

Respectfully,

Kirsty Sutherland, on Behalf of the Defence for Al Hassan

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