

Annex 20

Public

From: Trial Chamber X Communications
Sent: 25 January 2021 16:16
To: D28 Al Hassan Defence Team; Al Hassan Prosecution Team; V43 Victims Al Hassan Team
Cc: Trial Chamber X Communications; Associate Legal Officer-Court Officer; Chamber Decisions Communication
Subject: Decision on the Prosecution's request to add items relating to P-0654 to its list of evidence

Dear Counsel,

Notwithstanding the adjournment of the hearing, and the rescheduling of P-0654's testimony, the Single Judge here by issues the pending decision on the (i) Prosecution application under regulation 35 to add items related to Witness MLI-OTP-P-0654 to its List of Evidence (ICC-01/12-01/18-1223-Conf); and (ii) the Prosecution's application to add one item related to witness P-0654 (Email from the Prosecution dated 11 January 2021 at 10:18).

Request and responses

On 21 December 2020, the Prosecution filed a request seeking authorisation to add nine items relating to witness P-0654 to its List of Evidence (the 'First Request'). The Prosecution requests the addition of: (i) six documents authored by P-0654; (ii) one photograph handed over by P-0654; (iii) one open source item referring to P-0654; and (iv) one translation of a video which is already included in the Prosecution's List of Evidence, together with its transcript. The Prosecution submits the Chamber should authorise the late addition of these items in the interests of justice and determination of the truth, and given the limited number and volume, any prejudice caused by their late addition, if any, is outweighed by their probative value.

On 11 January 2021, the Prosecution submitted a second request seeking the addition of one additional item ([REDACTED]) relating to witness P-0654 to its List of Evidence (the 'Second Request'). It submits that [REDACTED]

[REDACTED]. Considering that this item was disclosed to the Defence since May 2019, that P-0654's witness statement refers to [REDACTED] and that there are no equivalent [REDACTED], the Prosecution submits that it would be in the interests of justice and the determination of the truth to grant the addition of this item.

On 12 January 2021, the Defence filed its response to the aforementioned requests (ICC-01/12-01/18-1246-Conf). The Defence opposes the two requests on the basis that (i) inadvertence is not an adequate excuse for non-compliance with a deadline; (ii) the addition of items will cause prejudice to the Defence; (iii) the fact that a number of items have been the subject of late disclosure does not provide adequate notice in lieu of their formal inclusion in the List of Evidence; and (iv) the requests should be rejected to prevent the late admission of items from becoming the norm during trial, also considering the untimeliness of the Second Request. Alternatively, if the requests are granted, the Defence requests the Chamber to either adjourn the testimony of P-0654 or adjourn the Defence's cross examination of P-0654.

On 13 January 2021, the LRVs indicated that they do not oppose the Second Request (Email from the LRVs dated 13 January 2021 at 13:26).

The Single Judge's determination

At the outset, the Single Judge notes that the Prosecution fails to sufficiently justify the late addition of the items to its List of Evidence. Instead, the Prosecution seeks to justify the late addition solely on the basis of the importance and probative value of the items. Further, and as correctly pointed out by the Defence, inadvertence is not *per se* a sufficient basis for seeking extension after the lapse of the original time limit.

The Chamber has indeed allowed the late admission of items when necessary for the interest of justice and the determination of the truth. This, however, does not relieve the Prosecution from complying with the second Sentence of Regulation 35(2) of the Regulations of the Court and demonstrating the existence of reasons outside its control, whenever applying for an extension after the lapse of the time limit. The Single Judge is concerned that throughout the present proceedings, there have been multiple requests for addition of items to the List of Evidence in which no attempt was made to demonstrate reasons outside the Prosecution's control. The Single Judge reminds the Prosecution

of the importance of diligently complying with its disclosure obligations and sufficiently justifying any request pursuant to Regulation 35 of the Regulations.

The Single Judge will nonetheless consider whether it shall exceptionally authorise the late addition of the items to the List of Evidence in the interest of justice and the determination of the truth.

Six documents allegedly authored by P-0654

Regarding the four contemporaneous documents allegedly authored by P-0654 [REDACTED]

[REDACTED], the Single Judge notes that, according to the Prosecution, these documents contain information relevant to the charges in the present case, in particular, [REDACTED].

The Prosecution also requests authorisation to add two documents which were allegedly authored by P-0654 [REDACTED]. The first document [REDACTED]

[REDACTED]. The Second document [REDACTED]

[REDACTED]. The Prosecution submits that this document assists in understanding the context in which each item [REDACTED] had been prepared by P-0654.

Considering the length of these items [REDACTED] and the fact that all six items were previously disclosed to the Defence, the Single Judge considers that no undue prejudice arises to the Defence. Accordingly, in the interest of justice and determination of the truth, the Single Judge grants the request to add these six items to the List of Evidence.

One photograph handed over by P-0654

According to the Prosecution, [REDACTED] is a photograph retrieved from P-0654 [REDACTED]

[REDACTED]. The Prosecution submits that the photograph is relevant to the identification of [REDACTED]

[REDACTED]. The photograph was disclosed to the Defence in June 2020.

The Single Judge considers the late addition to be in the interest of justice and determination of the truth, and that no undue prejudice arises to the Defence. Accordingly, the Single Judge grants the request to add this item to the List of Evidence.

One open source item mentioning P-0654

[REDACTED]. According to the Prosecution, [REDACTED], this particular item provides more details regarding [REDACTED]

The Single Judge notes that the item in question was disclosed to the Defence in August 2018, and [REDACTED] is already touched upon in other pieces of evidence. The Single Judge considers the addition of this open source report, which apparently corroborates items provided by P-0654, causes no undue prejudice to the Defence and that it is in the interests of justice and determination of the truth to grant its late addition. Accordingly, the Single Judge grants the request to add this item to the List of Evidence.

One Translation

The Prosecution also seeks the addition of a translation [REDACTED] of a video [REDACTED]. Both the video and its transcript [REDACTED] are included in the List of Evidence.

In line with its previous decisions, the Single Judge considers that transcripts and translations are to be regarded as accessories of the items included in the List of Evidence, and ultimately for the benefit of the Defence and those in court, including to avoid the need for evidence to be read and/or interpreted live. Accordingly, the Single Judge considers the late addition to be in the interest of justice and determination of the truth, and that no prejudice arises to the Defence. Therefore, the Single Judge grants the request to add this item to the List of Evidence.

List subject to the Second Request

The Prosecution also seeks the addition of [REDACTED]

[REDACTED]. The Prosecution submits that there are no equivalent [REDACTED]

The Single Judge notes that [REDACTED] was disclosed to the Defence in May 2019. The Single Judge considers the late addition to be in the interest of justice and determination of the truth, and that no

undue prejudice arises to the Defence. Accordingly, the Single Judge grants the request to add this item to the List of Evidence.

Defence's request for adjournment

Turning to the adjournment of P-0654's testimony or the cross examination sought by the Defence, considering that P-0654's testimony has been rescheduled (Email from the Prosecution dated 25 January 2021 at 14:42), the request is rejected as moot.

Kind regards,

[REDACTED]

On behalf of the Single Judge of Trial Chamber X