

Annex 28

Public

From: Trial Chamber X Communications
Sent: 05 February 2021 15:38
To: Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team
Cc: Trial Chamber X Communications; Associate Legal Officer-Court Officer; Chamber Decisions Communication
Subject: Decision on Defence objections to Prosecution List of Materials for P-0554

Dear counsel,
 Dear colleagues,

The Chamber takes note of the Defence objections to certain items the Prosecution intends to use during the examination of P-0554.

In Category A, the Defence objects on the basis that P-0554 did not author any of the items which the Prosecution seeks to submit through her testimony, and has not identified any personal knowledge of the witness which justifies the use of the items with the witness. As previously and consistently decided, the Chamber will not rule on such objections in the abstract. It is for the Prosecution to establish the foundation for showing these items to the witness during questioning and for the Chamber to determine at that point, also taking into account any objections raised at that point by the Defence, whether the items may be used.

In Category B the Defence objects to the use of video clips, allegedly authored by [REDACTED], which have been edited - on the basis that prejudicial content could affect the reliability of P-0554's testimony. As previously stated, the Chamber considered that the issue of editing of videos by [REDACTED] did not prevent submission of those items into evidence, but rather pertains to matters of probative value and relevance and ultimately to the weight to be given to these items of evidence (see email from the Chamber 18 December 2020, at 10:05). The same conclusion applies to any testimony that P-0554 may provide in relation to such clips. The fact that video clips sought to be used with P-0554 may have been edited therefore does not prevent their use with the witness.

In Category C, the Defence objects to 21 items including videos on the basis that they were not shown to the witness when her statement was taken. The Chamber notes that virtually all of the items are very short video clips or images showing what appear to be the same events [REDACTED]. The Prosecution clearly provided notice in its Trial Brief that some of these clips were, according to it, connected [REDACTED] and [REDACTED] (see Trial Brief, ICC-01/12-01/18-819-Conf-AnxA, para. 148 and footnotes). Four of the items ([REDACTED]) were also explicitly listed as exhibits to be shown to P-0554 in the summary disclosed to the Defence in April 2020 (ICC-01/12-01/18-740-Conf-AnxB). Furthermore, another five of the items [REDACTED] were shown to the witness during her preparation session, and the witness's comments thereon were recoded and disclosed to the Defence in the associated log. In the circumstances, the Chamber considers that it was (sufficiently) clear these items were related to the witness, and contrary to the Defence submissions, fails to see how their use during her testimony could generate new or unexpected issues for the Defence. The Chamber considers therefore that all items may be used with the witness.

The above conclusions of the Chamber apply equally to items identified in Category E, as they are accessories (transcripts and translations) of the relevant material in the aforesaid categories.

In Category D, the Defence objects to the transcript for Item 45, [REDACTED]. The Chamber reminds the parties that they are to consult to try and resolve such issues in accordance with paragraph 59 of the Directions on the conduct of proceedings ICC-01/12-01/18-789AnxA, and only seize the Chamber by email if the issue cannot be resolved.

Kind regards,

[REDACTED], on behalf of Trial Chamber X

From: [REDACTED]

Sent: 04 February 2021 14:50

To: Trial Chamber X Communications ; Al Hassan Prosecution Team ; D28 Al Hassan Defence Team ; V43 Victims Al Hassan Team ; Associate Legal Officer-Court Officer

Subject: RE: List of Materials for Prosecution Witness MLI-OTP-P-0554

Dear Trial Chamber X,
Dear Colleagues,

Pursuant to paragraph 60 of the [Directions on the Conduct of Proceedings](#), the Defence provides its objections to the Prosecution's List of Material related to Witness P-0554. The Defence notes at the outset that a number of the items proposed to be used with this witness have already been submitted as evidence. This, however, is without prejudice to the Defence's ability to object to the use of evidence with individual witnesses.

Category A Objections: Documents which have not been verified or authenticated through their alleged author, and which the witness will not have any personal knowledge of

Witness P-0554 did not author any of the items which the Prosecution seeks to submit through this witness. For this reason, the Prosecution ought not to be able to use these items with the witness, particularly given that the witness does not have personal knowledge of the production of the item. Furthermore, the author of the items is not yet in evidence: according to the metadata of these materials, [REDACTED] is the alleged author and source of the items but the items were not shown to [REDACTED] to confirm their provenance. In the premises of this further lack of proof of originality and integrity, the items ought not to be used with P-0554, given their prejudicial content which could affect the reliability of the witness's testimony.

Declining to allow the use of this material in the absence of such information verifying the originality and integrity of the material would be consistent with the practice of Chambers of this Court, as concerns the submission of audio and video material. In *Prosecutor v. Katanga and Ngudjolo Chui*, Trial Chamber II held, '[s]ince the relevance of audio and video material depends on the date and/or location of recording, evidence must be provided in this regard': [ICC-01/04-01/07-2635](#), para. 24(d). Similarly, in *Prosecutor v. Ntaganda*, Trial Chamber VI held ([ICC-01/04-02/06-2201-Red](#), paras 51-52):

51. A video excerpt of **Document 129, DRC-OTP-0036-0006**, is tendered by the Defence together with the corresponding excerpts of its transcript, **Document 130, DRC-OTP-0018-0363**. They purport to relate to the consequences of an attack on Nyankunde. The Chamber finds that, absent further information on the date and circumstances of the creation of this video, or any other form of authentication, it cannot assess relevance and probative value of the video and corresponding transcript, and therefore denies their admission into evidence.

52. For the same reasons, the Chamber declines to admit the excerpt of **Document 134, DRC-D18-0001-0440**, into evidence. As the Defence notes, the video seems to be recorded on 8 June 2003, but in the absence of further information on its creation, or any other form of authentication, and what is depicted, the Chamber finds that it is not *prima facie* relevant or probative, and therefore denies its admission into evidence.

Furthermore, in *Prosecutor v. Bemba*, Trial Chamber III held ([ICC-01/05-01/08-2299-Red](#), paras 121-122):

121. Recording **CAR-OTP-0005-0159**, is dated 13 February 2003 and is approximately one minute long. According to the prosecution this is an interview by journalist Ms Carinne Frenck with the accused in which he indicates that his troops will start withdrawing from the CAR. **However, the Chamber notes that, contrary to the prosecution's submissions, nowhere in the recording is the journalist identified. Further, the prosecution has provided no evidence whatsoever as to this recording's originality or integrity. In fact, the recording is evidently an excerpt of a longer interview which has not been submitted to the Chamber in its entirety. As regards the origin of this recording, although the prosecution states that the source is RFI, no evidence has been provided to that effect.** The Chamber notes, however, that the defence has not contested that this recording emanates from RFI or that the voice of one of the persons in this recording is that of the accused.

122. In the view of the Chamber, although the audio recording purports to be an interview of the accused by a journalist concerning the MLC's withdrawal from the CAR in March 2003, the item is unlikely to assist in the Chamber's determination of this particular issue. The recording would only be of minimal relevance to the Chamber's determination of the case. **Further, the recording is only an excerpt and the Chamber has not been provided with sufficient information in order to verify that this brief excerpt actually emanates from RFI or one of its reporters or correspondents. As previously stated, the prosecution should provide recordings in full and not just excerpts of them, and unless the recording bears sufficient *indicia* that it is what it purports to be (i.e. an RFI transmission), the prosecution must also provide information on its source, originality and integrity. In light of the absence of this information, the alleged probative value of the recording is outweighed by its potentially prejudicial effect on a fair trial.** The Chamber therefore rejects the admission of recording CAR-OTP-0005-0159.

In *Prosecutor v. Katanga*, Trial Chamber II, even though Presiding Judge Cotte acknowledged that the Chamber had adopted a liberal practice as to the admission of evidence and had postponed the determination of the weight to be given to various pieces of evidence to the end of the trial ([ICC-01/04-01/07-T-187-Red-ENG](#), pp. 37, lines 1-4), the Chamber refused to admit an excerpt of a journalistic broadcast and made the following comments on the video ([ICC-01/04-01/07-T-187-Red-ENG](#), pp. 37, line 10 to pg. 38, line 9):

Regarding the instant case, Mr O'Shea has pointed out that the statements made are highly unspecific. They are not dated. There is mention of Ngiti, but there is no additional information provided, no name of any commander is mentioned, so **we do not have any precise information about the date or time.**

[...]

While presenting evidence, we have to be sure that the probative value should not take too much precedence over the prejudicial effect on the Defence. In this precise case, the Chamber feels that the imprecise nature of this extract, that is extract 4.20, is more important; that is, when it comes to the probative value in relation to the prejudicial effect, the statement made by the journalists are very strong and therefore can have a prejudicial effect on the Defence. So the Chamber has decided not to admit this extract 4.20, and it will therefore not be assigned an EVD number.

The Prosecution has not identified any personal knowledge of the witness which justifies the use of the item with the witness.

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122. In the view of the Chamber, although the audio recording purports to be an interview of the accused by a journalist concerning the MLC's withdrawal from the CAR in March 2003, the item is unlikely to assist in the Chamber's determination of this particular issue. The recording would only be of minimal relevance to the Chamber's determination of the case. **Further, the recording is only an excerpt** and the Chamber has not been provided with sufficient information in order to verify that this brief excerpt actually emanates from RFI or one of its reporters or correspondents. **As previously stated, the prosecution should provide recordings in full and not just excerpts of them, and unless the recording bears sufficient *indicia* that it is what it purports to be (i.e. an RFI transmission), the prosecution must also provide information on its source, originality and integrity. In light of the absence of this information, the alleged probative value of the recording is outweighed by its potentially prejudicial effect on a fair trial.** The Chamber therefore rejects the admission of recording CAR-OTP-0005-0159.

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Category C Objections: Items which have not been shown to the witness

The Defence objects to the use of items with the witness which have not been shown to the witness for comment when her witness statement was taken. The use of these items with the witness will essentially constitute new testimony obtained on the stand (or indeed, during the witness preparation session immediately before the testimony) in violation of the Defence's right to notice.

Appeals chambers of international courts and tribunals, including the ICTR (*Muvunyi v. Prosecutor*, ICTR-00-55A-A, [Judgement](#), 29 August 2008, para. 18; *Ntagerura v. Prosecutor*, ICTR-99-46-A, [Judgement](#), 7 July 2006, para. 27); the ICTY (*Prosecutor v. Kvočka et al.*, IT-98-30/1-A, [Judgement](#), 28 February 2005, para. 31; *Prosecutor v. Kupreškić*, IT-95-16-A, [Appeal Judgement](#), 23 October 2001, para. 92) and the European Court of Human Rights (*Pelissier and Sassi v. France*, 25444/94, [Judgment](#), 25 March 1999, para. 52) have emphasised the importance of notice, recognising that the Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused during the course of trial depending on how the evidence unfolds.

It is inappropriate, and in violation of the defendant's right to adequate time and facilities to prepare a defence under Article 67(1)(b) of the Statute, and to have the opportunity to cross-examine witnesses under Article 67(1)(e) for the Prosecution to be able to mould its case and obtain new evidence on the stand when it has had more than adequate opportunity to do so in the past. P-0554's statement was obtained in **June 2019**, which is:

- **six and a half years after** Items 8, 10, 11, 12, 15, 16, 17, 20, 21, 24, 25, 28, 31, 34, 37, 38, 39 and 40 were produced and **almost five years after** these items entered the custody of the Prosecution;
- **six and a half years after** Item 41 was produced and **almost four and half years after** this item entered the custody of the Prosecution; and
- **between three and a half and four years after** Items 47 and 48 were produced and **shortly before** these items entered the custody of the Prosecution.

This Chamber recognised in paragraph 25 of its [Decision on witness preparation and familiarisation](#) that permitting witnesses to see new exhibits during the witness preparation scheme:

does not create a right for the Prosecution to conduct last-minute investigations or seek to obtain completely new evidence from witnesses immediately prior to their testimony. Judicial control over the Prosecution's ability to introduce at trial information which is not disclosed in a timely manner shall remain intact.

The Chamber went on to note, at paragraph 28:

Moreover, the Chamber notes that, even if the Prosecution obtains and discloses new evidence after having presented to a witness an exhibit he or she had not already seen, it does not mean that the Chamber will necessarily authorise the production of the related evidence during the witness's testimony. Concretely, should the questioning of a witness on certain topics be considered prejudicial because of insufficient notice provided to the accused, objections to certain lines of questioning or motions seeking further time to prepare may be formulated by the Defence prior to or during the course of a witness's testimony. It is on a case-by-case basis, being moved by the Defence or *proprio motu*, that the Chamber will exercise control over the evidence sought from witnesses, notably as well as, more generally, in light of the impact their introduction may have on the fair trial rights of the accused.

The Defence considers that the current circumstances justify the Chamber's intervention, both in terms of the Prosecution's failure to obtain testimony from the witness concerning these items and their prejudicial and highly

sensitive content which could affect the reliability of the witness's testimony. If the Prosecution wished to elicit evidence from the witness concerning these items, the Prosecution could have shown the witness the many pieces of video material already in its possession at the time, or contacted the witness to obtain a further statement in the **twenty months** which have elapsed since June 2019, and duly disclosed such statement to the Defence in accordance with its obligations. The prejudice associated with this is compounded by the fact that the Defence does not yet have a copy of the preparation log and therefore cannot currently appraise the extent of the new evidence elicited from the witness. Having failed to obtain this evidence in a timely and appropriate manner, the Prosecution ought not to be permitted to obtain this evidence based on these items, without notice and without due diligence, on the stand.

In the event that the Chamber does not order the exclusion of these items, in order to remedy the prejudice occasioned by the lack of notice, and depending on the information provided by the witness (which might occasion a need for discrete investigative inquiries or consultation with Mr. Al Hassan), the Defence requests that the Chamber provide the Defence a small adjournment before the start of cross-examination should it be necessary to do so to address these matters.

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Category D Objections: Video lacking an appropriate transcript

The linked transcript for this video (Item 45,) is not an accurate transcript for the purposes of the Directions on the Conduct of Proceedings as it simply describes the visual content of the video rather than accurately transcribing what was said. The Defence has not been provided with the necessary verbatim transcript for its use. The Defence therefore reserves the right to object to the use of the video during questioning and to seek a short extension of time prior to Defence questioning if necessary.

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Category E Objections: Transcripts and translations which are linked to material objected to

Consistently with its practice in the past, the Defence objects to the use of transcripts and translations linked to material to which it objects, being:

- Items 13 and 14 (linked to Item 12, [REDACTED]);
- Items 18 and 19 (linked to Item 17, [REDACTED]);
- Items 22 and 23 (linked to Item 21, [REDACTED]);
- Items 26 and 27 (linked to Item 25, [REDACTED]);
- Items 29 and 30 (linked to Item 28, [REDACTED]);
- Items 32 and 33 (linked to Item 31, [REDACTED]);
- Items 35 and 36 (linked to Item 34, [REDACTED]);
- Item 42 (linked to Item 41, [REDACTED]); and
- Item 45 (linked to Item 44, [REDACTED]).

Best regards,

[REDACTED] (on behalf of the Al Hassan Defence)

From: Dutertre, Gilles [REDACTED]

Sent: 02 February 2021 17:45

To: Trial Chamber X Communications; Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer; [REDACTED]

Cc: [REDACTED]

Subject: List of Materials for Prosecution Witness MLI-OTP-P-0554

Dear Trial Chamber X, Dear Colleagues,

The Prosecution attaches its list of materials for Prosecution Witness MLI-OTP-P-0554.

Kind regards,

Gilles Dutertre

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