

Annex 36

Public

From: Trial Chamber X Communications
Sent: 22 February 2021 08:08
To: [REDACTED]; Trial Chamber X Communications; Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer; Chamber Decisions Communication
Subject: RE: List of Materials for Prosecution Witness MLI-OTP-P-0431

Dear counsel,
 Dear colleagues,

The Chamber takes note of the Defence objections to one investigator's note and multiple photographs the Prosecution intends to use during the examination of P-0431.

As regards the investigation note [REDACTED]), which the Defence submits is testimonial in nature, the Defence objects on the basis that it has no relevance or probative value and that its use may constitute an impermissible form of leading by the Prosecution.

As regards the photographs (tabs 17-109 of the Prosecution's E-binder), the Defence submits that they were not taken by the witness and are dated prior to the events in the charges and thus 'do not accurately capture the state of the mosques and mausoleums prior to the charged events'. The Defence thus contests their relevance and their probative value, which it states is limited. The Defence argues that the associated prejudice of their use outweighs their probative value.

In accordance with previous decisions, the Chamber will not rule on these objections in the abstract. It will be for the Prosecution to establish the foundation for using these items during the examination-in-chief.

The Chamber will determine at that point whether the items may be used, having regard to the manner in which the items are presented and also taking into account any objections raised in court by the Defence.

Kind regards,

[REDACTED]
 (on behalf of Trial Chamber X)

From: [REDACTED]
Sent: 19 February 2021 15:00
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-0431

Dear Trial Chamber X,
 Dear Colleagues,

Pursuant to paragraph 60 of ICC-01/12-01/18-789-AnxA, the Defence provides its objections to the Prosecution's List of Material for Witness P-0431.

Category A Objections: Investigation note

The Defence objects to the use of Tab 113. This document is an investigation note authored by [REDACTED] of the Office of the Prosecutor. As this is testimonial in nature (per the Appeals Chamber in *Bemba et al* at para 304), it has not been authored or signed by the witness, and has not been submitted through Rule 68 (and the Office of the Prosecutor has indicated in the List of Material that it will not be submitted through this witness), the Chamber should therefore assess it as having no relevance or probative value.

Furthermore, the investigation note is prejudicial as it can be suggestive to the witness and may constitute an impermissible form of leading by the Office of the Prosecutor. It is instead the duty of the Prosecutor to elicit such testimony orally (per the Appeals Chamber in *Bemba et al* at paras 305-306). In any event, the Defence, in accordance with paragraph 60 of the Directions on the Conduct of Proceedings, reserves its right to object, during P-0431's testimony, to the manner in which this document is presented to the witness, in particular to the reading of any quotes from this document by the Office of the Prosecutor. As the Appeals Chamber stated in *Bemba et al* at para 307, if the document itself is relied on, it needs to be submitted as evidence.

In circumstances in which the Office of the Prosecutor proposes to use an item which is itself inadmissible in order to elicit testimony from the witness, the prejudice occasioned by such use outweighs the low probative value of the document.

Tab	Document ID	Title	Type	Main Date	To be submitted as evidence through this witness
113	[REDACTED]	[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]	[REDACTED]	No

Category B Objections: Photographs

The Defence objects to Tabs 17-109. These photographs were not taken by this witness, [REDACTED]. Furthermore, these photographs appear to be a set of photographs which date to circa 2005, a period considerably before the events in the charges, because:

- 21 of the images were used in the report [REDACTED] (which is dated 1 January 2006), including [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- the metadata path connected with 84 of the images (Tabs 17 to 101, [REDACTED] inclusively) refers to the images being connected in a folder labelled "2005-2006", and
- the witness himself referred to some of the images in this collection of images (including items both on the list and not on the list) as being a long time ago [REDACTED]
[REDACTED]
[REDACTED]

This means that these images do not accurately capture the state of the mosques and mausoleums prior to the charged events, and their relevance to the witness's testimony and any analysis of the impact of the charged events on these structures, is therefore highly limited. Furthermore, the Prosecution does not propose to submit these items through the witness, and have not shown these items to the witness previously. Given these indications, the prejudice associated with the use of these images outweighs their probative value.

Best regards,

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

From: Dutertre, Gilles [REDACTED]
 Sent: 15 February 2021 22:43
 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]; Luping, Dianne; Garcia, Lucio; Martin Salgado, Elena
 Subject: List of Materials for Prosecution Witness MLI-OTP-P-0431

Dear Trial Chamber X, Dear Colleagues,

The Prosecution attaches its list of materials for Prosecution Witness MLI-OTP-P-0431.

Kind regards,

Gilles Dutertre

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