

Annex 49

Public

From: Trial Chamber X Communications
Sent: 05 March 2021 11:47
To: Al Hassan Prosecution Team; V43 Victims Al Hassan Team; D28 Al Hassan Defence Team
Cc: Associate Legal Officer-Court Officer; Trial Chamber X Communications; Chamber Decisions Communication
Subject: Decision on Defence objections to Prosecution List of Materials for P-0595

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-0595.

In Category A, the Defence objects to two photographs, four videos and one document, on the basis that they were not shown to the witness for comment when the witness statement was taken, submitting that 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. In relation to the two photographs (items 50 and 60), and one of the videos (item 51), the Chamber notes that all were listed as exhibits to be shown to P-0595 in the summary disclosed to the Defence in [REDACTED], and that they were shown to the witness during the preparation session for the limited purpose of identification. The witness's comments thereon are recorded in the preparation log which has been disclosed to the Defence (see preparation log, paras 27-29).

In relation to the other three videos (items 53, 56 and 58), they were also listed as exhibits to be shown to P-0595 in the summary disclosed to the Defence [REDACTED]. They are very short clips which appear to show the same scene depicted in video item 51, showing the person identified by the witness in item 51 during witness preparation [REDACTED] (see preparation log, para. 29).

Finally, in relation to the document (item 64), the Chamber notes that this document was linked to [REDACTED]'s in the Prosecution's Trial Brief filed in May last year and identified therein as the *Procès-verbal* [REDACTED]. The Chamber further notes that the witness's comments on this document have been recorded in the witness preparation log which was disclosed to the Defence (see preparation log, para. 26).

Having considered the content of P-0595's statement, the contested items, as well as the various documents providing notice referred to above, the Chamber considers that it was sufficiently clear that all of these items were related to the witness, and contrary to the Defence submissions, fails to see how their use during his testimony could generate new or unexpected issues for the Defence. The Defence objection is therefore dismissed.

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

In Category C, the Defence objects to item 64, submitting that without 'a judicial waiver provided by [REDACTED] lifting all confidentiality obligations that apply to the interpreter as per this item', the Prosecutor can at most ask P-0595 to comment on the accuracy of the interpretation. The Chamber understands the Defence objection to relate more to the permissible scope of the eventual questioning than to the use of the item per se. In this regard, the Chamber clarifies that, once the relevant foundation has been established, the Prosecution can use the document with the witness to seek his comments on his personal experience of the unfolding of the hearing recorded therein, without infringing on any of his alleged confidential obligations as regard the content of the deposition he reports to have interpreted. Accordingly, the Defence objection is dismissed.

Kind regards,
 [REDACTED], on behalf of Trial Chamber X

From: [REDACTED]
Sent: 03 March 2021 18:25
To: Trial Chamber X Communications <TrialChamberXCommunications[REDACTED]>; Al Hassan Prosecution Team <AlHassanProsecutionTeam[REDACTED]>; V43 Victims Al Hassan Team <V43LRVTeam[REDACTED]>; Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer[REDACTED]>
Cc: D28 Al Hassan Defence Team <D28AlHassanDefenceTeam[REDACTED]>
Subject: RE: List of Materials for Prosecution Witness MLI-OTP-P-0595

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-0595.

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

The Defence objects to the use of items with the witness which were not shown to the witness for comment when the 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-0595's statement was obtained in [REDACTED] which is:

- ■ years and ■ months after Items 50, 51, 53, 56, and 58 were produced and more than ■ years after these items entered the custody of the Prosecution;
- ■ years and ■ months after Item 60 was produced and ■ years and ■ months after this item entered the custody of the Prosecution;
- ■ years and ■ months after Item 64 was produced and ■ years and ■ month after this item 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 and pictures already in its possession at the time, or contacted the witness to obtain a further statement in the [REDACTED] months which have elapsed since [REDACTED], and duly disclosed such statement to the Defence in accordance with its obligations. Having failed to do so, the Prosecution ought not to be permitted to obtain this evidence, without notice and without due diligence, on the stand.

Tab	Doc ID	Type	Title	Main Date	To be tendered as evidence	Referred to in the rule 68(3) application
50	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	Yes	No
51	[REDACTED]		[REDACTED]		Yes	No
53	[REDACTED]		[REDACTED]		Yes	No
56	[REDACTED]		[REDACTED]		Yes	No
58	[REDACTED]		[REDACTED]		Yes	No
60	[REDACTED]		[REDACTED]		No	No
64	[REDACTED]		[REDACTED] [REDACTED] [REDACTED] [REDACTED]		Yes	No

Category B 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:

- Item 52 (linked to Item 51, [REDACTED]);
- Items 54 and 55 (linked to Item 53, [REDACTED]);
- Item 57 (linked to Item 56, [REDACTED]); and
- Item 59 (linked to Item 58, [REDACTED]).

Category C Objections: Status as interpreter

The Defence objects to the use of Item 64 ([REDACTED]), made in the context of a professional or confidential relationship, to which a confidentiality obligation applies which the witness cannot himself waive.

Pursuant to Rule 73(2) of the [Rules and Procedure of Evidence](#), communications made in the context of professional or confidential relationships should be regarded privileged. Such communications of an interpreter before a Court or Tribunal produce a reasonable expectation of privacy and non-disclosure, confidentiality is essential to the nature and type of their work, and recognition of privilege would further the objectives of a Court. Setting such privilege aside would set a problematic precedent as noted by the ICTY:

The interpreter cannot be relied upon to testify on the evanescent words of his interpretation in the proceedings between the parties. It is also an important consideration in the administration of justice to insulate the interpreter or other functionaries of the International Tribunal from constant apprehension of the possibility of being personally involved in the arena of conflict, on either side, in respect of matters arising from the discharge of their duties. (*Prosecutor v. Zejnil Delalic & Others ex parte Zdravko Mucic "Pavo"*, IT-96-21-T, 8 July 1997, [para. 20](#))

This applies *mutatis mutandis* to interpreters before the [REDACTED]

[REDACTED] Without a judicial waiver provided [REDACTED] lifting all confidentiality obligations that apply to the interpreter as per this item, the Office of the Prosecutor can at most ask P-0595 to comment on the accuracy of the interpretation.

Kind regards,

[REDACTED]
On behalf of Counsel for Mr Al Hassan

From: Dutertre, Gilles [<mailto:Gilles.Dutertre@icc-ctd.org>] [REDACTED]
Sent: 26 February 2021 09:07
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-0595

Dear Trial Chamber X, Dear Colleagues,

The Prosecution attaches its list of materials for Prosecution Witness MLI-OTP-P-0595.

Kind regards,

Gilles Dutertre

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