

Annex 59

Public

From: Trial Chamber X Communications
Sent: 15 March 2021 13:09
To: Dutertre, Gilles; [REDACTED] Trial Chamber X Communications
Cc: Al Hassan Prosecution Team; Taylor, Melinda; D28 Al Hassan Defence Team;
 Chamber Decisions Communication
Subject: Decision on Defence request for disclosure of P-0636 witness preparation session recording

Dear colleagues,
 Dear counsel,

The Chamber notes the Defence request pursuant to the Witness preparation protocol, seeking to gain access to the video recording of the preparation session of P-0636. The Chamber notes the Prosecution's response, opposing the Defence request.

The Chamber does not consider that disclosure of the video-recording is warranted in the instant case. Neither is it necessary for the Chamber to review the recording in order to make this determination.

As regards the first point raised by the Defence, the Chamber does not consider that the sentence in paragraph 4 of the Preparation Log, [REDACTED] raises any concerns that would warrant disclosure of the recording. In fact, this phrase appears to be part of the introduction made at the preparation session. The Chamber also notes that the language used is simpler [REDACTED] [REDACTED] as well as the fact that this session took place through interpreters.

As regards the second point raised by the Defence, and having read the investigator's notes, the Chamber does not consider that the contacts between the witness and the Prosecution investigator raise any concern or appear inappropriate or irregular. These appear to be brief contacts that did not touch upon any substantive matter related to the witness's testimony. To the contrary, the Chamber notes the second contact took place at the request of the VWS, which had been unable to contact the witness. [REDACTED] [REDACTED] the Chamber considers that a relationship of trust between the witness and the OTP investigator is not a matter of concern or in any way inappropriate. The Chamber also agrees with the Prosecution in that there is no link between these contacts and the recording of the preparation session.

As regards the third point raised by the Defence, the Chamber notes that the Prosecution has confirmed it will not show these items to the witness during her testimony. Accordingly, the Chamber considers that this part of the Defence request is moot. However, the Chamber notes that all items appear on the Prosecution Updated List of Evidence, and the Chamber does not consider that showing images to a witness to recognise a location or a person, is per se in breach of the Witness preparation protocol.

Accordingly, the Chamber dismisses the Defence request.

Regards,

[REDACTED]
 (on behalf of Trial Chamber X)

From: Dutertre, Gilles <Gilles.Dutertre [REDACTED]>
Sent: 15 March 2021 09:24
To: [REDACTED] Trial Chamber X Communications
 <TrialChamberXCommunications [REDACTED]>

Cc: Al Hassan Prosecution Team <AlHassanProsecutionTeam [REDACTED]> Taylor, Melinda <mtaylor [REDACTED]>;
D28 Al Hassan Defence Team <D28AlHassanDefenceTeam [REDACTED]>
Subject: RE: Defence request for disclosure of P-0636 witness preparation session recording

Dear Trial Chamber,

The Defence's request is speculative, without merit and should be rejected.

In relation to the Defence's first concern, the Witness did not seek guidance on how she should answer questions. The Prosecution routinely explains to the witness during preparation sessions that coaching is not allowed, as is provided in paragraph 3 of the Witness Preparation Protocol. This was explained in simple terms for the witness to understand, so the witness was told that the Prosecution cannot tell her how to respond to questions. This was said to the Witness simply to indicate what could not be done during the Preparation session.

As regards the Defence's second concern, the circumstances of the said communication have been disclosed and the Defence is fully aware of the nature of its content. Further, there is no link between this communication and the Defence's request of the recording of the preparation session.

With respect to the Defence's third concern, the Defence's claim that "the prosecution was, at a minimum, seeking new evidence or continuing its investigation, and may have unduly influenced the witness' imminent testimony (in potential contravention of para. 3 of the Witness Preparation Protocol)" is speculative and without merit. The Prosecution was simply determining whether these elements could be used with the Witness in line with paragraph 24 of the Protocol. In the end the Prosecution chose not to use these items with the Witness.

Best regards,

Gilles Dutertre

From: [REDACTED]
Sent: 14 March 2021 21:44
To: Trial Chamber X Communications
Cc: Dutertre, Gilles; Al Hassan Prosecution Team; Taylor, Melinda; D28 Al Hassan Defence Team
Subject: Defence request for disclosure of P-0636 witness preparation session recording

Your Honours,
Dear Colleagues,

Pursuant to paragraph 13 of the Witness Preparation Protocol (ICC-01/12-01/18-666-Anx), the Defence hereby requests the disclosure of the audio-recording of Witness P-0636's preparation session.

There are a number of concerns arising that warrant the provision of the recording, namely:

- (i) [REDACTED], the Prosecution disclosed its Preparation Log for Witness P-0636 [REDACTED] describing its witness preparation sessions [REDACTED]. At para. 4 ([REDACTED]), this reads [REDACTED] At a minimum, this raises a concern that the witness sought guidance from the Prosecution as to how she should answer questions, raising a concomitant concern regarding the witness' development of a relationship of dependency towards the Prosecution. The need for clarity and precision regarding the circumstances of this exchange warrants the disclosure of the recording of the witness preparation session.
- (ii) [REDACTED], after the conclusion of the witness preparation, and despite it apparently being explained that there must be no further contact between the Prosecution and the witness after the preparation session, Associate Investigator [REDACTED] acceded to P-0636's request to call her ([REDACTED]). The reported content of this communication also raises concerns regarding the nature of the witness' relationship with the Prosecution. [REDACTED] details further contact the

following day. Neither the fact that P-0636 had not yet been contacted by VWS, nor the practical explanation are sufficient to remedy the breach of the protocol or the concern regarding the witness' dependency on the Prosecution. This irregular contact supports the need for the disclosure of the recording of the witness preparation session.

- (iii) During her preparation session, the Prosecution showed videos ([REDACTED]) and a number of photographs (MLI-OTP-0048-0729, [REDACTED], [REDACTED], [REDACTED], MLI-OTP-0009-1485) not previously seen by the witness. Pursuant to the general principle outlined at para. 2 of the Witness Preparation Protocol and para. 26 of ICC-01/12-01/18-666, this is permissible only if these have been disclosed to the Defence, appear on the Prosecution's list, and relate to a known issue for which adequate notice was provided. These were not included in the Prosecution's original list, nor in its final list. The prejudicial nature of these (especially, [REDACTED], [REDACTED], [REDACTED]) raises a concern that the prosecution was, at a minimum, seeking new evidence or continuing its investigation, and may have unduly influenced the witness' imminent testimony (in potential contravention of para. 3 of the Witness Preparation Protocol). This too warrants the disclosure of the full recording of the witness preparation session.

For all the reasons herein, the Defence respectfully requests the disclosure of the recording of Witness P-0636's preparation session.

Respectfully,

Kirsty Sutherland
Defence for Al Hassan

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