

Annex I

Public

From: [REDACTED]
Sent: 06 November 2020 15:56
To: Al Hassan Prosecution Team; 'V43LRVTeam [REDACTED]';
'D28AlHassanDefenceTeam [REDACTED]'; Associate Legal Officer-Court Officer; FS
Items Communication; Associate Legal Officer-Court Officer
Cc: Trial Chamber X Communications
Subject: Decision on submitted material for P-0653 and P-0655
Attachments: Defence Response 19.10.2020.pdf; Defence Submission of Material 16.10.2020.pdf;
OTP Reply 21.10.2020.pdf; OTP Response 16.10.2020.pdf; OTP Submission of
Material 14.10.2020.pdf; Defence Material to be Submitted 16.10.2020.pdf; Defence
Response 21.10.2020.pdf; OTP Material to be Submitted 16.10.2020.pdf; OTP Reply
22.10.2020.pdf; OTP Response 21.10.2020.pdf

Dear counsel,
Dear colleagues,

The Chamber notes the submission of items by the Prosecution (Email from the Prosecution dated 14 October 2020 at 19:15 and corresponding attachment), as well as by the Defence (Email from the Defence dated 15 October 2020 at 9:55) following the testimony of P-0653.

The Chamber also notes the submission of items by the Prosecution (Email from the Prosecution dated 16 October 2020 at 10:17 and corresponding attachment), as well as by the Defence (Email from the Defence dated 16 October 2020 at 13:15) following the testimony of P-0655.

It is noted that the Prosecution does not object to the submission of the items proposed by the Defence for P-0653 and P-0655 (E-mails from the Prosecution on 16 October 2020 at 12:35 and on 21 October 2020 at 14:56).

The Chamber takes note of the Defence's objections to items related to P-0653 (E-mail from the Defence of 19 October 2020 at 13:50) and the Prosecution's reply thereto (E-mail from the Prosecution of 21 October at 14:43).

The Chamber takes note of the Defence's objections to items related to P-0655 (E-mail from the Defence of 21 October at 15:03) and the Prosecution's reply thereto (E-mail from the Prosecution of 22 October 2020 at 15:20).

The Chamber has had due regard to the email exchanges between the parties as a result of their respective submission of items following the testimony of P-0653 and P-0655. Noting the overlap between the items related to these two witnesses and the objections and replies thereto, the Chamber has considered them together.

In respect of P-0653, the Chamber notes that the Defence objects to the submission of the expert report as well as the recordings of public hearings in the case referred to in the report. It submits that this is evidence obtained by means of a violation of internationally recognised human rights (i.e. self-incrimination and privacy). In respect of P-0655, the Chamber notes that the Defence makes similar objections as regards the reliance by this expert in his report, on recordings of public hearings in the case. Additionally, the Defence submits that P-0655's report relies on recordings obtained at the *Securité d'Etat*, which were obtained in breach of Article 55 of the Statute (the Prosecution does not seek to submit these recordings at this stage). It submits that the exclusionary rule applies in respect of violations (i.e. arbitrary detention and torture) committed against the accused. For both expert reports and related material, the Defence argues that given the objections it raised prior to testimony, the Prosecution was under the obligation to satisfy the Chamber of the legality of the evidence.

The Prosecution in its reply contends in relation to P-0653 that the report and related material were already authorised for submission in the Experts Decision (see Decision ICC-01/12-01/18-989-Conf). Additionally, the Prosecution submits that the use of publicly available images is not contrary to the accused's right to privacy or self-incrimination. As regards the allegations of tainted evidence, the Prosecution contends that arguments relating to

the expert report use of tainted evidence are premature, as the Prosecution is not seeking the submission of underlying material at this stage. The Prosecution submits, referring to the Chamber's Experts Decision, that the Chamber's conclusions in respect of P-0653 equally apply to P-0655's report and the material of court hearings relied on by the experts. The Prosecution further submits that the Chamber in the aforesaid Experts Decision already authorised the submission of P-0653 and P-0655's reports and related material pursuant Rule 68(3) of the Rules of Procedure and Evidence (the 'Rules').

The Chamber has considered the nature and scope of these experts' testimony, particularly that the Chamber previously authorised the introduction of the experts' reports and related material pursuant to Rule 68(3) of the Rules (see Decision ICC-01/12-01/18-989-Conf, paras 55-68). The Chamber further notes that the formalities pursuant to this provision were met during their respective testimonies.

However, the Chamber observes that some of the items included in the Prosecution's lists (in particular the recordings of court proceedings), although related to the experts' reports, were not comprised within the material to be submitted pursuant to Rule 68(3) of the Rules, but solely as material needed to understand the experts' reports (see Section III of the corresponding annexes in the Prosecution's Rule 68(3) request for P-0653 and P-0655, ICC-01/12-01/18-843-Conf-AnxA and AnxB). The Chamber notes that these items were not otherwise shown to the witness in court. Moreover, although the experts relied on this material to write their reports, the reports are self-contained documents that are understandable without having to refer to the underlying material. In fact, as noted by the Prosecution in its reply to the objections made by the Defence in respect of P-0655, the Prosecution is not seeking the submission of some of the underlying material at this stage (namely the recordings of Mr Al Hassan's interviews with Prosecution investigators).

Accordingly, the Chamber solely authorises at this stage the submission of the following items of the Prosecution:

P-0653: MLI-OTP-0048-4915-R01, MLI-OTP-0074-0534 and MLI-OTP-0066-2198.

P-0655: MLI-OTP-0069-9833, MLI-OTP-0074-0534 and MLI-OTP-0078-4924-R01.

Noting there is no objection from the Prosecution, and considering that the items the Defence seeks to submit were used during the cross-examination of P-0653 and P-0655, the Chamber authorises their submission. Thus, the following items of the Defence are formally submitted:

P-0653: MLI-D28-0004-1644, MLI-D28-0004-1694 and MLI-D28-0004-1696.

P-0655: MLI-OTP-0078-9278, MLI-OTP-0078-9236, MLI-OTP-D28-0004-1795, MLI-D28-0004-1875, MLI-D28-0004-2434, MLI-D28-0004-2812 and MLI-D28-0004-2820.

The Registry is directed to proceed in accordance with paragraph 34(vi) of the Directions on the conduct of the proceedings (ICC-01/12-01/18-789-AnxA).

Nonetheless, the Chamber observes that in light of its Directions on the conduct of proceedings, submission and admission of evidence must be distinguished. The challenges made by the Defence pursuant to Article 69(7) ultimately refer to the admissibility of the expert reports and the legality of the underlying material relied upon them to prepare their reports. Thus, pursuant to paragraph 32 of its Directions on the conduct of proceedings, the Chamber will render a ruling on the admissibility of the above submitted expert reports in due course. The Chamber may request further submissions from the parties and participants if deemed necessary for its determination.

Kind regards,



(on behalf of Trial Chamber X)