

Annex I

Public

From: Trial Chamber X Communications
Sent: 05 March 2021 16:30
To: D28 Al Hassan Defence Team (D28AlHassanDefenceTeam[REDACTED]); Al Hassan Prosecution Team; V43 Victims Al Hassan Team
Cc: Associate Legal Officer-Court Officer; FS Items Communication; Trial Chamber X Communications
Subject: Decision on submitted material for P-0114
Attachments: Prosecution Response.pdf; Prosecution objections.pdf; Prosecution List.pdf; Defence objections.pdf; Defence List.pdf

Dear counsel,
 Dear colleagues,

The Chamber notes the submission of items by the Prosecution (Email from the Prosecution dated 15 February 2021 at 17:58 and corresponding attachment (the ‘Prosecution List’)), as well as by the Defence (Email from the Defence dated 16 February 2021 at 13:45 (the ‘Defence List’)) following the testimony of P-0114.

The Chamber takes note of the parties’ objections to the submission of items by the other party (Email from the Prosecution dated 16 February 2021 at 17:02 and email from the Defence dated 18 February 2021 at 16:37) as well as the Prosecution’s response to the objections raised by the Defence (Email from the Prosecution dated 19 February 2021 at 17:46).

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-0114. The Chamber also considered the nature and scope of the witness’s testimony, particularly that the Chamber previously authorised the introduction pursuant to Rule 68(3) of the Rules of the two witness statements of P-0114, their annexes and associated material (*see* Decision ICC-01/12-01/18-1267-Conf, paras 10-15).

I. Defence objections to the Prosecution List

1. Category A

As regards the items objected by the Defence under ‘Category A’ on the basis that no authenticity has been established, the Chamber notes the Defence submissions that several items which the Prosecution seeks to submit were not shown to the witness nor even referred to over the course of the testimony (items 1-81, 84-85, 99 and 101-102 of the Prosecution List). The Defence therefore submits that the Prosecution failed to complete the formalities of Rule 68(3) and further, in relation to photographs in tabs 2-81 of the Prosecution binder, the Defence submits that there is no evidence of provenance.

The Chamber recalls its previous finding that ‘[w]hen confirming in court that the procedural prerequisites of Rule 68(3) have been fulfilled, it is not required that each piece of document must have been shown and individually confirmed by the witness. Rather, it is sufficient that the witness is given the opportunity to confirm the report and related materials as a whole’ (Email from the Chamber dated 29 October 2020 at 10:01; Email from the Chamber dated 6 November 2020 at 09:21).

In the instant case, the Chamber notes that items 2-82 were shown to the witness during the preparation session and is satisfied that P-0114 was given the opportunity to confirm these items as a whole. In fact, P-0114 confirmed that he agrees to the submission of his first statement as well as the related photographs (T-060-CONF-ENG ET p. 14 lines 12-16). Similarly, the Chamber finds that items 84 (MLI-OTP-0023-0391), 85 (MLI-OTP-0028-0116), and 99 (MLI-OTP-0033-5637)^[1] can be admitted together with P-0114’s first statement since they are annexes thereto (*see* MLI-OTP-0023-0344 at 0386-0387) which he reviewed and confirmed (*see* T-060-CONF-FRA ET, p. 13 lines 5-13). As regards items 101 and 102, the Chamber notes that these are copies of an email from P-0114 containing the photographs annexed to his second witness statement and that the email (MLI-OTP-0060-0403) was shown to the witness during the preparation session. Accordingly, the Chamber considers that the witness was given the opportunity to confirm these items as a whole and therefore authorises their submission.

Accordingly, the Chamber authorises the submission of these items.

As regards the Defence submissions on lack of provenance, the Chamber considers that the matter raised by the Defence pertains to the probative value of the items and does not prevent their submission at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence ‘without a prior ruling on relevance and/or admissibility’ and considering ‘relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’ (see ICC-01/12-01/18-789-AnxA, para. 29).

As regards item 1 (MLI-OTP-0007-0211), the Prosecution submits that although the witness was not asked explicitly to comment on this item, [REDACTED]

[REDACTED], and that although the witness did not comment on events in 2013, he provided evidence broadly relevant to destruction of mausoleums in Timbuktu’.

The Chamber notes that this item, which is a four-page report [REDACTED], was not shown to the witness during his testimony or the preparation session and neither is it referred to in the witness’s statements. The Chamber further notes that the witness was not asked to confirm if he agrees with the submission of item MLI-OTP-0007-0211 (see T-060-CONF-ENG ET, p. 14 lines 12-16).

In these circumstances, the Chamber considers that P-0114 was not given an opportunity to confirm this item and that therefore the Prosecution failed to satisfy the formalities of Rule 68(3) of the Rules. Accordingly, the Chamber rejects the submission of MLI-OTP-0007-0211.

2. Category B

The Defence also objects to items it identifies under ‘Category B’, on the basis that these presentations were prepared with a methodology lacking in rigour. The Defence avers that since P-0114 confirmed that these items contain information the witness did not verify and given that the witness relied on unverified third party sources of information not relating to Timbuktu or the relevant events, the Chamber should find that these items are wholly lacking in reliability, and should accord them no weight.

The Chamber considers that the matter raised by the Defence pertains to the probative value of the items which, for the reasons set out above, do not prevent the submission of these items at this stage. Accordingly, the Chamber rejects the Defence objections made to items it identifies under ‘Category B’.

As regards the remainder of items on the Prosecution List to which the Defence does not object, the Chamber is satisfied that the formalities under Rule 68(3) of the Rules has been satisfied and accordingly authorises their submission.

II. Prosecution objections to the Defence List

As regards the items to be submitted by the Defence, the Prosecution objects to the submission of MLI-D28-0004-4744, on the basis that the witness was not given an opportunity to review or comment on the item in its entirety. The Prosecution accordingly submits that only pages 4722 to 4725 should be taken into account by the Chamber. The Chamber notes that item MLI-D28-0004-4744 is P-0114’s CV and that the witness confirmed during his testimony that he had authored the document himself (T-060-CONF-ENG ET p.5 lines 15-18). Accordingly, the Chamber is satisfied that this item was used or discussed with P-0114 in a broad sense and therefore authorises its submission.

Further, the Chamber is satisfied that all the items in the Defence List have been used or otherwise discussed in a broad sense with witness P-0114.

For the aforementioned reasons, the Chamber authorises the submission of all items identified in the Prosecution’s email dated 15 February 2021 at 17:58 and the Defence’s email dated 16 February 2021 at 13:45, with the exception of item MLI-OTP-0007-0211.

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).

Kind regards,

[REDACTED]
On behalf of Trial Chamber X

^[1] With respect to MLI-OTP-0033-5637, the Chamber notes that the Prosecution Rule's 68(3) application for P-0114 (ICC-01/12-01/18-1106-Conf-AnxA, paras 4 (n.10) and 16 (n.27)) and its annex (ICC-01/12-01/18-1106-Conf-AnxA, p. 5 item II-85) describes this item as having the ERN 'MLI-OTP-0060-0402'. The Chamber is satisfied that this is a typographical error, and therefore considers that the submission of MLI-OTP-0033-5637 is authorised pursuant to Rule 68(3) of the Rules.