

Annex B

From: Trial Chamber X Communications
Sent: 21 April 2020 16:11
To: [REDACTED]
Cc: [REDACTED]
Subject: TC X - Decision on second Defence request seeking leave to reply to Prosecution response ICC-01/12-01/18-699-Conf and other related Defence request
Follow Up Flag: Follow up
Flag Status: Flagged

Dear Counsel,

The Single Judge takes note of the Defence second request for leave to reply to ICC-01/12-01/18-699-Conf (email dated 15 April at 9:35) and the Prosecution response opposing this request (email dated 15 April at 12:38). The Single Judge also takes note of the Defence's request for leave to reply to this Prosecution response (email dated 15 April at 13:28) as well as the related submissions formulated by the Prosecution in response (email dated 15 April at 14:29).

The Single Judge is of the view that these two subsequent and interrelated requests for leave to reply will not assist in her adjudication of the matter as raised in Defence request ICC-01/12-01/18- 667-Conf. The Single Judge further notes that the replies sought proposed to address a number of questions and issues in a way which goes far beyond the scope of a reply under Regulation 24(5). They are therefore dismissed.

Best regards,

[REDACTED]
 On behalf of the Single Judge of TC X

From: Dutertre, Gilles
 Sent: 15 April 2020 14:29
 [REDACTED]

Dear Trial Chamber X

For the limited purpose of correcting the record, it is prudent to draw the Chamber's attention that Prosecution filing 440, para 20, referred to in the Defence's email, which reads "*Disclosure and inspection under article 67(2) of the Statute and rule 77 of the Rules is an on-going obligation. In this case, the Prosecution has duly discharged this obligation, as shown, in particular, by the regularity with which disclosure packages have been communicated to the Defence over several months in accordance with the Chamber's decision on disclosure*" does not support the Defence's characterization of the Prosecution position.

In para 19 of the same filing, the Prosecution made it clear that *“when the overarching nature of an item is incriminatory, it is labelled and disclosed as such ”*.

It is therefore not accurate of the Defence to state that *“Prosecution has previously argued that disclosure letter classifications are not, in themselves, an indication of the likely use or nature of the content of the disclosed materials”*

Best regards,

Gilles Dutertre

From: Taylor, Melinda
Sent: 15 April 2020 13:28

[Redacted]

Dear Trial Chamber X,

The Defence respectfully seeks leave to reply to the Prosecution response below, to the limited extent, of highlighting firstly, that apart from references in the Prosecution BSQ response to disclosure (and non-disclosure), occurring within the framework of Rule 77 and Article 67(2), the Prosecution has previously argued that disclosure letter classifications are not, in themselves, an indication of the likely use or nature of the content of the disclosed materials (see, amongst others, Prosecution filing 440, para 20). A limited Defence addendum on this specific Rule 76 aspect would, moreover, lessen unnecessary litigation insofar as if the information in question falls under Rule 76, then the Defence request would be moot, since the information in the BSQs would then fall within the definition of a witness statement, as established by the Appeals Chamber in the Banda/Jerbo case.

Kind regards

Al Hassan Defence team

From: Dutertre, Gilles <Gilles.Dutertre@icc-cpi.int>
Sent: 15 April 2020 12:38

[Redacted]

Subject: RE:

Dear Trial Chamber X

The Prosecution opposes this yet again another attempt from the Defence to substantiate its original request and to add additional arguments in its support notwithstanding the Chamber's previous rejection to a similar request to seek leave to reply on the same matter.

On 17 March 2020, the Defence filed its request requesting the disclosure of all BSQs conducted in relation to [REDACTED] interviewed by the Prosecution (ICC-01/12-01/18-667-Conf).

On 30 March 2020, the Prosecution opposed this request (ICC-01/12-01/18-699-Conf).

On 3 April 2020, the Defence sought leave to reply to the Prosecution response (ICC-01/12-01/18-720-Conf), which the Prosecution opposed on 7 April 2020 on the grounds that the application is in violation of regulation 24 (4) and (5) of the Regulations of the Court as it contains substantive arguments prior to obtaining leave from the Chamber, and that the issues for which leave to reply is sought are not confined to issues which "could not reasonably have [been] anticipated" (ICC-01/12-01/18-730-Conf).

On 8 April 2020, the Single Judge found that her determination would not be materially assisted by further submissions on the issues identified by the Defence and therefore rejected the Defence application for leave to reply. (Email on 8/4/2020 at 13h20).

The Defence new request submitted *via* email today is premised on the argument that the Defence was only informed of the Prosecution's intention to use its investigation notes as Prosecution evidence with the filing of the Prosecution list of evidence.

The record of the case does not support this argument.

The Defence was well aware of the Prosecution's intention to rely on this type of notes as incriminatory evidence. As the record shows, the Prosecution classified investigation notes extracted from BSQs or more generally pertaining to the [REDACTED] of its witnesses as incriminatory evidence. This was known to the Defence prior to its original motion on 17 March 2020 and/or its application for leave to reply on 3 April 2020.

For example:

-) Investigation note MLI-OTP-0076-0027 cited in Defence's application for leave to reply (ICC-01/12-01/18-720-Conf, footnote 10) was disclosed as incriminatory evidence on 28/2/2020 in Pre-Trial INCRIM package 53.
-) Investigation note MLI-OTP-0070-1662 was disclosed as incriminatory evidence on 21/1/2020 in Pre-Trial INCRIM package 47 and again on 10/3/2020 in Pre-Trial INCRIM package 61

-) Investigation note MLI-OTP-0065-0194 was disclosed as incriminatory evidence on 24/1/2020 in Pre-Trial INCRIM package 48 and again on 6/3/2020 in Pre-Trial INCRIM package 57
-) Investigation note MLI-OTP-0064-1116 was disclosed as Rule 77 material on 5/2/2020 in Pre-Trial Rule 77 package 35 and was then reclassified as incriminatory evidence and re-disclosed again on 10/3/2020 in Pre-Trial Reclassification to INCRIM package 05.
-) Investigation note MLI-OTP-0069-8903 was disclosed as incriminatory evidence on 30/3/2020 in Pre-Trial INCRIM package 63
-) Investigation notes MLI-OTP-0071-0026, MLI-OTP-0071-0028, MLI-OTP-0071-0029, MLI-OTP-0071-0030, MLI-OTP-0071-0031, MLI-OTP-0071-0032, MLI-OTP-0071-0034, MLI-OTP-0071-0036, and MLI-OTP-0071-0041 were first disclosed as incriminatory evidence on 21/1/2020 in Pre-Trial INCRIM package 47

Therefore, the Prosecution's intention to rely on these notes has been made sufficiently clear to the Defence through their incriminatory classification when they were disclosed to the Defence. It is even clearer when the Prosecution reclassifies some of these notes from Rule 77 classification to Incriminatory evidence, as demonstrated above (*see e.g* MLI-OTP-0064-1116).

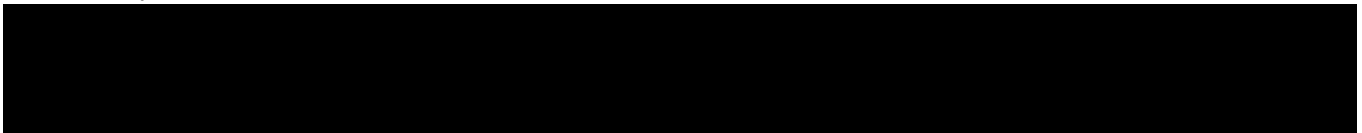
Further, the submission of the Prosecution's list of evidence on the date set by the Chamber and the formal inclusion into this list of evidence previously disclosed as incriminatory is not in and of itself a new issue or one that "could not reasonably have [been] anticipated".

The Defence's request should therefore be denied.

Best Regards,

Gilles Dutertre

From: Taylor, Melinda
Sent: 15 April 2020 09:35



Dear Trial Chamber X,

Yesterday, the Defence received the Prosecution's list of evidence, and witnesses summaries, which are linked to the evidence that the Prosecution intends to put to each witness in question. The Prosecution has included in its list of evidence (and summary linkages) several investigator's notes concerning the [REDACTED]. This is the first time that the Defence was informed

of the Prosecution's intention to use these notes as Prosecution evidence: the Prosecution never referred to this possibility in disclosure correspondence, or in its response to the Defence request for access to the underlying BSQ transcripts. To the contrary, the Prosecution specifically distinguished the applicability of the Lubanga appellate precedents on the grounds that the RFA in that case was relevant to the admissibility of Prosecution rebuttal evidence (Response, para 27) -thus implying that the investigator's notes were not Prosecution 'evidence'.

This changes the legal basis for the Defence request for access to the underlying BSQ transcripts, and further heightens the necessity of disclosure. Specifically, since the Prosecution intends to rely on these notes as evidence against Mr. Al Hassan, the Defence has a right to receive any materials that might be relevant to the reliability and accuracy of the production of these notes (as per Article 67(2) of the Statute). Non-disclosure would also raise equality of arms issues since the Prosecution (in possession of the underlying transcripts) would be in a privileged position as concerns its ability to raise these issues with witnesses on the stand.

In light of his new development, which post-dates both the Defence request, and the Defence request for leave to reply, the Defence seeks the leave of the Honourable Trial Chamber to file a short reply/addendum, addressing this development. Since the Prosecution was clearly aware that it would rely on these notes, as evidence, at the time it submitted its response, it cannot claim to be prejudiced by a short addendum/reply, addressing this specific development.

Kind regards

The Defence for Mr. Al Hassan

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