

From: Trial Chamber X Communications
Sent: 17 September 2020 17:56
To: D28 Al Hassan Defence Team ([REDACTED]); Taylor, Melinda; [REDACTED]
Cc: Dutertre, Gilles; [REDACTED]
Subject: RE: URGENT request for delay of testimony of witness P-193 and provision of further information
Follow Up Flag: Follow up
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Categories: Red Category

Dear counsel,

The Chamber has considered the matter raised by the Defence below and the Prosecution's response.

In light of the information available, the Chamber considers that the appropriate course of action is the following. First, to allow for the warranted scrutiny in light of the timing of the reported contact with P-0193, the Prosecution is directed to immediately disclose to the Defence the email in question. The Chamber does not find it necessary to require that this be provided at least 24 hours in advance of the witness's testimony. Second, in light of the information presently available, in particular that 'According to P-0193 the error does not change the conclusions of the report', the Chamber considers it appropriate for the witness to provide any clarification as to this error during the course of the examination-in-chief. Upon receiving these details, and if strictly necessary, the Defence may make a concrete oral request for remedy, including to postpone the start of its cross examination.

Best regards,

[REDACTED] on behalf of the Single Judge of Trial Chamber X

From: Dutertre, Gilles
 Sent: 17 September 2020 16:49
 To: Trial Chamber X Communications
 Cc: [REDACTED] Taylor, Melinda; [REDACTED]
 Subject: RE: URGENT request for delay of testimony of witness P-193 and provision of further information

Dear Trial Chamber X,

The Prosecution would like to clarify that the preparation session with witness P-0193 was conducted on 4 September 2020 in accordance with paragraph 11 of ICC-01/12-01/18-666-Anx. No further preparation was conducted thereafter.

The contact that was made today was initiated by the witness himself as described in the note communicated to the Defence today and attached to the Defence's email. The Prosecution did not seek to obtain any further clarification from the witness given that he is scheduled to appear tomorrow.

Accordingly, the Prosecution is in the same position as that of the Defence with respect to the substance of this clarification and will learn about it at the same time as the parties and participants during the witness's examination tomorrow, and therefore any claim of prejudice to the Defence is misplaced.

Clarifications are routinely made during witnesses' examinations in court and parties should be ready to address them as they unfold, especially as noted by P-0193 such clarification does not change the conclusions of the report.

Given the nature of this potential clarification, the Prosecution does not consider a postponement to the witness's examination is warranted, and therefore proposes that the examination of the witness proceed as scheduled.

In any event, should the Chamber assess after hearing the clarification that more time is required for the Defence to prepare, this can be properly considered and assessed after the Prosecution's examination in chief.

Finally, the Prosecution has conveyed the information in the email sent by the witness in an investigation note (as attached to the Defence's email) and therefore does not consider that a disclosure of the email itself is required.

Respectfully,
Gilles Dutertre

From: [REDACTED]
Sent: 17 September 2020 15:47
To: Trial Chamber X Communications
Cc: [REDACTED]; Taylor, Melinda;
Dutertre, Gilles
Subject: URGENT request for delay of testimony of witness P-193 and provision of further information

Dear Trial Chamber X,

This afternoon the Prosecution disclosed item MLI-OTP-0078-8540 via email to the Defence (attached) 14h25. The Defence attempted to resolve this on an *inter partes* basis but was unable to do so.

MLI-OTP-0078-8540 describes witness P-193 identifying an issue of substance in his report, and proposing to address the undisclosed substantive issue on the stand tomorrow.

The Prosecution subsequently informed the Defence that the contact occurred by email at 12h35 today - that, is, less than 24 hours before his testimony. Therefore, from the document at least the following can be observed:

1. It appears that there may have been contact between the witness and the Prosecution team within 24 hours of his testimony; and
2. This should not have occurred without notification to the parties and prior authorisation from the Trial Chamber, as pursuant to paragraph 11 of ICC-01/12-01/18-666-Anx, witness preparation is supposed to be completed at least 24 hours prior to testimony so that the Defence can be notified of any new information and be in a position to prepare its cross-examination accordingly.
3. The witness – as an in-house analyst – should have been aware of the restrictions on contact.

The witness's proposed course of action contained within the meeting note, that is to say, that P-193 addresses this issue for the first time on the stand, is inappropriate as it constitutes a form of trial by surprise. The Defence has a right to know the case it has to meet. For technical evidence of this nature, it is essential that the Defence can

analyse the changed information / explanation, review the existing material, and can potentially consult with external experts so that the Defence can examine the witness under the same conditions as the Prosecution. This will not be possible if P-193 addresses this issue for the first time on the stand tomorrow.

Following receipt of this email – the Defence contacted the Prosecution to identify how they intended to address the issue and what steps could be taken to ensure timely disclosure of the information referred to by P-193, and to mitigate any the prejudice to the Defence (including for example, adjourning P-193’s testimony, or deferring cross-examination until Monday). The Prosecution confirmed that they will elicit this information during examination-in-chief and proposed that any further steps be determined tomorrow after the testimony is known. The Prosecution also declined to disclose the email in question.

Given the very short amount of time available before the commencement of testimony, and the clear relevance of the inaccuracies identified by P-193 to the content of his forthcoming testimony, the Defence proposes that:

- The email – which violated the contact protocol – be disclosed to the parties;
- The Prosecution should be required to identify and disclose the nature of this inaccuracy to the Defence 24 hours in advance of his testimony; or
- The Defence should be afforded the opportunity to post-pone cross-examination so that it can assess the extent to which any such new information impacts on its lines of questioning, and to add additional items to its list of evidence if necessary.

Kind regards,

[REDACTED]

On behalf of Counsel for Mr Al Hassan

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