

ANNEX 17

Public redacted

From: Trial Chamber X Communications
Sent: 22 September 2020 13:23
To: Dutertre, Gilles; [REDACTED]
 [REDACTED] D28 Al Hassan Defence Team; V43 Victims Al Hassan Team
Cc: Trial Chamber X Communications; [REDACTED]
Subject: Decision on Regulation 35 request in relation to P-0623

Follow Up Flag: Follow up
Flag Status: Flagged

Dear counsel

The Chamber renders this present ruling on the Prosecution's request to add three items to its List of evidence, [REDACTED]
 [REDACTED]
 [REDACTED] and the relief requested in the Defence email response of 21 September 2020 at 13:51.

Regulation 35 request

The Chamber applies the principles set out in its decision of 5 August 2020 (Decision 988, para. 6).

The Prosecution acknowledges that the items were inadvertently not included in its List of Evidence, and the test under Regulation 35(2) is therefore not satisfied. The Chamber notes with concern that the information which is the subject of these items was referenced in P-0623's statement and yet was not disclosed in a timely manner. The Chamber emphasises its previous direction that requests for late additions to the list of evidence are exceptional and should not in any way become the norm during trial (Decision 988, para. 8). This notwithstanding, the Chamber considers that in the instant case, it is in the interest of justice and determination of the truth to grant the late addition sought, having notably found that no undue prejudice arises to the Defence. In this regard, the Chamber disagrees with the Defence submission that these items 'fundamentally change the nature of P-0623's testimony'. The Chamber notes in this respect that the documents or the information therein apparently corroborates aspects of P-0623's statement rather than providing new allegations: [REDACTED]
 [REDACTED]
 [REDACTED]

[REDACTED] The Chamber further considers that it is in the interests of fairness that this material be added to the List of Evidence such that it may be used during the examination (and cross examination) of the witness.

Other Defence relief requested

In relation to the request from the Defence for access to the recording of P-0623's witness preparation session, the Chamber considers that there is nothing in the witness preparation log to suggest that the corrections or statements from the witness on the issues raised by the Defence (in particular in paragraphs 1 and 8 of the preparation log) were anything but spontaneous. The Chamber therefore considers that access to the video has not been shown to be warranted pursuant to para. 13 of the Witness Preparation Protocol (Decision 666-Anx).

In relation to the other relief sought by the Defence for what it submits are 'new allegations uncovered in the course of witness preparation', namely either (i) an adjournment of P-0623's testimony to permit the Defence to investigate the allegations, or (ii) that P-0623 be excluded from testifying on the impacted subject matter of contacts, the Chamber does not consider that either are warranted, in light of the information presently available. However, following the examination in chief, if strictly necessary, the Defence may make a concrete oral request for remedy, including to postpone the start of its cross examination.

Kind regards,
 [REDACTED]

on behalf of Trial Chamber X

From: [REDACTED]
 Sent: 21 September 2020 13:51
 To: Trial Chamber X Communications; Dutertre, Gilles; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team
 [REDACTED]

Subject: RE: Regulation 35 request in relation to P-0623

Dear Trial Chamber X,

The Defence opposes the request by the Prosecution to add the three items listed in the chart to its list of evidence ('Request'). However, the Defence also submits that the refusal of the Request will not be sufficient in these circumstances, as even if these documents are not added to the Prosecution's list, prejudice will still be occasioned to the Defence if the witness testifies on these issues, as the proposed new evidence goes to the heart of the witness's contention that she spoke with Mr. Al Hassan and there is evidence associated with these documents, which could be exculpatory in nature, which is not available to the Chamber. In these circumstances, as detailed below, the Defence requests that the Chamber:

-) reject the Request;
-) grant the Defence a remedy for the prejudice occasioned by the new allegations uncovered in the course of witness preparation, in the form of *either* an adjournment of P-0623's testimony to permit the Defence to investigate the allegations, or that P-0623 be excluded from testifying on the impacted subject matter of contacts; and
-) order the Prosecution to provide the Defence with a copy of the recording of the witness preparation session with P-0623.

The Defence recalls that the deadline for the Prosecution to disclose material in its possession and provide a list of evidence was originally set as 14 April 2020, which was then, on request by the Prosecution, postponed to 12 May 2020. The Prosecution has since been permitted to add an additional 16 items of evidence to its list in decisions of 5 August 2020 (in respect of 11 items) and 1 September 2020 (in respect of 5 items).

For the reasons set out below, and consistently with the Chamber's reasoning in its decision of 5 August 2020, the Request should be denied because:

1. The Request does not comply with the requirements of Regulation 35;
2. It is not in the interests of justice to grant the Request; and
3. Granting the Request will cause prejudice to the Defence.

The Request does not comply with the requirements of Regulation 35

The Prosecution has indicated in the Request that the transcript MLI-OTP-0078-8475 was 'only discovered' on 14 September 2020 and that [REDACTED] 'the Prosecution only recently discovered that due to oversight [have] not been disclosed'. The Chamber, in the decision of 5 August 2020 at paragraph 8, stated (emphasis added):

"At the outset, the Chamber notes that for a number of items requested to be added late to the Prosecution's Final List of Evidence, no explanation is given for the failure to include them within the original deadline, or the Prosecution indicates that they were not added within the deadline due to an oversight. The Chamber takes this opportunity to remind the Prosecution of the importance of diligently complying with its disclosure obligations in a timely manner, and the need to sufficiently justify requests pursuant to Regulation 35 of the Regulations. Failing to comply with a deadline due to inadvertence is not a reason outside of the Prosecution's control. The Chamber also emphasises that these late additions are exceptional and should not in any way become the norm during trial."

The Prosecution has failed to demonstrate why this Request is exceptional.

It is not in the interests of justice to grant the Request

The Defence acknowledges that the Chamber has, in the past, permitted the addition of items to the list of evidence, even when Regulation 35 does not apply, where it was in the interests of justice.

However, the Defence submits that it would not be in the interests of justice to grant this Request. The Prosecution has not demonstrated why it is necessary to introduce three new items to its list of evidence, in the days leading up to the commencement of witness testimony from P-0623, currently scheduled for 23 September 2020. Furthermore, these documents, along with the preparation log provided to the Defence *via* email on 20 September 2020 at 2:56 pm fundamentally change the nature of P-0623's testimony.

Most importantly, the witness stated at paragraph 1 of the preparation log that instead of speaking in French with Mr. Al Hassan, she instead spoke with the witness *via* an interpreter who interpreted between a local language and English [REDACTED] which previously had not been disclosed to the Defence. The Defence requested, via an *inter partes* request for disclosure, the call data records (CDRs) [REDACTED], but the Prosecution has now confirmed to the Defence that it does not hold the CDRs for either of these phone numbers, and moreover has indicated that obtaining such CDRs would be impossible, as they 'will no longer be retained by [REDACTED] Malian authorities'. The CDRs are directly relevant to the witness's testimony for many reasons, as the CDRs would indicate the location of the witness during the relevant periods and the phone number and details of [REDACTED] and furthermore, it is best practice, when conducting CDR analysis, to have both sides of the alleged contact. This represents a significant prejudice to the Defence in circumstances where the Prosecution has obtained CDRs for phone numbers which are alleged to belong to members of Ansar Dine but the Defence has no opportunity to obtain CDRs relating to this witness.

Granting the Request will cause prejudice to the Defence

Contrary to the Prosecution's submission below, addition of the items will cause prejudice to the Defence. P-0623 is due to commence testimony in two days, on 23 September 2020. The addition of these three new items, and the proposed changes to P-0623's testimony, at such a late stage, will cause prejudice to the Defence and, relatedly, Mr. Al Hassan's Statutory right to adequate time and facilities for the preparation of the defence.

Request for remedy

On this basis, not only should this Request be denied, but the Defence formally requests a remedy to resolve these issues. Even if the documents are not added to the Prosecution's list, the witness's statements in the preparation log make it likely that these new lines of argumentation will be elicited through oral testimony on the stand.

In *Prosecutor v. Blagojevic & Jokic*, Case No. IT-02-60-T, [Decision on Prosecution's Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolic](#), 16 September 2003, the Trial Chamber noted the following:

FINDING that there was more than sufficient time for the Prosecution to complete all interviews and final proofing sessions with Mr. Nikolić and to inform the Defence of any new information arising out of such proofing sessions in advance of him being called to testify,

CONSIDERING that the Prosecution has only disclosed the final notes from its last proofing sessions to the Defence on 16 September 2003, one day before Mr. Nikolic is to testify, and that this information needs to be translated into B/C/S for Defence review,

CONSIDERING that the Defence should not be adversely affected due to the late conclusion of Prosecution proofing sessions and the late disclosure of new information from such sessions,

CONSIDERING therefore that it is in the interests of justice to give the Defence additional time to prepare for the testimony of Momir Nikolić,

REMINDING the Prosecution that all such proofing sessions of witnesses – particularly witnesses whom it expects to testify at length – should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions,

Similarly, in *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, [Decision on the Defence Motion Regarding Will-Say Statements](#), 14 July 2005, para. 6, ICTR Chamber III noted (emphasis added):

6. While the will-say statement only supplements or elaborates on information previously disclosed to the Defence, the Chamber shares the Defence’s view that it may eventually bring new elements on which the Defence was not put on notice. Although it is not acceptable for the Prosecution to mould its case against the Accused in the course of the trial, it must be admitted that a Witness may recall and add details to his or her prior statements. In this situation, several remedies are possible such as providing additional time to the Defence for its preparation or, where appropriate, the exclusion of the evidence. Each time, the Chamber will apply the appropriate remedy on a case-by-case basis in conformity with the rights of the Accused, including the right to be tried without undue delay.

In line with this case law of international courts and tribunals, the Defence requests *either* the exclusion of P-0623’s testimony on the substantive issue of [REDACTED] [REDACTED] (being the testimony impacted by the late disclosure) or the adjournment of P-0623’s testimony until such a time as the Defence has an opportunity to investigate these new lines of evidence.

This is consistent with the Prosecution’s own submissions regarding witness preparation, which noted ([ICC-01/12-01/18-687-Red](#), paras. 11-12):

11. Witness preparation by one party does not necessarily trigger any such further investigations by the other party—because witness preparation itself is not an investigative process. Indeed, the Protocol specifically states that “witness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party’s investigative activities.” The need for such investigations by the non-calling party may thus only arise exceptionally if a witness spontaneously reveals new material during witness preparation.

12. In any event, the Witness Preparation Protocol identifies its own remedies should new material be revealed during witness preparation that may necessitate investigation or other action by the other party. The non-calling party may object to the use of such material or may seek additional time to investigate. The Defence is fully able to rely on these remedies, should the need arise, and consequently it fails to show that the protocol adversely affects its investigative activities to the extent it infringes upon Mr Al Hassan’s fair trial rights.

The Defence indicated, in its original submissions regarding witness preparation, the possible delays and prejudice which could be occasioned by the Chamber adopting the witness preparation process, by indicating how these matters could arise in circumstances very similar to what has occurred with P-0623 ([ICC-01/12-01/18-592](#), para. 10):

10. The practice of the ad hoc Tribunals also demonstrates that witness proofing can lead to delays or prejudice. There appear to have been several examples, where the Prosecution disclosed entirely new allegations against the defendant, after obtaining this information from proofing sessions. It was then necessary to translate these new allegations, and delay the testimony, in order to ensure the defendant’s right to adequate notice and time for preparation. The delays would also be likely to be far greater if the new allegations triggered a request from the Defence to interview the witness, in advance of his or her testimony. It was also possible that the evidence would be excluded, in order to prevent further prejudice to the Defence. Allegations of potential impropriety also exhausted court-time, as the Defence (as was their entitlement) routinely questioned witnesses as to whether the Prosecution had crossed the line as concerns the manner in which the witnesses were prepared.

Similar submissions were made by the Defence in its reply on witness preparation (see, in particular, [ICC-01/12-01/18-620](#), paras. 7-20).

Noting criticisms made of the witness preparation system by Judge Bonomy ([ICC-01/12-01/18-592](#), para. 11), the Defence submitted that the best practice would instead be for the Prosecution to re-interview, ahead of the deadline for disclosure, its witnesses (para. 12). This would have avoided the issues associated with P-0623's testimony where she has, essentially, provided a new witness statement on the eve of trial and without the Defence having any opportunity to investigate these new allegations. Furthermore, in light of the fact that the witness has provided such substantive evidence in the preparation session such as to essentially constitute a new witness statement, the Defence requests a copy of the recording of the witness preparation session.

Best regards,

Al Hassan Defence Team

From: Trial Chamber X Communications [REDACTED]

Sent: 18 September 2020 10:27

To: Duterte, Gilles; Trial Chamber X Communications; Taylor, Melinda; [REDACTED]

Subject: RE: Regulation 35 request in relation to P-0623

Dear counsel,

The Defence is instructed to submit any response to the request below via e-mail, by COB Monday, 21 September 2020.

Kind regards,

[REDACTED]
(on behalf of the Single Judge of TCX)

From: Duterte, Gilles

Sent: 18 September 2020 06:33

To: Trial Chamber X Communications; Taylor, Melinda; [REDACTED]

Subject: Regulation 35 request in relation to P-0623

Dear Trial Chamber X,

The Prosecution seeks the Chamber's authorisation to add the following 3 items listed in the chart below to its list of evidence.

In preparation for P-0623's examination, the Prosecution has discovered one open source material which corroborates P-0623's account regarding [REDACTED], which inadvertently had not been disclosed. These items have been promptly disclosed to the Defence under rule 77 on 16 September 2020. As described in more detail below, these items are highly relevant and of probative value to the Prosecution case. These items are:

1. MLI-OTP-0078-8475: [REDACTED]

[REDACTED]
[REDACTED].

2. MLI-OTP-0078-8536: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

3. MLI-OTP-0078-8538: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Given the limited number and volume of these items, any prejudice caused to the Defence is outweighed by their probative value. The Prosecution submits that granting the late addition sought is in the interest of justice and determination of the truth (*See* Decision on OTP Request to amend the LOE with 5 photographs from P-0007 issued via email on 01 September 2020 at 10:28. *See also* ICC-01/04-01/07-2325-Red, para. 15).

1	MLI-OTP-0078-8475	[REDACTED]	[REDACTED]	[REDACTED]
2	MLI-OTP-0078-8536	[REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]	[REDACTED]
3	MLI-OTP-0078-8538	[REDACTED] [REDACTED] [REDACTED] [REDACTED]	[REDACTED] [REDACTED]	[REDACTED]

Respectueusement,

Gilles Dutertre

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si

vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.