

ANNEX 20

Public redacted

From: Trial Chamber X Communications
Sent: 24 September 2020 11:03
To: [REDACTED]; Trial Chamber X Communications
Cc: [REDACTED]
 [REDACTED] Dutertre, Gilles; V43 Victims Al Hassan Team; D28 Al Hassan Defence Team
Subject: RE: List of material for submission regarding Witness MLI-OTP-P-0102
Follow Up Flag: Follow up
Flag Status: Flagged

Dear counsel,
 Dear colleagues,
 The Chamber rejects the Defence's request to submit a further reply to the Prosecution's reply to the Defence's response to the Prosecution's list of material for submission regarding witness MLI-OTP-P-0102. The Chamber notes that it already has enough information to decide on the submission of the item in question.
 The Chamber's decision is however without prejudice to the Defence's possibility to further address admissibility factors at a later stage in the proceedings, including in its closing statements/briefs.
 Kind regards,
 [REDACTED]
 (on behalf of Trial Chamber X)

From: [REDACTED]
Sent: 22 September 2020 14:37
To: Trial Chamber X Communications [REDACTED]
Cc: [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] Dutertre, Gilles [REDACTED]
 [REDACTED] V43 Victims Al Hassan Team [REDACTED] D28 Al Hassan Defence Team
 [REDACTED]
Subject: RE: List of material for submission regarding Witness MLI-OTP-P-0102

Dear Trial Chamber X,

I am writing on behalf of Counsel for Mr Al Hassan to request leave to reply to the below Prosecution reply. The Conduct of Proceedings provisions for the submission of evidence do not explicitly contemplate the possibility of a reply (see ICC-01/12-01/18-789-AnxA, para. 34(iv) et seq); however, in the case of documents filed before the Court, a party has a right to seek leave to provide a reply pursuant to Regulation 24(5) of the Regulations of the Court ('RoC') within three days (Regulation 34(c) RoC).

The Defence relies upon that provision by analogy in the present email. The Prosecution response raises two new connected issues. On the one hand it raises an issue in respect to possible bars to submission pursuant to Rule 68(3) and on the other hand it indicates that evidence can be submitted in a manner that is not contemplated by the legal regime of the court.

Both issues are connected and important in respect to the legality of the submission of Item 2902 and they also have wider implications for the legal criteria that will be applied in respect to other materials in the case throughout the proceedings. It is thus in the interests of justice to have a Defence reply in respect to the submission of Item

2902 and Counsel therefore requests leave to provide a reply by email on the two connected issues raised by the Prosecution reply.

Kind regards,

██████████ on behalf of Counsel

From: ██████████
 Sent: 21 September 2020 17:03
 To: ██████████; Trial Chamber X Communications; Dutertre, Gilles; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team

Subject: RE: List of material for submission regarding Witness MLI-OTP-P-0102

Dear Trial Chamber X, Dear Colleagues,

In relation to the first part of the Defence's email ("**MLI-OTP-0074-0575 (Item 2902)**"), the Prosecution observes that this ballistic report was not included in the request for submission of materials under rule 68(3) because it directly relates to the acts and conduct of the Accused. In its application, the Prosecution had clearly mentioned that it would conduct a *supplementary examination* on the ballistic report related to the weapon of the Accused written by P-0102 (see ICC-01/12-01/18-850-Conf para. 24 and 25). This was done on 14 September 2020, pursuant to rule 67 of the Rules of Procedure and Evidence and in accordance with article 69, paragraph 2 of the Statute.

On 14 September 2020 during the witness's testimony he was asked questions *viva voce* and items to be submitted on the basis of the testimony of this particular witness have been used or otherwise discussed with the witness during his testimony, including the ballistic report referenced at MLI-OTP-0074-0575, and which he confirmed that he wrote. For these reasons, the Prosecution submits that this item, together with the other items relating to P-0102's testimony, have been properly submitted.

Further the Prosecution submits that this item is relevant and of probative value so should be ultimately admitted and accorded appropriate weight. In particular, the ballistic report features Mr Al Hassan carrying a weapon, which type, according to P-0102's testimony and report, is an AK-47. This image of the Accused is relevant to the acts and conduct of the accused, the role of Mr Al Hassan as the *de facto commissaire* of the Islamic Police, his presence on various crime scenes relevant to the charges as well as to the existence of a non-international armed conflict.

In relation to the second part of the Defence's email ("**Various items at Items 107 to 293, 4515 to 4584**"), the photographs the Prosecution seeks to submit were already part of the Rule 68(3) application for witness P-0102 (see annex of ICC-01/12-01/18-850-Conf). The Chamber decided on the matter (see ICC-01/12-01/18-989-Conf) stating that subject to the procedural pre-requisites of Rule 68(3) of the Rules being satisfied when witness P-0102 appear, their prior recorded testimonies and related materials are allowed to be introduced into evidence. On 14 September 2020, during trial, items to be submitted on the basis of the testimony of this particular witness have been used or otherwise discussed with the witness during testimony. The Presiding Judge further indicated that the conditions of Rule 68(3) were met (see ICC-01/12-01/18-T-023-CONF-FRA ET page 24, lines 10 to 15).

For these reasons, the Prosecution submits that these items have been properly submitted. Further the Prosecution submits that the items are relevant and have probative value so should be ultimately admitted and attributed appropriate weight. In particular, item 2, as indicated during trial, are HD photographs of items collected respectively by P-0007, P-0010 and P-0055, i.e. three witnesses who collected documents on the ground in Timbuktu shortly after the liberation of the town in places of interest for the charges (such as the BMS and the Islamic Tribunal). Witnesses P-0007 and P-0010 have previously testified in relation to the items collected on the ground. Witness P-0055 is also expected to testify about the items collected as depicted in the images. Moreover additional witnesses will testify about the content of the items collected. Following an assessment of the totality of the evidence, including testimony regarding the content of these items, it is submitted that these items should be ultimately admitted not only as proof that the photographs were taken, but also for the truth of their contents.

It is also worth raising a point of legal consistency posed by the Prosecution's non-Rule 68 submission of this item. If a report such as MLI-OTP-0074-0575 is prior recorded testimony, then for the Trial Chamber to receive it, it should be submitted through Rule 68. If however such a report such is not testimony, then it appears that many ICC Trial Chambers, including the present, have been receiving evidence through an incorrect legal provision and this should be addressed by the Appeals Chamber promptly.

Finally, it is also notable that the Prosecution did not indicate that it intended to submit this report through Rule 68(3) in its List of Materials (see Tab 2, MLI-OTP-0074-0575, pg. 203) or when given the opportunity in the course of the witness's testimony. No further explanation was forthcoming when Defence Lead Counsel referred to the lack of any Rule 68(3) indication (ICC-01/12-01/18-T-023-CONF-ENG, pg. 10, line 6), when the Prosecution responded to the Defence's objection on this report (ICC-01/12-01/18-T-023-CONF-ENG, pg. 11, line 10 to pg. 12, line 17), during the course of the witness' testimony (ICC-01/12-01/18-T-023-CONF-ENG, pg. 13, line 12 to pg. 16, line 10), or when the Trial Chamber otherwise addressed Rule 68(3) (ICC-01/12-01/18-T-023-CONF-ENG, pg. 26, lines 23-24). In particular, the Prosecution merely asked the witness if he had any objection to 'all of [his] reports and their annexed material being adduced into evidence' without specifically identifying this report, which had not been submitted under Rule 68(3) (ICC-01/12-01/18-T-023-CONF-ENG, pg. 26, lines 14-16). Moreover, the Prosecution provides no legal or factual explanation or basis as to why it can, should, or has departed from its prior practice and that of the Trial Chamber.

In *Bemba et al*, the Prosecution gave notice that it would seek to introduce a witness statement of P-0242 under Rule 68(3) for the first time *via* email communicated to the Chamber and parties the day before the witness was due to testify ([ICC-01/05-01/13-T-37-Red-ENG](#), pg. 9, lines 12-25). In those circumstances, Presiding Judge Schmitt rejected the request, finding that 'The Chamber does not consider that the Prosecution has justified the delay in filing this application' and, in particular, noted the lesser expediting effect of using this Rule as compared with other witnesses ([ICC-01/05-01/13-T-37-Red-ENG](#), pg. 11, lines 5-16). Therefore, while the Defence reserves its rights to make submissions at any future point of submission, the Prosecution should be barred from re-submitting the item pursuant to Rule 68(3).

The present objection is not one about legal form only. Rather, it concerns procedural regularity and fairness for Defence preparation and notice as to what to prepare for a cross-examination and how it expends its resources. The manner that the item is submitted impacts upon legal and procedural clarity with respect to the evidential value of the item. Given its form, it would be reasonable to conclude that the Prosecution is not submitting the item as testimonial and to inform the Trial Chamber as to its contents but merely as evidence that P-0102 prepared a report at some time and therefore its content, based on his knowledge of ballistics, cannot and will not be considered by the Trial Chamber. This conclusion could however be wrong and therefore puts the Defence in an impermissible double bind of having to treat both circumstances as true. For this reason the submission of MLI-OTP-0074-0575 should be rejected.

Various items at Items 107 to 293, 4515 to 4584

The Prosecution seeks to submit, through P-0102, photographs and scanned versions of documents collected by individuals other than P-0102, including what the Prosecution submits are internal guidelines, Islamic Police Reports and Islamic Court Judgments. The Defence objects to the submission of these documents (at Items 107, 110, 111, 113, 114, 117, 118, 120, 121, 123, 124, 126, 127, 129, 130, 132, 133, 135, 136, 138, 139, 141, 142, 144, 145, 147, 148, 150, 151, 153, 154, 156, 157, 159, 160, 162, 163, 165, 166, 168, 169, 171, 172, 174, 175, 177, 178, 180, 181, 183, 184, 186, 187, 188, 190, 191, 193, 194, 196, 197, 199, 200, 202, 203, 205, 206, 208, 209, 211, 212, 214, 215, 217, 218, 220, 221, 223, 224, 226, 227, 229, 230, 232, 233, 235, 236, 238, 239, 241, 242, 244, 245, 247, 248, 250, 251, 253, 254, 256, 257, 259, 260, 262, 263, 265, 266, 268, 269, 271, 272, 274, 275, 277, 278, 280, 281, 283, 284, 286, 287, 289, 290, 292 and 293 (pgs. 17 to 32)) and the translations thereof (at Items 4515 (pg. 468) to 4584 (pg. 471)). P-0102's reports, as admitted into evidence, establish merely that P-0102 took these photographs but do not establish the truth of the contents of the photographs. These documents therefore cannot be submitted as proof of their contents but rather merely as proof that the photographs were taken.

Kind regards,

 (on behalf of the Al Hassan Defence)

-----Original Message-----

From: Dutertre, Gilles [REDACTED]

Sent: 15 September 2020 13:29

To: Trial Chamber X Communications; Taylor, Melinda; [REDACTED]; Nsita Luvengika, Fidel; Kassongo, Mayombo; Doumbia, Seydou

Subject: List of material for submission regarding Witness MLI-OTP-P-0102

Chère Chambre de Première Instance X et Chers Collègues,

Conformément au paragraphe 34. ii. de l'annexe ICC-01/12-01/18-789-AnnA, l'Accusation vous prie de bien vouloir trouver en pièce jointe la liste de tous les éléments dont la soumission est requise concernant le témoin P-0102.

Respectueusement,

Gilles Dutertre

Dévouement - Intégrité -
Respect

Dedication - Integrity - Respect

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