

Annex 26

**PUBLIC
REDACTED**

From: Trial Chamber X Communications
Sent: 27 October 2020 13:24
To: Al Hassan Prosecution Team; D28 Al Hassan Defence Team
Cc: V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber X Communications
Subject: Decision on Prosecution's Regulation 35 request and Defence's objections to material with P-0065

Dear counsel

This email contains the Chamber's rulings on the (i) Prosecution's Regulation 35 request to add items to the List of Evidence for P-0065 of 26 October (ICC-01/12-01/18-1129-Conf); and (ii) the Defence's objections to a number of items on the Prosecution list of material to use with P-0065 in court and request for relief of 22 October.

Prosecution Regulation 35 Request

The Chamber notes that the Prosecution seeks to add two videos - [REDACTED] and [REDACTED] (the 'Videos'), one email - [REDACTED] (the 'Email') and 24 translations and transcripts related to P-0065 to its List of Evidence (the 'Request').

At the outset the Chamber notes that the Request was only filed on the evening of Monday 26 October, after the originally scheduled start of P-0065's testimony, after the Defence raised related objections last Thursday, and after a full week adjournment for the preparation of this witness's testimony. Apart from its previous comments regarding the exceptional nature of such Regulation 35 requests, the Chamber considers it unacceptable that the Request was filed so late in these circumstances. This should not happen again. The Chamber will nevertheless consider the Request in line with its previous rulings on similar requests.

The Chamber has exceptionally made its determination on the Request without a response from the Defence.

The Videos

In relation to the Videos ([REDACTED] and [REDACTED]), the Chamber notes that the Prosecution provides no explanation for its failure to include them on the List of Evidence. While short in length (no more than 30 seconds each), one of the videos allegedly shows the accused standing behind a man sentenced to death. In the circumstances, in particular noting the extremely late filing of the Request, the Chamber considers that late addition of the Videos to the List of Evidence unduly prejudices the Defence's preparation. Noting further that according to the Prosecution there are other analogous videos showing the same incident already included in the List of Evidence, the Chamber considers it not necessary for the determination of the truth to add the Videos. The Chamber therefore rejects the request to add the Videos and associated transcript and translation ([REDACTED] and M [REDACTED]) to the List of Evidence.

The Email

The Prosecution also provides no explanation for its failure to include the Email [REDACTED] in the List of Evidence. Notwithstanding, the Chamber notes that according to the Prosecution, the substantive information contained in the one page Email was already duly disclosed and included in the List of Evidence, with metadata linking it to P-0065 as the provider. Accordingly, the Chamber considers that no prejudice arises to the Defence and that the late addition is in the interest of justice and determination of the truth. The Chamber therefore grants the request to add the Email and its translation to the List of Evidence.

Transcripts and translations

As for the remaining 21 transcripts and translations (see [REDACTED]), the Chamber notes that according to the Prosecution these are translations and transcriptions of original materials already in the List of Evidence and 16 of them are final translations of drafts already included in the List of Evidence. The Chamber

considers that these transcripts and translations are to be regarded as accessories of the items included in the List of Evidence, and ultimately for the benefit of the Defence and those in court, including to avoid the need for evidence to be read and/or interpreted live. Accordingly, the Chamber considers the late addition to be in the interest of justice and determination of the truth, and that no prejudice arises to the Defence. Accordingly, the Chamber grants the request to add these items to the List of Evidence.

Defence objections to use of material with P-0065

Each category of the Defence's objections is dealt with in turn.

Category A

The Defence objects to 20 transcripts and translations, and to the Videos on the basis that they were not included in the Prosecution's List of Evidence.

At the outset the Chamber notes that one of the objected transcripts - [REDACTED] – is in fact included in the Prosecution's Updated List of Evidence ([REDACTED]) so is not considered further.

In relation to the Videos and related transcript and translation, the Chamber refers to its ruling above and determines that these items may not be used with P-0065.

In relation to the other objected transcripts and translations, the Chamber refers to its ruling above and determines that these items may be used with P-0065.

Category B

The Defence additionally objects to 17 Category A transcripts and translations on the basis of late disclosure (15 items were disclosed between 19 and 21 October 2020 and two in June 2020). If this material is permitted for use, the Defence requests a remedy in the form of a substantial adjournment before the commencement of cross-examination.

The Chamber has considered the nature and length of the material in question - particularly the material disclosed in October 2020 which altogether amounts to approximately 50 pages. The Chamber notes however that 12 of the 15 items disclosed in October 2020 are apparently final versions of draft translations already included in the List of Evidence. Noting further the expected length of P-0065's examination-in-chief, and the adjournments already this week to his testimony, the Chamber does not consider an adjournment before the start of cross-examination warranted in this instance.

Category C

The Defence refers to the late lifting of redactions in four items on 19 October 2020 and requests an adjournment of the cross-examination of P-0065 to the next court day following the conclusion of the examination-in-chief.

Recalling again the expected length of P-0065's examination in chief, the Chamber does not consider the adjournment requested by the Defence warranted in this instance. However, the Chamber reminds the Prosecution of its continuing obligation to lift redactions immediately when no longer justified (see ICC-01/12-01/18-546, para. 19). This exercise is of fundamental importance to the proceedings, particularly in light of the investigative difficulties faced by the Defence. The Chamber expects this obligation to be strictly complied with.

Category D

The Defence objects to certain videos on the basis that the Prosecution has not established the provenance of the videos. The Chamber will not rule on this objection in the abstract. It will be for the Prosecution to attempt to establish the relevance of presenting audio-visual material to P-0065 in court pursuant to para. 58 of the Directions on the Conduct of Proceedings (ICC-01/12-01/18-789-AnxA), and for the Chamber to determine at that point, also taking into account any objections raised at that point by the Defence, whether the requirements of para. 58 have been satisfied.

Category E

The Defence objects to two purported Facebook chats with an unnamed 'Facebook User'. The Chamber will not rule on this objection in the abstract. It will rule on this objection only if and when the material is presented to P-0065 in court, depending on the manner in which the material is presented.

Kind regards,

[REDACTED]

On behalf of Trial Chamber X

From: [REDACTED]

Sent: 22 October 2020 16:00

To: Trial Chamber X Communications; Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer

Subject: RE: List of material for Witness MLI-OTP-P-0065

Dear Trial Chamber X,

Dear Colleagues,

Pursuant to paragraph 60 of ICC-01/12-01/18-789-AnxA, the Defence provides its objections to the use of the following material with Witness P-0065 (and requests remedies accordingly):

Category A Objections: Items not included in the Prosecution's Updated List of Evidence [REDACTED]

[REDACTED] **filed 12 August 2020)**

Tab	Document ID	Title	Type	Main Date	Date of Disclosure
13	[REDACTED]	[REDACTED]	Translation - ENG	9-Jul-2012	19-Oct-2020
17			Translation - FRA	28-Feb-2014	19-Oct-2020
47			Translation - ENG	09-Oct-12	21-Oct-20
66			Transcript	13-Dec-12	21-Oct-20
312			Transcript	06-Oct-12	21-Oct-20
401			Transcript	26-May-12	21-Oct-20
417			Transcript	06-Oct-12	12-Jun-20
431			Audio / Video Material	02-Oct-12	1-Jun-20 30-Sep-20 (metadata)
432			Audio / Video	04-Oct-12	9-Mar-20 1-Jun-20

		Material	(reclassification) 30-Sep-20 (metadata)
433		Transcript	04-Oct-12 1-Jun-20
434		Transcript	04-Oct-12 27-May-2020
497		Transcript	12-Dec-12 12-May-20
504		Translation - ENG	27-Nov-12 12-Jun-2020
506		Translation - ENG	08-Dec-12 21-Oct-20
508		Translation - ENG	28-Dec-12 21-Oct-20
510		Translation - ENG	03-Nov-12 21-Oct-20
519		Translation - FRA	07-Jan-13 21-Oct-20
521		Translation - FRA	21-Oct-20
544		Translation - ENG	10-Sep-12 21-Oct-20
548		Translation - ENG	15-Aug-12 21-Oct-20
550		Translation - ENG	10-Aug-12 21-Oct-20
575		Translation - ENG	02-Jul-12 21-Oct-20

The above items were not included in the Prosecution's Updated List of Evidence, and 15 out of the 22 items were disclosed **between 19 and 21 October 2020**. In light of this substantial prejudice, the Prosecution ought not to be permitted to use these items with the witness.

Category B Objections: Late Disclosure

As stated above, certain of the items relied upon by the Prosecution were the subject of late disclosure, including the following:

Tab	Document ID	Title	Type	Main Date	Date of Disclosure
13			Translation - ENG	9-Jul-2012	19-Oct-2020
17			Translation -	28-Feb-2014	19-Oct-2020

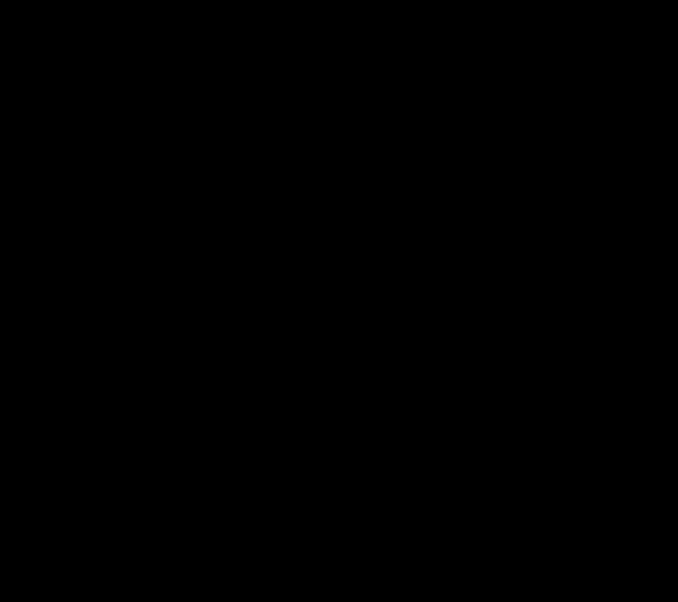
		FRA		
47		Translation - ENG	09-Oct-12	21-Oct-20
66		Transcript	13-Dec-12	21-Oct-20
312		Transcript	06-Oct-12	21-Oct-20
401		Transcript	26-May-12	21-Oct-20
417		Transcript	06-Oct-12	12-Jun-20
504		Translation - ENG	27-Nov-12	12-Jun-2020
506		Translation - ENG	08-Dec-12	21-Oct-20
508		Translation - ENG	28-Dec-12	21-Oct-20
510		Translation - ENG	03-Nov-12	21-Oct-20
519		Translation - FRA	07-Jan-13	21-Oct-20
521		Translation - FRA		21-Oct-20
544		Translation - ENG	10-Sep-12	21-Oct-20
548		Translation - ENG	15-Aug-12	21-Oct-20
550		Translation - ENG	10-Aug-12	21-Oct-20
575		Translation - ENG	02-Jul-12	21-Oct-20

The Defence objects to the Prosecution being permitted to rely on these items, particularly in circumstances in which the Prosecution has not filed any Regulation 35 request in respect of the items.

The appropriate remedy for late disclosure is exclusion of the evidence. If this material is permitted for use, the Defence would request a remedy in the form of a substantial adjournment before the commencement of cross-examination.

Category C Objections: Late Lifting of Redactions

Tab	Document ID	Title	Type	Main Date	Date of Disclosure
18			ICC Statement - General	31-May-15	21-Oct-2020

27		ICC Investigation notes / report / correspondence	7-Oct-2014	19-Oct-2020
28		ICC Investigation notes / report / correspondence	17-Apr-2014	19-Oct-2020
29		ICC Investigation notes / report / correspondence	29-Aug-2018	19-Oct-2020

These four items were the subject of late lifting of redactions on 19 October 2020.

The Single Judge, in commenting on redactions covered by the standard justifications, indicated that whenever such redactions are no longer considered justified, the disclosing party is under the obligation to lift such redactions immediately and re-disclose the relevant material: [ICC-01/12-01/18-546](#), para. 19.

Even though the information now disclosed by the lifted redactions is of benefit to the Defence, its late provision is still prejudicial as it impacts on the Defence's preparation. The timing and possible impact of any such removal of redactions exacerbates the already significant challenge for the Defence to adequately prepare for P-0065's cross-examination, as outlined in its earlier submission of 15 September 2020 () and recognised by the Chamber in its subsequent decision thereon (ICC-01/12-01/18-1049, paras. 4-6).

More so, the lifting of redactions revealed information which necessitates further investigation by the Defence and thereby creates a material prejudice on the conduct of its *in situ* investigations regarding Witness P-0065. Given that the material in question had been in the possession of the Prosecution since at least 21-23 May 2014 and 31 May 2015 respectively, the Prosecution has had every opportunity to review the material in line with the directions provided by the Single Judge and outlined in the Evidence Disclosure Protocol. That it only did so less than one week prior to hearing the witness's testimony is problematic under normal circumstances, let alone when Defence investigations must occur in the midst of a global pandemic.

In light of the above, and to safeguard adversarial fairness of the proceedings, the Defence requests a remedy for the late disclosure of these lifted redactions, in the form of an adjournment of the cross-examination of Witness P-0065 to the next court day following the conclusion of the Prosecution's examination-in-chief of the witness.

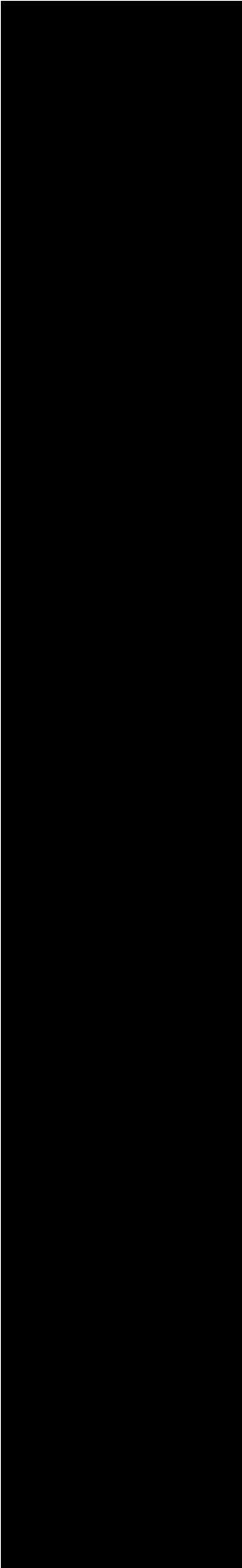
Category D Objections: Videos

The Defence objects to the videos relied upon by the Prosecution.

The 'Directions on the Conduct of Proceedings' (ICC-01/12-01/18-789-AnxA) clearly state at paragraph 58:

If parties or participants wish to present audio-visual material to a witness, they must establish the relevance of this exercise, for example that the witness has personal knowledge of the making of the recording or its contents. This may be achieved by playing a brief excerpt of the audio-visual material to the extent strictly necessary, and without sound where appropriate, for the witness to confirm his/her personal knowledge of it. Once this has occurred, the party or participant may play the excerpt(s) of the recording it intended to present to the witness.

The witness refers to having being the author of, or having knowledge of the filming of, the following videos:



[REDACTED]

Apart from these, the Prosecution has not established the provenance of the videos. In the absence of this, the Prosecution should be restricted to these specific videos where there is evidence of the author.

This is particularly important because the witness statement ([REDACTED], paras. 31-32 states:

[REDACTED]

Witness P-0065 has stated in his most recent witness statements that photographs and videos, including, for example, Tab 51 ([REDACTED]), were shown to him in the course of him giving his 2020 statement and the Office of the Prosecutor told him that the photographs and videos formed part of material he had given them, but the witness did not confirm their provenance and stated that he was 'unable to make a connection' with the incident described: [REDACTED], paras. 47-48, 61, 72.

Category E Objections: Facebook

Tab	Document ID	Title	Type	Main Date
671	[REDACTED]		Communication - E-message	28-Feb-12
672			Translation - ENG	28-Feb-12

The Defence objects to Items 671 and 672 as they purport to be Facebook chats with an unnamed 'Facebook User'. No information is provided about the identity of the other party to the conversation and the lack of identity raises concerns about the reliability of the document.

Best regards,
[REDACTED] (on behalf of the Al Hassan Defence)

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

From: Dutertre, Gilles [REDACTED]

Sent: 20 October 2020 18:33

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

Cc: [REDACTED]

[REDACTED] D28 Al Hassan Defence Team; [REDACTED]

V43 Victims Al Hassan Team; [REDACTED]
Subject: List of material for Witness MLI-OTP-P-0065

Chère Chambre de Première Instance X et Chers Collègues,

Conformément au paragraphe 57 de l'annexe ICC-01/12-01/18-789-AnnA, l'Accusation vous prie de bien vouloir trouver en pièce jointe la "List of Material" concernant le témoin P-0065.

Excepté à ce stade le screening, les statements et contact notes, l'Accusation entend verser tous ces éléments au dossier via ce témoin (y compris toutes annexes aux statements).

Respectueusement,

Gilles Dutertre

Dévouement - Intégrité -
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