

Annex 32

Public

From: Trial Chamber I Communications
Sent: 29 April 2022 10:07
To: Chamber Decisions Communication
Subject: FW: Request for Disclosure of Video-Recording of Witness P-0903 Preparation Session (sect. 13 of Witness Preparation Protocol)

From: Trial Chamber I Communications [REDACTED]
Sent: 29 April 2022 10:05
To: Nicholls, Julian [REDACTED]; Laucci, Cyril [REDACTED] Trial Chamber I Communications
Cc: Abd Al Rahman Prosecution Team [REDACTED] V47 Abd Al Rahman LRV Team
 [REDACTED] D31 Abd-Al-Rahman Defence Team
Subject: RE: Request for Disclosure of Video-Recording of Witness P-0903 Preparation Session (sect. 13 of Witness Preparation Protocol)

Dear counsel,
 Dear colleagues,

The Chamber notes the Defence's application for the disclosure of the video-recording of the preparation session held by the Prosecution in relation to Witness P-0903 [REDACTED]. The Chamber notes the Prosecution's response, opposing the Defence request.

According to para. 13 of the Witness Preparation Protocol (ICC-02/05-01/20-478-AnxA):

"Should the non-calling party wish to gain access to the video recording of a witness preparation session, it shall apply to the Chamber, orally or in writing, setting out: (i) the reason why access to the video-recording is necessary; and (ii) the information in its possession, evidentiary or other, demonstrating that access to the video is warranted. If the Chamber considers it necessary, it may review the recording itself, or order the disclosure of the recording."

The relevant part of the Protocol has been set out as this is the first application made under para.13. The Prosecution are obliged to disclose, by way of a written log, any new information which is given by the witness. Were the Defence only to be supplied with the recording, this would cause, inevitably, more time being spent by the Defence in having to watch, potentially, a lengthy recording. Unless the Defence have demonstrated good reason to believe that the Prosecution has acted with a lack of integrity and withheld information, disclosure of the recording is not warranted. The Chamber has noted, with approbation, the spirit of respect and co-operation which exists between the parties.

In this instance, the Chamber is not satisfied that the Prosecution withheld information regarding P-0903's visit to an execution site. P-0903 indicated that the first time he mentioned 'Khor Talaba' was before the Court on 13 April 2022 (ICC-02/05-01/20-T-033-ENG RT, p. 65, line 1 to p. 66, l.3 & 14 April p.65). The Prosecution provided the explanation that its subsequent questioning on 'Khor Talaba', as a result of this unexpected evidence from the witness, was based on counsel's knowledge of the statements of other witnesses. The Chamber therefore finds that the mention of 'Khor Talaba' was not based on information provided by the witness in the preparation session.

In respect of the second matter, the English transcript clearly demonstrates that the witness mentioned [REDACTED] without any prompting from Prosecution counsel.

Accordingly, the Chamber rejects the Defence application on both matters and finds that access to the video is unwarranted.

As the French and English transcripts have different page numberings which leads to confusion if parties refer to different versions, in future, references to the transcript, should be to the English version in the present case.

Kind regards,

[REDACTED]
(on behalf of Trial Chamber I)

From: Nicholls, Julian [REDACTED]
Sent: 22 April 2022 19:04
To: Laucci, Cyril [REDACTED] Trial Chamber I Communications [REDACTED]
Cc: Abd Al Rahman Prosecution Team [REDACTED]; V47 Abd Al Rahman LRV Team [REDACTED] D31 Abd-Al-Rahman Defence Team [REDACTED]
Subject: RE: Request for Disclosure of Video-Recording of Witness P-0903 Preparation Session (sect. 13 of Witness Preparation Protocol)

Dear Trial Chamber I,
 Dear colleagues,

The Prosecution hereby responds to the request for disclosure of the video made by the Defence (“Defence Request”). The Defence Request is unfounded and should be denied for the following reasons:

The Prosecution did not withhold information regarding a visit by P-0903 to an execution site

1. Contrary to the allegations of the Defence, the Prosecution did not withhold information provided by P-0903 regarding a visit by him to an execution site named “Khor Talaba” together with [REDACTED]. P-0903 did not provide such information during the relevant preparation session.

The questions asked by the Prosecution were not based on undisclosed / withheld information

2. None of the questions asked by the Prosecution required the use of such allegedly withheld / undisclosed evidence. The questions were based on well-known, disclosed information.
3. The Defence claims that the OTP “*was manifestly not surprised by this new evidence and asked very specific questions to the witness which strongly suggest that it was already aware of the answers the witness would give. For instance, the Office of the Prosecutor asked whether Khor Talaba also had another name [...] thus prompting the mention of the other alleged name “Khor Kushef”.*”
4. This argument of the Defence is baseless. While the Prosecution could not anticipate that witness would testify that he visited an execution site, the Prosecution was familiar with the extensive (and disclosed) evidence about the execution sites provided by numerous other witnesses. Hence the Prosecution “*knew [...] which questions it should ask*” to follow up.
5. For example, “Khor Talaba” is mentioned as a case-relevant execution site by a number of other OTP witnesses in their (disclosed) witness statements:
 - **P-0720** [DAR-OTP-0210-0291 at 0308, para. 109] “*People in Mukjar initially thought that the prisoners were taken to the Garsilla court to be tried but about a week later people were certain that these prisoners were executed near Mukjar in Khor Talaba. [...]*”

- **P-0756** [DAR-OTP-0211-0039 at 0057, para. 80] “*After a few days, I heard from general talk amongst people that women collecting firewood had found many bodies near Khor Talaba, located to the north of Mukjar town. [...]*”
 - **P-0884** [DAR-OTP-0216-0503 at 0525, para. 98] “[...] *In the city there was rumour that Umda ISSA was still alive and people went to fetch him but they found him dead. He died of bleeding. This killing happened at KHOR TALABA in Mukjar. It is where the Head Quarters of UNAMID is currently located. [...]*”
6. Moreover, (disclosed) witness statements also provide that this case-relevant execution site close to Mukjar (and later, the UNAMID base) was also referred by other names. For example,
- **P-0877** [DAR-OTP-0217-0211 at 0233, paras. 126-127] [...] *We arrived at the location which was a dried Khor, about 700 metres north of Mukjar Police building. [...] This location is now referred to as Khor KUSHAYB by the Mukjar community. [...] I found two groups of corpses at this location [...]*
 - **P-0877** [DAR-OTP-0224-0142 at 0158, para. 56] “*I have been asked if I knew about the name Khor KUSHAYB. I know this Khor and that it was formerly referred to as Khor SINNANG, Khor TALABA and Khor ABU JOKHAN. [...] the name Khor KUSHAYB came after the events of 2004. This was because Ali KUSHAYB was a notorious person who was responsible for the executions at this location. [...]*”
 - **P-0919** [DAR-OTP-0217-0423 at 0434, para. 58] “*The site was near a dry valley. I do not know the name of the valley but it was to the west of Garsila road. Now people call this valley KUSHAYB's valley. I saw a huge fig tree there. The valley is close to the location of the present-day UNAMID building.*”

The Prosecution did not propose to the Defence that [REDACTED] was present at Khor Talaba

7. The Defence claims that “[w]hereas Witness P-0903 had mentioned the name of four persons who allegedly went with him to Khor Talaba ([REDACTED]) [...] the Office of the Prosecutor asked a specific question about a presence of another man whom Witness P-0903 had not yet mentioned”.
8. This is incorrect. The English transcript (T-032-ENG RT) makes clear that the witness mentioned “[REDACTED]”’s presence at Khor Talaba before the Prosecution enquired about the same. The relevant excerpt is reproduced below, with the relevant text highlighted:

68:23 Q. [12:46:42] [...]. When you went to khor Talaba, were you
25 alone or were you with anyone else?

69: 1 A. [12:46:57] No, there were a lot of people there. A lot of
2 people from the area. Maybe around a hundred people. Maybe
3 more than a hundred.

4 Q. [12:47:09] Okay. But when you went there, do you know
5 the name of anyone who was nearby to you at khor Talaba?

6 A. [12:47:23] Many, many people. Some of them I knew, so
7 there was somebody called ^^ [REDACTED]

[REDACTED] ^^ but as I
9 said, there were a lot of people there.

10 MR SACHITHANANDAN: [12:47:48] (Overlapping speakers) private
11 session for, for two questions.

12 PRESIDING JUDGE KORNER: [12:47:55] Yes.
 13 (Private session at 12.48 p.m.)
 14 THE COURT OFFICER: [12:48:06] We're in private session,
 15 Madam President.
 16 MR SACHITHANANDAN: [12:48:10]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

9. The Prosecution notes, in addition, that P-0903 mentioned knowing [REDACTED] in his statement (Statement DAR-OTP-0221-0436 at 0442-0443, paras. 31-32) and also mentions meeting [REDACTED] in his screening (DAR-OTP-0215-5313 at 5315). And, P-0877 himself has stated in his (disclosed) witness statements that he visited the above mentioned execution site:

- **P-0877** [DAR-OTP-0217-0211 at 0233, paras. 126-127] [...] *We arrived at the location which was a dried Khor, about 700 metres north of Mukjar Police building. [...] This location is now referred to as Khor KUSHAYB by the Mukjar community. [...] I found two groups of corpses at this location [...]*
- **P-0877** [DAR-OTP-0224-0142 at 0158, para. 56] *"I have been asked if I knew about the name Khor KUSHAYB. I know this Khor and that it was formerly referred to as Khor SINNANG, Khor TALABA and Khor ABU JOKHAN. [...] the name Khor KUSHAYB came after the events of 2004. This was because Ali KUSHAYB was a notorious person who was responsible for the executions at this location. [...]"*

10. Hence, while the Prosecution did not anticipate that witness P-0903 would testify that he visited an execution site, the Prosecution was able to question the witness effectively in light of the above information. None of the questions asked by the Prosecution required the use of allegedly withheld / undisclosed evidence.

Conclusion

11. In light of the foregoing, the Prosecution respectfully requests the Chamber to reject the Defence Request.

Best,

Julian

From: Laucci, Cyril [REDACTED]
Sent: 22 April 2022 13:02
To: Trial Chamber I Communications [REDACTED]
Cc: Abd Al Rahman Prosecution Team [REDACTED] V47 Abd Al Rahman LRV Team
 [REDACTED] D31 Abd-Al-Rahman Defence Team
 [REDACTED]
Subject: Request for Disclosure of Video-Recording of Witness P-0903 Preparation Session (sect. 13 of Witness Preparation Protocol)

Honourable Judges,
 Dear Colleagues,

Pursuant to section 13 of the Witness Preparation Protocol ([ICC-02/05-01/20-478-AnxA](#)), the Defence hereby applies for the disclosure of the video recording of the preparation session held by the OTP in relation to Witness P-0903 on [REDACTED].

In the course of his testimony on 13 April 2022, Witness P-0903 mentioned for the first time evidence about his visit to a place called “Khor Talaba”, some weeks after the alleged execution of persons detained in Mukjar (ICC-02/05-01/20-T-032-CONF FRA, p. 52, line 18 to p. 55, line 25) (English version of Transcript not available). The evidence of P-0903’s alleged visit to Khor Talaba and of the renaming of that place as “Khor Kushef” (ICC-02/05-01/20-T-032-CONF FRA, p. 52, lines 2-13) is entirely new and did not appear in any document related to the witness, including his Written Statement (DAR-OTP-0221-0436) and Preparation Log (DAR-OTP-0222-5192). In his Written Statement, Witness P-0903 had only mentioned hearsay evidence that the persons may have been executed in a Khor at the North of Mukjar, without mentioning any name, nor having mentioned being an eye-witness of the presence of corpses in that location (DAR-OTP-0221-0446, par. 48). This information is not revisited in Witness P-0903’s Preparation Log.

Yet, the Office of the Prosecutor was manifestly not surprised by this new evidence and asked very specific questions to the witness which strongly suggest that it was already aware of the answers the witness would give. For instance, the Office of the Prosecutor asked whether Khor Talaba also had another name (ICC-02/05-01/20-T-032-CONF FRA, p. 52, lines 2-3), thus prompting the mention of the other alleged name “Khor Kushef”. The OTP did not ask any further question about the meaning of this other name. Whereas Witness P-0903 had mentioned the name of four persons who allegedly went with him to Khor Talaba (“[REDACTED]”) (ICC-02/05-01/20-T-032-CONF FRA, p. 55, lines 9-11), the Office of the Prosecutor asked a specific question about a presence of another man whom Witness P-0903 had not yet mentioned: “*Vous avez dit que [REDACTED] était avec vous à Khor Talaba.*” (ICC-02/05-01/20-T-032-CONF FRA, p. 55, line 19). Witness P-0903 had not yet said so before the Court, which provides good reason to believe that he mentioned it to the OTP prior to his appearance.

The disclosure of the video-recording of the preparation session of Witness P-0903 is necessary for the Defence to understand how the Office of the Prosecutor (i) did not display any surprise about this entirely new evidence, (ii) knew in advance which questions it should ask to elicit it and (iii) was aware of the presence of [REDACTED] when Witness P-0903 allegedly visited Khor Talaba. It will also reassure the Defence and the Chamber about the fact that the OTP did not fail to comply with its obligations of disclosure pursuant to par. 31 of the Witness Preparation Protocol.

Prior to escalating this matter to the Chamber, the Defence tried to seek the disclosure of the requested video directly from the Office of the Prosecutor (email, 21 April 2022, 18.03). The Office of the Prosecutor denied that request and advised that the Defence should address its Request to the Chamber pursuant to section 13 of the Witness Preparation Protocol (email, 21 April 2022, 19.47). The Defence hereby complies with the advice of the Office of the Prosecutor.

For the foregoing reasons, the Defence prays the Honorable Chamber to order the disclosure of the Video recording of Witness P-0903’s Preparation session.

Yours Sincerely,

Cyril Laucci,
Lead Counsel for the Defence of Mr Abd-Al-Rahman.

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