

Annex 2

Confidential

From: Trial Chamber X Communications
Sent: 12 April 2021 12:18
To: D28 Al Hassan Defence Team; Al Hassan Prosecution Team
Cc: V43 Victims Al Hassan Team; Trial Chamber X Communications; Chamber Decisions Communication
Subject: TC X - Single Judge decision on Defence request for clarification the application of the Contact Protocol in relation to P-0204 and P-0630

Dear Counsels,

The Single Judge recalls that, in a Chamber's decision of 26 March 2021, the reports and associated work products of P-0204 and P-0630 were introduced into evidence pursuant to Rule 68(2)(b) of the Rules (ICC-01/12-01/18-1402-Conf-Red, para. 30). This includes the interactive platform meant to assist with the localisation of certain places of relevance to the charges.

The Single Judge recalls that the abovementioned ruling authorising the introduction into evidence of the platform included the 'caveat' that 'the Defence will be given functional access to the relevant material in due course' (ICC-01/12-01/18-1402-Conf-Red, paras 29-30). In this regard, the Single Judge notes the Defence submission that, despite engagement with the Registry, it has been unable to run the platform on court provided computers. The Single Judge also notes that the witnesses appear to have volunteered a solution to facilitate access and use of the platform (by providing an amended version of the platform which does not include a discrete item).

The Single Judge further notes that the Prosecution has already facilitated contacts between the Defence and P-0204 and P-0630, and that an interview took place on [REDACTED] in the presence of both Prosecution and Defence representatives. The Single Judge therefore assumes that the two witnesses' consent to be interviewed by the Defence has been obtained by the Prosecution in accordance with paragraphs 29-31 of the Contact Protocol (ICC-01/12-01/18-674-Anx2).

In these circumstances, and in particular having considered the nature and scope of the witnesses' testimony, as well as the fact that their evidence has been introduced under Rule 68(2)(b) of the Rules, the Single Judge finds it appropriate to grant the request and authorise direct contacts between the Defence and Witnesses P-0204 and P-0630. This should allow the Defence to obtain from the witnesses the complementary information and material it finds most suitable for its preparation.

The obligation under paragraph 39 of the Contact Protocol continues to apply and the Single Judge clarifies that, should P-0204 and P-0630 provide additional or amended versions of their work product to the Defence, this should also be provided to the Prosecution in addition to the recording of any interview or written exchanges.

Finally, the Single Judge takes this opportunity to encourage the parties to attempt to resolve such disputes on an *inter partes* basis and to seize the Chamber only in circumstances where a judicial intervention is strictly necessary.

Kind regards,

On behalf of the Single Judge of TC X

From: Dutertre, Gilles <Gilles.Dutertre [REDACTED]>
Sent: 07 April 2021 16:55

To: [REDACTED] Trial Chamber X Communications <TrialChamberXCommunications@[REDACTED]>
Cc: D28 Al Hassan Defence Team <D28AlHassanDefenceTeam@[REDACTED]>; Taylor, Melinda <mtaylor@[REDACTED]>;
 Al Hassan Prosecution Team <AlHassanProsecutionTeam@[REDACTED]>; V43 Victims Al Hassan Team
 <V43LRVTeam@[REDACTED]>
Subject: RE: Request for clarification the application of the protocol on contact between a party and witnesses of
 the opposing party (P-0204 and P-0630)

Dear Trial Chamber X,

The Prosecution observes that the description of the communications between the Prosecution and Defence as detailed below is misleading, and conflates two issues.

First, The Prosecution observes that the platform was disclosed almost one year ago on 14 April 2020, and the Prosecution has endeavoured to respond to the Defence's recent requests for information in a timely manner.

Second, the Prosecution did not object to the request to effectively modify an existing Prosecution item of incriminatory evidence.

However, if such a modification is made to existing incriminatory evidence – including one, that the Defence might seek to use in Court with witnesses – the Prosecution considers it is only appropriate that it should be added as a different (new) item of incriminatory evidence for potential use by all parties and participants.

Moreover, the Prosecution observes, as the Defence is well aware, that it is not correct to state that removal of the BSM mesh is the only way to have a way of operating the existing platform/item of Prosecution evidence. As the Prosecution indicated to the Defence, in the attached emails sent last week, the Registry should be able to assist the Defence in using the existing platform by providing an appropriate laptop for that purpose. The Prosecution provided the necessary specifications in relation to this.

Additionally, the platform was used during the opening statement and as the Trial Chamber will have seen it is not particularly slow.

In sum: there is no inequality of arms.

Third, the issue of potentially jointly instructing the experts (with consultation), was raised when the Defence made a separate request directly to the Prosecution's experts about the possibility of adding a new point of interest to the existing item of incriminatory evidence. The Prosecution indicated that it considered that all points of interest were already available in the platform, but that if the Defence wanted to add a point of interest to its evidence, and thus effectively seek to jointly instruct the Prosecution experts, it would consider any such proposal.

At no point has the Prosecution refused to allow for contact with the Prosecution experts, and in fact facilitated the meeting [REDACTED]. Nor did the Prosecution agree to either of these two proposals made during the meeting, but simply indicated that both requests would be transmitted to the Prosecution senior trial lawyer for further consideration.

However, the Prosecution has indicated its views that the Protocol allows for contact and to interview Prosecution witnesses, including experts, and does not grant the ability to directly contact the opposing party's experts to independently instruct them to modify by removing or adding to a pre-existing item of evidence (including evidence already submitted, under rule 68(2)(b)).

Last, the Prosecution observes that the experts indicated the need for two minor edits to the existing platform (correction of placement of two videos), during the meeting with Defence and Prosecution. The Prosecution will formally seek authorisation to submit the modified version of the original item of evidence [REDACTED]

Best regards,

Gilles Dutertre

From: [REDACTED]
Sent: 07 April 2021 15:51
To: Trial Chamber X Communications <[TrialChamberXCommunications](#)> [REDACTED]
Cc: D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#)> [REDACTED]; Dutertre, Gilles <[REDACTED]> [REDACTED]; Taylor, Melinda <[mtaylor](#)> [REDACTED] Al Hassan Prosecution Team <[AlHassanProsecutionTeam](#)> [REDACTED]; V43 Victims Al Hassan Team <[V43LRVTeam](#)> [REDACTED]
Subject: Request for clarification the application of the protocol on contact between a party and witnesses of the opposing party (P-0204 and P-0630)

Dear Trial Chamber,

I am writing on behalf of Counsel to respectfully request the Trial Chamber clarify the application of the protocol on contact between a party or participant and witnesses of the opposing party (ICC-01/12-01/18-674-Anx2) or alternatively apply the protocol. Specifically, the Defence seeks clarification as to whether the Prosecution must convey a request to witnesses P-0204 and P-0630 described below or alternatively whether the Defence is now permitted to contact P-0204 and P-0630 itself.

The Defence is ultimately seeking a version of a disclosed item [REDACTED] with one element removed so that it can be used internally on less powerful Defence computers; we are not seeking new evidence or an additional report. The attached email shows the Defence request to the Prosecution made on 31 March 2021. The Prosecution is refusing the Defence request and five days have elapsed since the request. Thus, the Defence raises this with the Trial Chamber now pursuant to paragraph 30 and 32 of the protocol (#674-Anx2).

[REDACTED] are the authors of a digital platform that presents Prosecution evidence on a map of Timbuktu. Despite engagement with the Registry, the Defence has been unable to run their platform on court provided computers. In its current form, this platform requires a specific powerful computer, and we are told that this would cost 2,000-2,500 USD ([REDACTED]). In a 25 March 2021 interview, P-0204 and P-0630 explained that one item in the platform used at one location (the "BMS mesh") was the reason that an expensive computer was required (see [REDACTED]). Removing this item would not alter the use or functionality of the rest of the platform. They volunteered to create a slightly modified version of their platform ([REDACTED]) without the mesh so that the Defence could use the platform on less expensive computers. No cost to the Prosecution was associated with this proposal from the witnesses. It is also worth noting that at the time, the Prosecution did not note an objection during this discussion.

The Prosecution response seeks to condition conveying the request to the witnesses and the creation of the lighter version of the platform upon joint instruction of the witnesses and agreement that the resulting item can be added to the Prosecution list of evidence as incriminatory. The applicable protocol does not enable the Prosecution to attach conditions to a Defence interview with witnesses. Moreover, there is no property in a witness; the witnesses voluntarily offered a technical solution to assist the Defence, and the Prosecution should not be able to block the Defence benefiting from this service. The Prosecution response also raises issues of fair-trial rights. The Defence cannot be compelled to introduce incriminating evidence as a condition to being able to work with a disclosed item. The response thus effectively seeks to obtain the appearance of Defence consent through leveraging the fact that the Defence cannot freely access and use the platform and has less access to resources. That would be unfair.

It is also worth emphasizing the benefits of the Defence request to the Prosecution to a fair and efficient process. Fulfilling the request

1. contributes to equality of arms by ensuring Defence legal-aid resources are not expended to assess an item that may be ultimately of little use to the Defence;
2. contributes to fairness since it the Prosecution should not be permitted to use an item in the proceedings that the Defence cannot adequately access, assess, or use;
3. will be the most expeditious way for the Defence to be able to obtain and make general use of the platform. A member of the Registry has explained to us that procurement of the high-performance computer could take months; and
4. could avoid COVID-19 related disruption since being able to run the platform on multiple computers will be advantageous if another court lock-down is imposed since multiple team members will be able to run the platform.

Finally, we wish to make clear that we are not seeking to submit another version in place of [REDACTED]. The goal is to obtain a version for internal use that can run on Defence computers so that it can be further examined and used as a tool in the office. The Defence has also at no point objected to the 'working version' also being provided to the Prosecution.

Thus, for all these reasons, the Defence respectfully requests the Trial Chamber to clarify the application of protocol #674-Anx2 or apply it to the circumstances described above.

Kind regards,

[REDACTED] on behalf of Counsel

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