

Annex 38

Confidential

From: Trial Chamber X Communications
Sent: 12 May 2021 17:56
To: Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team
Cc: Trial Chamber X Communications; Chamber Decisions Communication; Associate Legal Officer-Court Officer
Subject: TC X - Decision on the 'Request to restrict the scope of questions put to P-0643'

Dear counsel,

The Chamber refers to the Defence request for the Chamber to restrict the scope of questions the Prosecution may put to P-0643 (email from the Defence dated 11 May 2021 at 15:14 and corrigendum on the same day at 15:28; the 'Request') as well as the response of the Prosecution and the LRVs (email from the Prosecution dated 12 May 2021 at 14:48; email from the LRVs dated 12 May 2021 at 15:16).

The Chamber considers that it will not be assisted by further submissions on this matter and accordingly rejects the Defence's request for leave to refer to additional jurisprudence (email from the Defence date 12 May 2021 at 15:39).

The Chamber recalls that in the 'Decision on the introduction of evidence of witness P-0643' (ICC-01/12-01/18-1409-Conf), it explicitly rejected the Defence submission that the taking of a witness statement was a 'fundamental requirement to ensure the right of the Defence to prompt notice as concerns the nature and content of P-0643's testimony on issues of fact' (ICC-01/12-01/18-1387-Conf, para. 5). Instead, the Chamber found that 'the 2021 Report and associated material to be relied on by the Prosecution clearly demarcate the scope and nature of the expected expert evidence' (ICC-01/12-01/18-1409-Conf, paras 19-20).

The Chamber further considers that nothing in the Prosecution's 9 March 2021 Application (ICC-01/12-01/18-1350-Conf) or P-0643's preparation log supports the Defence submission that the Prosecution has expressed its intention to put questions on matters falling outside the Rule 68(3) material. In this regard, the Chamber notes the Prosecution's response that it 'proposes to ask supplementary questions *based on the Expert's report and his curriculum vitae, as disclosed to the Defence*' (email from the Prosecution dated 12 May 2021 at 14:48; emphasis added).

Accordingly, the Chamber dismisses the Defence request as unsubstantiated and unwarranted. This is without prejudice to the Defence objecting to particular lines of questioning in court on a case-by-case basis.

For these reasons, the Chamber rejects the Request.

Kind regards,

On behalf of Trial Chamber X

From: [REDACTED]
Sent: 12 May 2021 14:48
To: Trial Chamber X Communications <TrialChamberXCommunications@[REDACTED]>
Cc: D28 Al Hassan Defence Team (D28AlHassanDefenceTeam@[REDACTED]); V43 Victims Al Hassan Team (V43LRVTeam@[REDACTED]); Al Hassan Prosecution Team <AlHassanProsecutionTeam@[REDACTED]>
Subject: RE: TC X - Decision shortening the time limit for responses to the 'Request to restrict the scope of questions put to P-0643'

Dear Trial Chamber X,

As a preliminary point, the Defence's objections are [REDACTED]. Moreover, the Prosecution refers to the Chamber's decision (ICC-01/12-01/18-1409-Conf, p.8-9), in which it observed that it would

be artificial [REDACTED]
[REDACTED]
[REDACTED]

It is appropriate for the Prosecution to ask the witness questions related to [REDACTED]
[REDACTED] It is well-established jurisprudence of this Court, that a witness may elaborate on aspects arising from their prior statements.

The Prosecution observes that as indicated in its responses to the Defence on 10 May 2021, and detailed in its application [REDACTED]
[REDACTED] as disclosed to the Defence.

It is incorrect to state that there is no information [REDACTED] [REDACTED] [REDACTED]
[REDACTED] For instance:

- [REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]

In another document from [REDACTED], disclosed to the Defence, he described his various relevant roles, including [REDACTED]

Kind regards,

[REDACTED]
Trial Lawyer

From: Trial Chamber X Communications <[TrialChamberXCommunications](#)> [REDACTED]
Sent: 11 May 2021 15:38
To: Al Hassan Prosecution Team <[AlHassanProsecutionTeam](#)> [REDACTED]; D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#)> [REDACTED]; V43 Victims Al Hassan Team <[V43LRVTeam](#)> [REDACTED]
Cc: Trial Chamber X Communications <[TrialChamberXCommunications](#)> [REDACTED] Chamber Decisions Communication <[ChamberDecisionsCommunication](#)> [REDACTED]; Associate Legal Officer-Court Officer <[AssociateLegalOfficer-CourtOfficer](#)> [REDACTED]
Subject: TC X - Decision shortening the time limit for responses to the 'Request to restrict the scope of questions put to P-0643'

Dear counsel,

Pursuant to Regulation 34 of the Regulations of the Court, the Single Judge decides that any response to the below request should be submitted via email by 12 May 2021 at 16:00.

Kind regards,

On behalf of the Single Judge of Trial Chamber X

From: Taylor, Melinda <[mtaylor](#)>
Sent: 11 May 2021 15:28
To: Trial Chamber X Communications <[TrialChamberXCommunications](#)>
Cc: Al Hassan Prosecution Team <[AlHassanProsecutionTeam](#)>; D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#)>; V43 Victims Al Hassan Team <[V43LRVTeam](#)>
Subject: RE: Request to restrict the scope of questions put to P-0643

Dear Trial Chamber X, Dear Colleagues,

The Defence just noticed that the last sentence of this email should have a “not” before “been disclosed to the Defence” i.e. It cannot be extrapolated from this Decision that the Prosecution was authorised to elicit information and evidence on matters that have not been disclosed previously to the Defence.

Kind regards,
 Melinda Taylor on behalf of the Al Hassan Defence

From: Taylor, Melinda
Sent: 11 May 2021 15:14
To: 'TrialChamberXCommunications'
Cc: Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team
Subject: Request to restrict the scope of questions put to P-0643

Dear Trial Chamber X,

In line with the remedy directly envisaged by the Decision on Witness Preparation, the Defence for Mr Al Hassan respectfully requests the Trial Chamber to order the Prosecution to restrict the parameters of its questions for P-0643 to matters that are referred to within the content of evidence that has been disclosed in advance of the commencement of P-0643's testimony.

Article 67(1)(a) of the Statute sets out the defendant's right to receive prompt notice of the nature, cause and content of the evidence that will be led against him. In line with this fundamental right, Rule 76(1) requires the Prosecution to disclose witness statements “sufficiently in advance to enable the adequate preparation of the Defence”. Article 64(3) specifies that the Trial Chamber shall provide for the disclosure of “information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”. These principles are reflected in the Trial Chamber's determination in ICC-01/12-01/18-666 (paras. 27-28) that:

The Chamber expects that the disclosure of entirely new information on the eve of a witness's testimony, as a result of the procedure authorised by way of the amendment retained or otherwise, will be rare and refers to the Prosecution's duty of diligence in this regard. Moreover, the Chamber notes that, even if the Prosecution obtains and discloses new evidence after having presented to a witness an exhibit he or she had not already seen, it does not mean that the Chamber will necessarily authorise the production of the related evidence during the witness's testimony. Concretely, should the questioning of a witness on certain topics be considered prejudicial because of insufficient notice provided to the accused, objections to certain lines of questioning or motions seeking further time to prepare may be formulated by the Defence prior to or during the course of a witness's testimony.

These considerations apply with even greater force to the situation where the Prosecution elicits new factual information and evidence for the first time, when the witness is on the stand.

In the current instance, although the Prosecution announced its intention to obtain an additional factual statement from [REDACTED] it declined to do so. As things stand, the Defence has only received [REDACTED]

[REDACTED] During the preparation session, the Prosecution also did not address any issues concerning the charged facts in this case, or the factual circumstances in Timbuktu in 2012. There is, therefore, no disclosed evidential foundation corresponding to the Prosecution's stated intention to question [REDACTED]

[REDACTED] If this occurs, the Defence will be ambushed with new factual allegations, of which it has had no prior disclosure, and no ability to seek instructions, investigate, or prepare in the manner which is consistent with its right to adequate time and facilities. The Prosecution has also rebuffed Defence efforts to obtain further clarity as to the likely lines of questioning – merely referring back to the broad, generic themes set out in its application. These themes do not put the Defence on notice as concerns the contents of P-0643's responses to such themes. This situation therefore falls squarely within the Trial Chamber's dictum that it would exclude lines of questioning that are "prejudicial because of insufficient notice provided to the accused".

Finally, although the Trial Chamber found that the factual nature of [REDACTED], the Chamber did not grant the Prosecution license to question P-0643 in a manner that fails to respect Mr Al Hassan's overriding right to adequate notice. The Prosecution's application concerned a request to call P-0643 additionally or alternatively as a fact witness. The Chamber's determination on this request focussed on the evidence and information set out in the disclosed reports (ICC-01/12-01/18-1409-Conf, paras. 19, 23-24); indeed, the Chamber's finding that the Defence was not prejudiced by the late disclosure of certain materials was predicated on the extent to which the new documents [REDACTED]. It cannot be extrapolated from this Decision that the Prosecution was authorised to elicit information and evidence on matters that have been disclosed previously to the Defence.

Kind regards
Melinda Taylor, on behalf of the Al Hassan Defence

From: Dutertre, Gilles [REDACTED]
Sent: 10 May 2021 17:50
To: Taylor, Melinda; Al Hassan Prosecution Team; D28 Al Hassan Defence Team
Subject: RE: P-0643

Dear Ms. Taylor,

The Prosecution reiterates that it will be asking supplementary questions with specific reference to [REDACTED]. Relevant references were included in its application to the Chamber.

The Prosecution also refers to the Chamber's decision in this regard.

Kind regards,

Gilles Dutertre

From: Taylor, Melinda <[mtaylor](#)>

Sent: 10 May 2021 17:13

To: Dutertre, Gilles <> Al Hassan Prosecution Team <[AlHassanProsecutionTeam](#)>
<> D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#)>

Subject: RE: <>

Dear Mr Dutertre,

Article 67(1)(a) enshrines the right of the defendant to prompt and adequate notice of the content of evidence that will be led by the Prosecution at trial. Your avowal that the Prosecution will elicit factual testimony <>

<> does not satisfy this right, particularly as <> do not set out any allegations or details concerning <>. As you can appreciate, references to <> do not put the Defence on notice as concerns the personal knowledge and prospective testimony of this witness. Could you please therefore specify the disclosed foundation for your proposed line of questioning?

Kind regards

Melinda

From: Dutertre, Gilles <>

Sent: 10 May 2021 16:57

To: Taylor, Melinda; Al Hassan Prosecution Team; D28 Al Hassan Defence Team

Subject: RE: <>

Dear Ms. Taylor,

As indicated during the Prosecution's application for supplementary questioning of the witness, the Prosecution will ask questions relevant <>

Kind regards

Gilles Dutertre

From: Taylor, Melinda <[mtaylor](#)>

Sent: 10 May 2021 15:16

To: Al Hassan Prosecution Team <[AlHassanProsecutionTeam](#)>; D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#)>

Subject: <>

Dear Mr Dutertre,

Having reviewed the preparation log with <>, it would appear that <> did not provide any evidence on issues pertaining to fact during the preparation session.

In the absence of any prior disclosure of a factual account from [REDACTED], I would be grateful for your confirmation that [REDACTED] will be questioned solely [REDACTED], and that the scope of examination will not fall outside the parameters of [REDACTED] as clarified during the preparation session.

Kind regards
Melinda

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