

Annex 42

Confidential

From: Trial Chamber X Communications
Sent: 20 May 2021 13:31
To: D28 Al Hassan Defence Team; Al Hassan Prosecution Team; V43 Victims Al Hassan Team
Cc: Chamber Decisions Communication; Trial Chamber X Communications
Subject: Decision on Prosecution's Regulation 35 request for documents to use [REDACTED] [REDACTED]

Dear counsel,
 Dear colleagues,

The Single Judge notes the Prosecution request pursuant to Regulation 35 of the Regulations of the Court (the 'Regulations'), seeking authorization to add 107 items to its List of Evidence for the upcoming testimony [REDACTED] (the 'Request').

The Single Judge notes the Defence response, objecting the Request and seeking in the alternative a delay in the start of the testimony [REDACTED].

The Single Judge notes that the items can be divided as follows:

- 94 items are transcripts and translations of items already included in the List of Evidence
- 7 items are handwritten and original language versions of transcribed and translated items in the List of Evidence
- 1 item ([REDACTED]) is a duplicate of an item already in the List of Evidence
- 1 item ([REDACTED]) is a photo of one page of a notebook (other pages of that notebook are already in the List of Evidence)
- 4 items are translations or transcripts of items already included in the List of Evidence that will be finalised and disclosed soon.

The Single Judge notes the submission of the Prosecution that, except for the aforesaid 4 items that still need to be finalised, all other items were disclosed to the Defence during pre-trial.

Although the Prosecution has failed to demonstrate good cause for its untimely addition of these items to the List of Evidence, the Single Judge considers that it is in the interest of justice and particularly the determination of the truth, to grant the Request. The Single Judge reiterates the Chamber's previous findings that transcripts and translations are to be regarded as accessories of items already included in the List of Evidence as it is 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. The Single Judge considers that the same principle is applicable to the seven items above which the Prosecution submits are the original versions of translations and transcripts already in the List of Evidence.

The Single Judge notes that although one item [REDACTED] is not in the List of Evidence, it is one page long and is a photo of one page of a notebook (other pages of that notebook are already in the List of Evidence). [REDACTED]. The Single Judge further notes that the physical item and source of this photo has already been formally submitted into evidence ([REDACTED] is the SD card containing this image and other images of the same notebook and has been formally submitted through P-0007).

The Single Judge therefore considers that no undue prejudice to the Defence arises in granting the Prosecution Request.

Accordingly, the Single Judge grants the Prosecution Request.

Regards,

[REDACTED]
 (on behalf of the Single Judge to Trial Chamber X)

From: [REDACTED]
Sent: 19 May 2021 17:25
To: Trial Chamber X Communications <TrialChamberXCommunications[REDACTED]> Al Hassan Prosecution Team <AlHassanProsecutionTeam[REDACTED]>; V43 Victims Al Hassan Team <V43LRVTeam[REDACTED]>
Cc: D28 Al Hassan Defence Team <D28AlHassanDefenceTeam[REDACTED]>
Subject: RE: regulation 35 request for documents to use [REDACTED]

Dear Trial Chamber X,
Dear Colleagues,

The Defence for Mr Al Hassan requests the Trial Chamber to reject the request as being untimely and prejudicial.

First, the Defence has the right to prompt notice of the content of Prosecution evidence that will be used to substantiate the confirmed charges against the defendant. The Appeals Chamber has emphasized that “the Statute and the Rules of Procedure and Evidence provide that disclosure by the Prosecutor should, in principle, take place prior to the commencement of trial” (ICC-01/04-01/07-2288, para 43). There is, moreover, a related obligation to inform the Defence promptly and clearly as to whether items will be used for incriminating purposes or whether the items have been disclosed in order to satisfy the Defence right to receive relevant information to assist Defence preparation and investigation (ICC-01/12-01/18-31-tENG-Corr, para. 24). This obligation is tied to the Defence’s right to adequate time and facilities: specifically, given the reality of preparing for trial with limited time and resources, the Defence will obviously focus its analysis and efforts on items identified as incriminating evidence and in relation to which the Prosecution has expressed its intention to submit as evidence at trial. It also ensures that the Prosecution does not mould its case depending on how the evidence unfolds at trial (ICC-01/04-01/07-1547-tENG, para. 23). The Prosecution is expected to know its case before the commencement of the trial: for this reason, it cannot be given licence to change the qualification of disclosure at trial, to fit new or evolving case theories.

The Defence thus notes that:

- [REDACTED]
[REDACTED]
[REDACTED] were disclosed under Rule 77 without any clear indication that they could be used as incriminating items;
- [REDACTED] were originally disclosed under Rule 77 and reclassified to INCRIM less than 3 months before the expected start of this witness; and
- [REDACTED]
[REDACTED]
[REDACTED] were disclosed after the commencement of the trial, with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] disclosed less than three months before the expected start of this witness.

These rights and related obligations are of heightened importance as concerns a key witness [REDACTED]. As things stand, there is a significant volume of transcripts, exhibits and preparation logs which the Defence must review in order to prepare for this witness. The Prosecution list [REDACTED] contains 1402 items thus far. The Regulation 35 request comprises 107 items and [REDACTED] is scheduled to testify imminently. The Regulation 35 request significantly increases the volume of Defence workload at a time

when the Defence is already over-stretched and lacks the capacity to absorb additional work. It is also imperative that the Defence can prepare and formulate its case concerning this witness before the witness commences his testimony: the Defence cannot be expected to follow ██████'s testimony, prepare cross-examination, under-take investigations arising from his testimony, while at the same time reviewing translations and exhibits for the first time.

Second, the above issues of prejudice are aggravated in circumstances where the Defence has no notice of the prospective testimony ██████ on such items. The Prosecution conducted extensive preparation sessions ██████ and already introduced a substantial number of new items during these preparation sessions. Notwithstanding the time afforded to them to conduct witness preparation, the Prosecution did not show the following items or corresponding originals ██████:

No.	Doc ID	Main Date
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As a result, if the Prosecution were to show these items for the first time when [REDACTED] is on the stand, the Defence would be deprived of its right to prompt and adequate prior disclosure as concerns [REDACTED]'s

evidence on such points. The Defence will have no ability to conduct investigations or prepare its case in advance of this testimony.

Third, a clear element of prejudice arises in circumstances where the Prosecution is now seeking to rely on items from P-0065 even though the Prosecution failed to introduce these items through P-0065 during his testimony [REDACTED]

[REDACTED] or, if they used videos, failed to disclose transcripts or translations concerning the content to the Defence at the relevant time [REDACTED]. Even if the videos were previously on the list or used with other witnesses, the Prosecution did not play sound or otherwise introduce evidence concerning the audio content of such videos. The Defence was thus deprived of the opportunity of exploring such matters with P-0065 during his testimony. Given the late notification of its intention to use such matters, it was also deprived of the opportunity to verify the accuracy of these translations or to explore issues concerning the audio integrity of these videos.

Fourth, the confirmed charges delineate the factual parameters of the trial and the incidents that comprise these charges. The Pre-Trial Chamber confirmed specific incidents concerning cases brought before the Islamic Tribunal and not others. The Pre-Trial Chamber further declined to confirm incidents pertaining to cases where the defendant was a member of the groups and not a 'civilian' (ICC-01/12-01/18-461-Corr-Red, paras 478-480). Item [REDACTED] concerns facts and circumstances that are analogous to those explicitly excluded by the Pre-Trial Chamber through the operation of law. In paragraphs 478-480 of the Confirmation of Charges decision (ICC-01/12-01/18-461-Conf-Corr), the Pre-Trial Chamber declined to confirm incidences where [REDACTED]

[REDACTED]. Item [REDACTED] is a translation of a document appearing to concern [REDACTED]. Both instances refer to the individuals concerned [REDACTED]. This information means that this document falls squarely within the category of those which were explicitly excluded by the Pre-Trial Chamber.

The Prosecution cannot be permitted to evade the strictures and protections of the confirmation decision by indicating its intention to introduce evidence of new incidents—10 months after the commencement of the trial and on the eve of [REDACTED]'s testimony. Even relying on such documents to demonstrate issues of control or responsibility introduces prejudice, as such allegations directly concern the acts and conduct of Mr Al Hassan and his alleged individual responsibility. The Defence was thus entitled to know the Prosecution position on such matters before the start of the trial (if not earlier) and it was certainly entitled to know this position sufficiently in advance of its preparation for this witness.

Fifth, the Prosecution has provided no explanation as concerns why it did not include these items on its list at an earlier juncture. If transcripts and translations are a useful tool, then these tools should have been provided at an earlier juncture to facilitate Defence preparation and examination of earlier witnesses. By characterising them as 'incrim', it is also clear that the Prosecution is not seeking for them to be used as a preparatory tool, but as content to incriminate the defendant. Given the absence of diligence on the part of the Prosecution, the Defence should not be prejudiced further by the use of these additional items.

In the alternative, should the Chamber grant the request in whole or in part, in order to counteract this prejudice, it would be necessary to adjourn [REDACTED] testimony or the commencement of cross-examination. It is also necessary for such an adjournment to be determined and granted at this juncture, rather than being reserved until the commencement of cross-examination, so that the Defence can make informed decisions as to the optimal use of its resources.

Respectfully,

On behalf of Counsel for Mr Al Hassan,

From: Dutertre, Gilles [REDACTED]
Sent: 18 May 2021 12:28
To: Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Al Hassan Prosecution Team
Subject: regulation 35 request for documents to use [REDACTED]

Dear Trial Chamber X,

Pursuant to regulation 35 of the Regulations of the Court ("Regulations"), the Prosecution seeks Trial Chamber X's ("Chamber") authorisation to add 107 items to its List of Evidence ("LOE"). These are:

- **103 existing items** ("Existing Items") listed in the attached Excel spreadsheet; and
- **1 transcript and 3 translations** which have been requested from the OTP Language Services Unit but have not been finalised yet or have not been fully processed yet ("Items To Be Finalised/Processed").

Under regulation 35(2) of the Regulations a Chamber may extend a time limit "if good cause is shown", but it may also extend a time limit where it is in the "interest of justice" (see ICC-01/04-01/10-505, para.11). Moreover, where conditions of regulation 35(2) are not met, the Chamber may authorise the late addition of incriminating evidence pursuant to its powers under articles 64(6)(d) and 69(3) of the Statute to allow admission of evidence that it deems necessary for the determination of the truth (see ICC-01/04-01/07-2325-Red, para.15).

I. Existing Items

Of the 103 Existing Items which the Prosecution is seeking to add to its LOE, **94 items are transcripts and translations**, while 9 items are other documents.

A. 94 Transcripts and translations

Of the 94 transcripts and translations, 93 are transcripts and translations of corresponding items which are already in the LOE. These 93 transcripts and translations are:

- 19 transcripts for which the corresponding item of audio/ video material already appears in the LOE (items 11-29 in the attached list);
- 74 translations for which the corresponding item already appears in the LOE (items 30-103 in the attached list).

The 94th item is 1 translation ([REDACTED]) (item 10 in the attached list) of a document not in the LOE ([REDACTED]), for which detailed submissions are included below regarding other existing items).

It is in the interest of justice and determination of the truth to allow the Prosecution to add these transcripts and translations to the LOE, and there is no prejudice to the Defence.

As the Chamber has repeatedly found, 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" (See e.g. Decision on Prosecution's Regulation 35 request and Defence's objections to material with P-0065, issued by Chamber's email on 27 October 2020 at 13:24; Decision on Prosecution request to add items to the List of Evidence (P-0565 and P-0557), issued by Chamber's email on 23 November 2020 at 11:22; Decision on the Prosecution's request to add items relating to P-0654 to its list of evidence, issued by Chamber's email on 25 January 2021 at 16:16).

B. 9 Other items

It is in the interests of justice and determination of the truth to allow the Prosecution to include the 9 other existing items in the LOE, and there is no prejudice to the Defence.

These 9 items are relevant and assist in the determination of the truth for the following reasons:

1. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] These items are already in the LOE.

2. [REDACTED]
[REDACTED]
[REDACTED]

3. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] All these four documents are in the LOE. Including this item in the LOE will therefore allow to better contextualise [REDACTED]

5. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The following are requested to be included for completeness of notebook the first page of which is [REDACTED]
[REDACTED]

6. [REDACTED]
[REDACTED] It is included for completeness and contextualisation, as are the following pages which are not in the LOE from this same notebook.

7. [REDACTED]
[REDACTED] It is included for completeness and contextualisation, [REDACTED]
[REDACTED].

8. [REDACTED]
[REDACTED] It is included for completeness and contextualisation, [REDACTED]
[REDACTED].

9. [REDACTED]
[REDACTED] It is included for completeness and contextualisation, [REDACTED].

In addition, allowing the Prosecution to add these 9 other existing items to the LOE would allow the Prosecution to use them with upcoming witness [REDACTED]. Allowing this request would also not prejudice the Defence.

All of these items were provided by P-0007 and disclosed in pre-confirmation rule 77 package 10 of 31 August 2018, almost a year before the beginning of trial in this case. These 9 documents are short, most of them amounting to one page each. The Defence is aware of the Prosecution's reliance on these types of documents, provided by P-0007. Furthermore, the translations of 7 of these 9 documents already appear in the LOE.

II. Items To Be Finalised/Processed

In addition, the Prosecution asks permission to add to the LOE 1 transcript and 3 translations which have been requested from the OTP Language Services Unit but have not been finalised yet or have not been fully processed yet:

- The translation of [REDACTED], which was disclosed in Pre-Confirmation INCRIM Package 14 of 24 August 2018 and is in the LOE. This translation ([REDACTED]) has been received and is being disclosed;
- The translation of [REDACTED], which was disclosed in Pre-Trial INCRIM Package 53 of 28 February 2020 and is in the LOE. This translation ([REDACTED]) has been received and is being disclosed;
- The transcript and translation of video [REDACTED], which has been formally submitted (Decision on submitted material for P-0065, issued by Chamber's emails on 18 December 2020 at 10.05 and 10.07). This transcript and translation have been requested but have not been finalised yet.

For the reasons explained above in relation to the transcripts and translations in the Existing Items, it is in the interest of justice and determination of the truth to allow the Prosecution to add these Items To Be Finalised/Processed to the LOE, and there is no prejudice to the Defence.

Respectfully,

Gilles Dutertre

Dévouement - Intégrité - Respect
Dedication - Integrity - Respect

Dévouement - Intégrité - Respect
Dedication - Integrity - Respect

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