

Annex 22

Confidential

From: Trial Chamber X Communications
Sent: 30 August 2021 10:18
To: Al Hassan Prosecution Team; V43 Victims Al Hassan Team; D28 Al Hassan Defence Team
Cc: Trial Chamber X Communications; Associate Legal Officer-Court Officer; Chamber Decisions Communication
Subject: TC X - Decision on Prosecution Request to add items related to Witness P-0099 to its list of evidence

Dear counsels,

The Single Judge has had regard to the Prosecution's request (the 'Request') pursuant to Regulation 35 of the Regulations of the Court (the 'Regulation') to add items related to P-0099 to its list of evidence (the 'LoE') as well as the Defence's response to the Request.

At the outset, the Single Judge observes that, as rightly pointed out by the Defence, while the Prosecution bases its request on Regulation 35 of the Regulations, the Prosecution fails to explain how the test under Regulation 35(2) of the Regulations is met.

Nonetheless, the Single Judge will assess whether she shall exceptionally authorise the late addition of the items to the LoE in the interest of justice and the determination of the truth, bearing in mind any potential prejudice to the Defence.

Firstly, the Single Judge notes that the Prosecution requests to add two transcripts and two translations [REDACTED] of videos which are already on the LoE.

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 LoE 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 remains unconvinced by the Defence's submissions that the intention to rely on one of the original videos ([REDACTED]) with P-0099 should have been communicated before [REDACTED]. In particular, the Single Judge considers it sufficient that the intention to use a particular piece of item with a witness be communicated in accordance with the time limit set out in the directions on the conduct of proceedings (ICC-01/12-01-18-789-AnxA, para. 57) and that, as regards the video at hand, sufficient notice has been provided by virtue of the video's inclusion in the LoE.

Thus, the Single Judge considers the late addition of the accessory items to be in the interest of justice, and that no prejudice arises to the Defence. Accordingly, the Single Judge grants the addition of these items to the LoE.

Further, the Single Judge notes that the Prosecution requests to add the following items to its LoE:

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

The Single Judge disagrees with the Defence that the fact that the witness was not shown these items during previous interviews with the Prosecution *per se* constitutes a violation of the defendant's right to notice.

As concerns the above items, the Single Judge notes that they were disclosed to the Defence in 2018, save for [REDACTED] which was disclosed in May 2019, and that the Defence was accordingly in possession of these items for more than two years. Having had regard also to the volume of the items, the fact that the Defence has approximately two months to prepare for P-0099's testimony, and the fact that any issues arising from the items identified in the Request can be directly addressed during the cross-examination of P-0099, the Single Judge finds that the addition of these items would not unduly prejudice the Defence. The Single Judge also finds that the addition of these items to the LoE is in the interest of justice in particular as it would contribute to the determination of the truth.

For the aforementioned reasons, the Single Judge grants the Request and authorises the late addition of all items identified in the Request to the Prosecution's LoE.

However, the Single Judge reiterates her concern as regards the Prosecution's repeated requests for adding items to its LoE and emphasises that in principle all such requests shall comply with the second sentence of Regulation 35(2) of the Regulations.

Kind regards,

On behalf of the Single Judge of Trial Chamber X

From: Taylor, Melinda >

Sent: 09 August 2021 12:42

To: Trial Chamber X Communications <>

Cc: Al Hassan Prosecution Team >; D28 Al Hassan Defence Team
>; V43 Victims Al Hassan Team

Subject: FW: Request pursuant to Regulation 35 for addition on the list of evidence of documents related to Witness P-0099

Dear Trial Chamber X,

Dear Colleagues,

The Defence opposes the inclusion of the listed items below on the grounds that the requirements of Regulation 35 are not met, as the Prosecution has made no attempt to justify its request by reference to the criteria contained therein. As the Chamber has stated previously, the Prosecution has sought relief under Regulation 35 to add items without articulating a clear basis under Regulation 35 (email decision of 27 October 2020 at 13:24: "the Prosecution provides no explanation for its failure to include them on the List of Evidence"; email decision of 25 January 2021 at 16:16: "the Single Judge notes that the Prosecution fails to sufficiently justify the late addition of the items to its List of Evidence. Instead, the Prosecution seeks to justify the late addition solely on the basis of the importance and probative value of the items. Further, and as correctly pointed out by the Defence, inadvertence is not per se a sufficient basis for seeking extension after the lapse of the original time limit"; email decision of 18 May 2021 at 13:31: "the Prosecution has failed to demonstrate good cause for its untimely addition of these items to the List of Evidence"). In other cases, the Prosecution has itself acknowledged that the test under Regulation 35 was not met (*see* email decision of 22 September 2020 at 13:23: "The Prosecution acknowledges that the items were inadvertently not included in its List of Evidence, and the test under Regulation 35(2) is therefore not satisfied").

Furthermore, as emphasised by the Chamber, 'requests for late additions to the list of evidence are exceptional and should not in any way become the norm during trial (Decision 988, para. 8)' (email decision of 22 September 2020 at 13:23). The Defence also recalls the Single Judge's statement: "The Single Judge is concerned that throughout the present proceedings, there have been multiple requests for addition of items to the List of Evidence in which no attempt was made to demonstrate reasons outside the Prosecution's control. The Single Judge reminds the Prosecution of the importance of diligently complying with its disclosure obligations and sufficiently justifying any request pursuant to Regulation 35 of the Regulations." (email decision of 25 January 2021 at 16:16).

Finally, the Defence underscores that the right to adequate and prompt notice of the nature, cause and content of the charges comprises first, a right to timely notice of the Prosecution's intent to rely on evidence as incriminatory evidence (as opposed to Rule 77 disclosure) and second, a right to timely notice of the witness's testimony in relation to these specific items of evidence.

Accordingly, the fact that the Prosecution has disclosed evidence under Rule 77 at a previous point does not satisfy this right, particularly if the item cannot be properly understood or contextualised in the absence of P-0099's evidence concerning the item/s in question.

In respect of the specific merits of each item, the Defence position is as follows:

Item	Doc ID	Title	Type	Comments
1. Video-audio/photographic material [REDACTED] P-0099 of relevance to his anticipated testimony:				
a.	[REDACTED]			The Chamber's finding that transcripts and translations are ancillary to the original audio-video materials and their late addition to the List of Evidence to be in the interests of justice (email decision of 27 October 2020 at 13:24). On this basis, the Defence does not object to these transcripts or translations.
b.	[REDACTED]	[REDACTED]	[REDACTED]	The substantive piece of evidence ([REDACTED]) has not been shown to the witness in the previous Prosecution interviews. On this basis, the Defence objects to the addition of these transcripts or translations as addition would be in violation of the defendant's right to notice under the Statute. [REDACTED] [REDACTED] the Defence should have been put on notice of the Prosecution's intent to rely on these materials with P-0099 before [REDACTED], so that the Defence could obtain
	[REDACTED]	[REDACTED]	[REDACTED]	

				exculpatory information [REDACTED] [REDACTED] on these issues.
c.	[REDACTED]			The Chamber has previously rejected a Prosecution request to add disclosed videos to its List of Evidence where the Prosecution provided no explanation for its failure to include them on the basis that addition would ‘unduly prejudice the Defence’s preparation’ (email decision of 27 October 2020 at 13:24). The Defence relies on this ruling and argues that even though this request has been made earlier that the ‘extremely late filing’ the subject of this decision, the interests of justice would be best served by the Chamber rejecting this request because the substantive piece of evidence has not been shown to the witness in the previous Prosecution interviews so addition would be in violation of the defendant’s right to notice under the Statute. The transcript is moreover incomplete or unclear [REDACTED] [REDACTED] [REDACTED] it is crucial that the Defence receives clear and complete notice of the content of these scenes.
2. Colour version of documents with photographs, including images previously disclosed in black and white, [REDACTED]				
a.	[REDACTED]	[REDACTED]	[REDACTED]	These substantive pieces of evidence have not been shown

				to the witness in the previous Prosecution interviews. On this basis, the Defence objects to the addition of these items as addition would be in violation of the defendant's right to notice under the Statute.
b.				ncerns [REDACTED] there are [REDACTED] different images. The Prosecution has not specified which images will be used – which aggravates the prejudice faced by the Defence in view of the lack of notice as concerns P-0099's prospective testimony on these items. With respect to [REDACTED], given that this allegedly concerns a member of the Islamic police, it is necessary for the Defence to have sufficient advance notice of the Prosecution's case regarding this item so that the Defence can consult with Mr Al Hassan and conduct its own investigations. The Defence cannot do this if the Prosecution elicits evidence for the first time during witness preparation or on the stand.
3. [REDACTED] (withdrawn)				
4. Certain documents [REDACTED]				
a.				These substantive pieces of evidence have not been shown to the witness in the previous Prosecution interviews. On this basis, the Defence objects to the addition of these items as addition would be in violation of the defendant's right to notice under the Statute. [REDACTED]

b.				The Defence is in the process of obtaining clarification from the Prosecution as concerns a potential discrepancy between the items listed in this document and [REDACTED].

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

From: [REDACTED]
Sent:
To: Trial Chamber X Communications
Cc: Al Hassan Prosecution Team; V43 Victims Al Hassan Team; D28 Al Hassan Defence Team
Subject: RE: Request pursuant to Regulation 35 for addition on the list of evidence of documents related to Witness P-0099

Dear Trial Chamber X,

The Prosecution refers to its request below.

The Prosecution withdraws its request for addition of the two items [REDACTED] both of which were previously disclosed as INCRIM items and are on the LOE.

Kind regards,

[REDACTED]
Trial Lawyer

From: Dutertre, Gilles [REDACTED] >
Sent: 23 July 2021 09:39
To: Trial Chamber X Communications <[REDACTED]>
Cc: 'D28AlHassanDefenceTeam[REDACTED]' <[REDACTED]>; V43 Victims Al Hassan Team ([REDACTED]) <[REDACTED]>; Al Hassan Prosecution Team [REDACTED]
Subject: Request pursuant to Regulation 35 for addition on the list of evidence of documents related to Witness P-0099

Dear Trial Chamber X,

The Prosecution requests, under regulation 35, the addition on the list of INCRIM evidence ("LOE") of the following documents related to Witness P-0099, which it submits would be in the interests of justice and determination of truth, be added.

The Prosecution submits that there would be no prejudice to the Defence:

-) The majority of these items have been previously disclosed, either as INCRIM in a lesser-quality duplicate form, or under rule 77.
-) Most are short documents.
-) Moreover, P-0099 is not expected to testify until mid-October 2021, providing ample time for these few additional items to be assessed prior to his testimony.

1. Video-audio/photographic material [REDACTED] P-0099 of relevance to his anticipated testimony:

a. Transcript [REDACTED] and Translation [REDACTED] of INCRIM Video [REDACTED]

[REDACTED]: [REDACTED]
[REDACTED] was disclosed as INCRIM on 14 April 2020 and is on the LOE. The corresponding transcript and translation are being disclosed under rule 77. The Prosecution seeks authorisation to re-disclose these items as INCRIM and include them on the LOE. The Prosecution recalls prior decisions of the Chamber that transcripts and translations are ancillary to the original audio-video materials, which have already been disclosed as INCRIM.

b. Transcript [REDACTED] and [REDACTED] of INCRIM video [REDACTED]

[REDACTED]: [REDACTED]
Video [REDACTED] was disclosed as INCRIM on 18 October 2018 and is on the LOE. The corresponding transcript ([REDACTED]) and translation ([REDACTED]) were disclosed as INCRIM on 27 May 2020, but are not on the LOE. The Prosecution seeks authorisation to add these INCRIM items on the LOE.

c. [REDACTED]: TFI video [REDACTED]

[REDACTED] The video was disclosed under Rule 77 on 13 July 2018. The Prosecution also seeks authorisation to include the related transcript [REDACTED].

2. Colour version of documents with photographs, including images previously disclosed in black and white, [REDACTED]

[REDACTED]:

a. [REDACTED] ALBUM PHOTOGRAPHIQUE [REDACTED] members of AQIM. This [REDACTED]

item was disclosed as rule 77 material on 1 May 2019. A number of the photographs, [REDACTED], are found duplicated as black and white images in [REDACTED] (all three items disclosed as Rule 77 on 5 October 2018);

b. [REDACTED] Photographic album to identify an individual [REDACTED] a member of the Islamic police. This [REDACTED] document was disclosed as rule 77 material on 5 October 2018.

3. [REDACTED]

4. [REDACTED]

[REDACTED] These items are of relevance to P-0099's expected testimony regarding the common purpose of the armed groups. This 10 page document, and its 4 page translation, were disclosed as rule 77 material on 5 October 2018.

[REDACTED]
[REDACTED] The details regarding weaponry

and letters, are not included in prior documents disclosed as INCRIM. This 1 page document was disclosed as rule 77 material on 5 October 2018.

Respectfully,

Gilles Dutertre



Gilles Dutertre

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