

Annex 25

Confidential

From: Trial Chamber X Communications
Sent: 01 September 2021 09:48
To: Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team
Cc: Associate Legal Officer-Court Officer; Trial Chamber X Communications; Chamber Decisions Communication
Subject: Ruling on Defence objections to use of items with P-0603

Dear counsel,

This email contains the Chamber's ruling and preliminary guidance on the Defence objections to the use of items with P-0603.

Category 1 objections (items 31, 32, 33, 34, 35, and 36)

Concerning the Defence's category 1 objections, the Chamber notes that the Prosecution provided notice that P-0603's expected testimony would cover the 'destruction of monuments' ([REDACTED]) and that relevant information is contained in her statement ([REDACTED]).

Having considered the nature of the charges against the accused, the information provided and disclosed in relation to P-0603 specifically, as well as the contested items, the Chamber fails to see how their use during her upcoming testimony would generate new or unexpected issues for the Defence or otherwise cause undue prejudice. The Defence objection is therefore dismissed.

Category 2 objection - Items related to the platform of Timbuktu (items 38 and 39)

The Chamber recalls its decision [1671-Conf](#), *inter alia* conditionally authorising the introduction into evidence of material including MLI-OTP-0080-3503 (the 'corrected platform'). In rendering that decision, the Chamber found it unnecessary to entertain a Defence's objection to the proposed use by the Prosecution of the corrected platform with witnesses, including P-0603, and noted that such objection would be considered by the Chamber on the case-by-case basis at the relevant time.

This part of the email contains the Chamber's preliminary guidance on the Defence objection to the use of the corrected platform with upcoming witness P-0603 (or item 39 on the list of material to be used with P-0603). The Chamber recalls that the Defence opposes the Prosecution's proposed use of the corrected platform with P-0603, prior to testimony and during testimony, due to the potential prejudice that the Defence submits would arise ([REDACTED]). The Defence submits, *inter alia*, that showing a witness the platform before they provide their own independent account of the topography of the area raises a significant risk of prejudice, and that using the platform with P-0603 could cause the witness to give information which is inaccurate or based on updated geography rather than her own recollections. If the platform is used with P-0603, the Defence submits that an opportunity for her to testify first in an open way as to the route taken before the platform (which the Defence submits clearly provides evidence of the route allegedly taken) is a minimum necessary safeguard.

The Chamber recalls that in principle, the party or participant calling the witness shall examine the witness by way of neutral questioning ([Decision 789-AnxA](#), para. 50), and that during witness preparation sessions, the questioning lawyer must not seek to influence the substance of the witness' answers, either directly or indirectly ([Decision 666-Anx](#), para. 28). The Chamber does not consider that these principles are offended *per se* by the proposed use of the platform (in its original or corrected form) with P-0603, recalling notably that images and maps of Timbuktu have been used regularly throughout these proceedings with all types of witnesses, and that it is for the Chamber to decide on the weight if any to be attributed to witness testimony taking into account all relevant factors including prior use of any visual material with the witness. The Chamber reiterates that it will not rule on the present Defence

objection in the abstract, but rather will decide on any objections regarding the use of the corrected platform with witness P-0603 at the relevant time.

Kind regards,

██████████ on behalf of Trial Chamber X

From: ██████████
Sent: 31 August 2021 15:51
To: ██████████; Trial Chamber X Communications
 <TrialChamberXCommunications██████████>; Al Hassan Prosecution Team <AlHassanProsecutionTeam██████████>; D28 Al Hassan Defence Team <D28AlHassanDefenceTeam██████████>; V43 Victims Al Hassan Team <V43LRVTeam██████████>; Associate Legal Officer-Court Officer <AssociateLegalOfficer-CourtOfficer██████████>;
 ██████████
 ██████████
Cc: Dutertre, Gilles <Gilles.Dutertre██████████>
 ██████████
Subject: RE: List of Materials for Prosecution Witness MLI-OTP-P-0603

Dear Trial Chamber X,
 Dear Colleagues,

Pursuant to paragraph 60 of ICC-01/12-01/18-789-AnxA, the Defence provides its objections to the Prosecution's List of Material for Witness P-0603.

Category 1- Items which have not been shown to the witness

The Defence objects to the use of items 31 (item 32- transcript, item 33- translation) and item 34 (item 35 – transcript and item 36- translation) with the witness which were not shown to the witness for comment when the witness statement was taken. The use of these items with the witness will essentially constitute new testimony obtained on the stand (or indeed, during the witness preparation session immediately before the testimony) in violation of the Defence's right to notice. Furthermore these items were not listed as exhibits to be shown to P-0603 ██████████ disclosed to the Defence ██████████.

Appeals chambers of international courts and tribunals, including the ICTR (*Muvunyi v. Prosecutor*, ICTR-00-55A-A, [Judgement](#), 29 August 2008, para. 18; *Ntagerura v. Prosecutor*, ICTR-99-46-A, [Judgement](#), 7 July 2006, para. 27); the ICTY (*Prosecutor v. Kvočka et al.*, IT-98-30/1-A, [Judgement](#), 28 February 2005, para. 31; *Prosecutor v. Kupreškić*, IT-95-16-A, [Appeal Judgement](#), 23 October 2001, para. 92) and the European Court of Human Rights (*Pelissier and Sassi v. France*, 25444/94, [Judgment](#), 25 March 1999, para. 52) have emphasised the importance of notice, recognising that the Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused during the course of trial depending on how the evidence unfolds.

It is inappropriate, and in violation of the defendant's right to adequate time and facilities to prepare a defence under Article 67(1)(b) of the Statute, and to have the opportunity to cross-examine witnesses under Article 67(1)(e), for the Prosecution to be able to mould its case and obtain new evidence on the stand when it has had more than adequate opportunity to do so in the past. P-0603's statement was obtained ██████████ at this time the Prosecution had been in possession of these items for ██████████ years.

This Chamber recognised in paragraph 25 of its [Decision on witness preparation and familiarisation](#) that permitting witnesses to see new exhibits during the witness preparation scheme: "does not create a right for the Prosecution to conduct last-minute investigations or seek to obtain completely new evidence from witnesses immediately prior to their testimony. Judicial control over the Prosecution's ability to introduce at trial information which is not disclosed in a timely manner shall remain intact."

The Chamber went on to note, at paragraph 28:

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. It is on a case-by-case basis, being moved by the Defence or *proprio motu*, that the Chamber will exercise control over the evidence sought from witnesses, notably as well as, more generally, in light of the impact their introduction may have on the fair trial rights of the accused.

The Defence submits that the current circumstances justify the Chamber's intervention, both in terms of the Prosecution's failure to obtain testimony from the witness concerning these items and their prejudicial and highly sensitive content which could affect the reliability of the witness's testimony. If the Prosecution wished to elicit evidence from the witness concerning these items, the Prosecution could have shown the witness the many pieces of video material and pictures already in its possession at the time, or contacted the witness to obtain a further statement at any point [REDACTED], and duly disclosed such statement to the Defence in accordance with its obligations. Having failed to do so, the Prosecution ought not to be permitted to obtain this evidence, without notice and without due diligence, on the stand.

Category 2 - Items related to the platform of Timbuktu

The Defence opposes to the use of items 38 and 39. The Prosecution's own witness has emphasised that the material on which the platform is based is a 'a tool to visualise' (ICC-01/12-01/18-T-087-CONF-ENG ET, p. 57, line 8).

As previously set out [REDACTED]
[REDACTED]
[REDACTED], the Defence objects to the use of the platform with P-

0603 on the bases that:

(i) *unfair prejudice arises from the inherently persuasive and unduly demonstrative nature of the material;*

The Defence opposes to the use of the platform prior to testimony and during the testimony of Witness P-0603 due to the potential prejudice this would occasion as the minimum safeguard offered by eliciting evidence freely on the stand before the use of any potentially-influential material, would be rendered nugatory.

Academic literature supports the taking of particular caution when it comes to the use of tools such as this platform. Writing in the *Journal of Information, Law & Technology* in 2009, Dr Damian Schofield stated:

*At first glance, these graphical reconstructions may be seen as potentially useful in many courtroom situations, and they are often treated like any other form of digital evidence regarding their admissibility (Schofield and Goodwin, 2007). However, perhaps this specific form of digital media warrants special care and attention due to its inherently persuasive nature, and the undue reliance that the viewer may place on the evidence presented through a visualisation medium, this is often referred to as the 'seeing is believing' tendency (Galves, 2000; Girvan, 2001; Spiesel et al, 2005; Sherwin, 2007). [Dr Damian Schofield, '[Animating Evidence: Computer Game Technology in the Courtroom](#)' (2009) 1 *Journal of Information, Law & Technology (JILT)* at 4.]*

In 2014, Caitlin O. Young wrote:

With the proliferation of immersive virtual environments (IVEs) in areas such as video games and job training, it won't be long until lawyers seek to employ the new technology in the courtroom. However, by combining the most salient features of previous forms of demonstrative evidence, such as the crime-scene view and computer animations, the use of IVEs pose an exponentially greater risk of unfair prejudice, which must be closely monitored by the courts. This Note argues that IVEs are not merely "another point along a line of technological progression, from scene viewing to photography to video evidence to virtual evidence," but rather, that they are fundamentally

different from previous forms of demonstrative evidence. As such, the use of IVEs at trial must be scrutinized much more carefully by the courts, especially in criminal trials, because of their unique risk of unfair prejudice.

[...]

Computer animations have proven to be a useful tool of persuasion in the courtroom because people have a natural tendency to accept what they see as true. [Caitlin O. Young, [‘Employing Virtual Reality Technology at Trial: New Issues Posed by Rapid Technological Advances and Their Effects on Jurors’ Search for “The Truth”](#)’ (2014) 93 *Texas Law Review* 257, 257-258, 261.]

Similarly, in 2019, Khirin Bunker noted the following:

As this Note has repeatedly stated, the source of many of the potentials for prejudice created by IVEs is their unique vividness and interactivity, which produce feelings of presence and body ownership in the user. [Khirin Bunker, ‘From Presentation to Presence: Immersive Virtual Environments and Unfair Prejudice in the Courtroom’ (2019) 92(2) *Southern California Law Review* 411, 438.]

This risk is particularly acute with regard to Witness P-0603 who has been described by the Prosecution as [REDACTED] and whose memory of alleged events will be affected both by the fact that her evidence was not collected [REDACTED] and she will not be testifying until September 2021 (ICC-01/12-01/18-1020-Conf-Exp, para 28). By showing the witnesses a virtual environment which will be more vivid and immediate than their own recollections, the Prosecution’s use of the platform will be leading and prejudicial to the Defence, as it will be difficult for the Defence effectively to cross-examine witnesses on the sources of their knowledge for the geography shown in the platform.

(ii) the platform is a visual aid, and ought therefore not be provided to a witness ahead of testimony;

Case law of this Court demonstrates the clear risk of prejudice associated with the use of maps or other navigation tools before the witness has provided their own account regarding the area in question.

In *Prosecutor v. Katanga and Ngudjolo*, Presiding Judge Cotte upheld a Defence objection to a witness being shown a map of the relevant area before first providing his own account of the events and the area (ICC-01/04-01/07-T-156-Red-ENG, pp. 28–34.). Presiding Judge Cotte directed the Prosecution to:

ask the witness to clarify the topography of the site [...] And once we have moved further on and certainly as regards the expected answers, then the document will be shown in order to obtain confirmation ... [e]ither you ask the witness to add to his narrative as regards to his own progression ... and once you’ve got answers to those questions, the sketch will be put to him so that he can confirm certain things [...] or if you think it’s preferable, you ask him, as of now, to make his own rough sketch of the centre of Bogoro [...] It’s quite is simply question of delaying [the map’s] production before the eyes of the witness. ([ICC-01/04-01/07-T-156-Red-ENG](#), p. 30, lines 5-18; p. 33, line 4 to p. 34, line 3.)

A similar ruling was made later in that same case concerning a witness’s testimony concerning the layout of a camp where Presiding Judge Cotte again upheld a Defence objection to a witness being shown leading and prejudicial material. The Prosecution had requested to show the witness the sketch he had produced during interview but the Defence objected, particularly as there were details in the sketch produced in the course of interviews which had not yet been stated by the witness during his oral testimony ([ICC-01/04-01/07-T-205-Red-ENG](#), pp. 28–31). Presiding Judge Cotte agreed with the Defence and ordered the witness to produce a new sketch during the break.

The Prosecution has requested permission to use the platform with Witness P-0603 in both preparation sessions and during in-court testimony. In a manner analogous to the use of the map and the sketch in the *Katanga and Ngudjolo* case, showing a witness the platform before they provide their own independent account of the topography of the area raises a significant risk of prejudice. If the platform is used with the witness, an opportunity for her to testify first as to the route taken before the platform (which clearly provides evidence of the route allegedly taken) is a minimum necessary safeguard. Furthermore, such testimony must be elicited in an open way, rather than by seeking to have her confirm a particular description of the topography. The Defence recalls in this regard that this open approach to the witness’s testimony on this vital issue must be taken both during in-court testimony and the preparation sessions, as the Witness Preparation Protocol in this case prohibits the Prosecution from ‘seek[ing] to influence the substance of the witness’ answers, either directly or indirectly (including ... leading the witness in an inappropriate way).’ (ICC-01/12-01/18-666-Anx, para 28).

In conclusion: the OTP has not established the necessary foundation for the use of this OTP-produced platform with this witness, whether in her preparation session or in court. [REDACTED] P-0603 is in a position to provide her own description of the town's geography at the relevant period. It is unnecessary to use a virtual platform with her since she ought to be fully able accurately to describe relevant geography freely and from her own memory. Moreover, she did not take the images underlying the platform, nor was she present when they were taken, nor is she depicted in them. This platform is not a neutral, independently produced map of the broader area; instead, it is based on images taken significantly after the events in question, is highly directed in its focus of certain buildings, and is 'annotated' in that certain locations are heavily photographed while others are not, and some contain indicia of names. Use of this OTP-produced material would be directly analogous to showing a witness an annotated OTP-produced map prior to testimony, which, for the reasons stated above, is not permissible. To the extent that this platform might be described as a site reconstruction, the Defence notes that witness visits to sites must take place in the presence of the Defence. In line with this fundamental requirement, a previous judicial site visit conducted by the ICC included representatives of all parties and participants ([ICC-02/04-01/15-1020](#)). The use of any such material with a witness outside the presence of the Defence – and the Court – must therefore be prohibited on the basis that it is unduly leading and therefore highly prejudicial.

The use of a visual tool with P-0603 prior to eliciting her evidence from memory in court would irrevocably contaminate her testimony. Any subsequent testimony relating to the geography of Timbuktu would be rendered unreliable. The Defence therefore objects to the Prosecution's use of this OTP-produced platform with the witness prior to her openly elicited testimony on relevant topography of and/or routes taken through Timbuktu on the basis that it would be strongly leading and antithetical to the basic principles of a fair trial.

For these reasons the Defence respectfully requests the Chamber not to permit the Prosecution to use items 31, 32, 33, 34, 35, 36, 38 and 39 with Witness P-0603.

Kind regards,

[REDACTED] on behalf of Al Hassan Defence

From: [REDACTED]

Sent: 27 August 2021 10:07

To: Trial Chamber X Communications; Al Hassan Prosecution Team; D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Associate Legal Officer-Court Officer; [REDACTED]

Cc: Dutertre, Gilles; [REDACTED]

Subject: FW: List of Materials for Prosecution Witness MLI-OTP-P-0603

Dear Trial Chamber X, Dear Colleagues,

Please find attached the updated list of materials for Prosecution Witness MLI-OTP-P-0603. [REDACTED] has been added at row 9.

Best regards,

[REDACTED]

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