

Annex 37

Confidential

From: Trial Chamber X Communications
Sent: September 2021 16:49
To: Hassan Prosecution Team; D28AlHassanDefenceTeam
V43LRVTeam
Cc: Associate Legal Officer-Court Officer; Chamber Decisions Communication; Trial Chamber X Communications
Subject: TC X - Decision on Defence request to bar the Prosecution from eliciting evidence concerning P-1707 and P-1717 during the testimony of

Dear counsel,

The Chamber has had regard to the below request as well as the Prosecution's response. The Chamber considers that it will not be assisted by further submissions on this issue and accordingly rejects the request for leave to reply.

The Chamber notes that PTC I did not confirm the charges as concerns P-1707 and P-1717. While the Chamber agrees with the Defence that it would be wholly inappropriate to re-introduce charges that were rejected by the Pre-Trial Chamber, this does not mean that the parties are barred from posing all questions relating to the incidents involving these two individuals.

In the Chamber's view, the Defence's request is based on an erroneous understanding that eliciting any evidence concerning P-1707 and P-1717 should be characterised as a re-introduction of the charges that were not confirmed. The Chamber considers that, as put forward by the Prosecution, the parties may explore issues relevant to the charges as concerns P-1707 and P-1717, without exceeding the parameters of the charges set by PTC I. The Chamber will decide on the relevance of particular lines of questioning to the charges on a case by case basis, taking into account the fact that Pre-Trial Chamber I refused to confirm the charges as concerns P-1707 and P-1717.

Finally, the Chamber considers that the Defence was on sufficient notice as concerns the fact that evidence relating to P-1707 and P-1717 may be elicited via , notably by virtue of the witness's statement.

Accordingly, the Defence request is rejected.

Kind regards,

– on behalf of Trial Chamber X

From: Taylor, Melinda >
Sent: September 2021 15:50
To: >; Trial Chamber X Communications
<
Cc: D28 Al Hassan Defence Team <; V43 Victims Al Hassan Team
<; Al Hassan Prosecution Team <
Subject: <

Dear Trial Chamber X,

The Defence respectfully seeks leave to reply to the Prosecution's arguments in order to first, address the fact that the arguments below fail to distinguish between the situation where the confirmation decision does not explicitly address specific facts and incidents, as compared to the situation where facts and incidents are explicitly rejected by the Pre-Trial Chamber, and second, distinguish ICTY case law that is inapposite in light of the difference in legal regime concerning amendments to the charges. The Chamber's power to freely assess the evidence is ultimately tied to Article 74 (2), which restricts the framework of the judgment to the facts and circumstances confirmed by

the Pre-Trial Chamber. The confirmed charges, and not the evidence, also establish the parameters for these facts and charges. Since the Chamber cannot base the judgment on facts and circumstances that were explicitly rejected by the Pre-Trial Chamber, it would be contrary to the interests of expedition and fairness to hear evidence on such matters, and to require the Defence to divert its time and resources to attempting to respond.

Kind regards

Melinda Taylor, on behalf of the Al Hassan Defence

From: [REDACTED]
Sent: [REDACTED] September 2021 15:23
To: Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team; V43 Victims Al Hassan Team; Al Hassan Prosecution Team
Subject: [REDACTED]

Dear Trial Chamber X,

The Prosecution submits that it is appropriate to elicit evidence regarding P-1707 or P-1717, because this evidence is highly relevant and probative for other matters for determination by the Chamber, even if the evidence relates to matters outside specific charges concerning these named victims. In particular this evidence is relevant to the following matters, *inter alia*:

- the issue of the intent and knowledge of the Accused, who amongst other defences is claiming that he acted under duress;
- background or context to the nature of his conduct, as charged;
- the nature of his membership of the armed groups; and
- contextual evidence of the widespread or systematic nature of the attack on the civilian population for the purposes of crimes against humanity.

The evidence is also relevant to the crime of persecution (for which the PTC confirmed it is not necessary to have specifically named victims).

This Chamber has found of relevance the evidence of the role of the Accused in the execution of a member of the armed group, even though that incident is not charged.

The Prosecution refers to other prior jurisprudence of this Court, where the Prosecution has been granted authorisation to elicit evidence related to acts and conduct of the Accused, going beyond specific charges against the accused regarding named victims. *See e.g. Prosecutor v Ntaganda*, [REDACTED]

[REDACTED] The Prosecution was authorised to elicit evidence regarding the alleged murder by Bosco Ntaganda of an individual, who was not a named victim in the charges of direct perpetration of murder against Mr. Ntaganda. *See also*, ICC-01/04-02/06-968, para.13-17. The Prosecution was authorised to elicit evidence regarding the direct perpetration of rape and sexual slavery by Mr. Ntaganda, although he had not been charged as a direct perpetrator of these counts. In *Prosecutor v Ongwen*, the Prosecution was granted authorisation to elicit evidence related to criminal conduct outside the facts and circumstances of the charges. *See e.g.* [REDACTED]

In *Prosecutor v Lubanga*, the Chamber found admissible evidence where it “relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the Accused” (ICC-01/04-01/06-1399, para. 27); or where it concerns “issues and events (or information) that are sufficient proximity to the charges the accuse faces to be, prima facie, of potential assistance in this trial” (ICC-01/04-01/06-1981-Anx, 24 June 2009, Anx 8, 9, 36, 39, 48 and 82).

The Prosecution also refers to relevant jurisprudence of the *ad hoc* tribunals. For instance, chambers of the ICTY have deemed admissible evidence of other non-charged conduct, for the purpose of proving the accused’s state of mind in connection to acts charged in the indictment. See e.g. *Prosecutor v Milorad Krnojelac*, Judgment, IT-97-25-T, 15 March 2002, para 67; *Prosecutor v Kunarac et al.* Judgment, IT-96-23-T; 22 February 2001, para.589; *Prosecutor v Kupreskic et al.*, Judgment, IT-96-23-T & IT-96-23/I-T, 22 February 2001, para. 589; *Prosecutor v Kvocka et al.*, Judgment, 2 November 2001, para. 652.

See also *Prosecutor v Payle Strugar*, Decision on the Defence Objection to the Prosecution’s Opening Statement Concerning Admissibility of Evidence’, IT-01-42-T, 22 January 2004, p.3. In *Nahimana et al. v The Prosecutor*, ICTR-99-52-A, Judgment, 28 November 2008, para.315, the ICTR Appeals Chamber affirmed that it is possible even to adduce evidence of acts beyond the tribunal’s jurisdiction – quite apart from matters outside the scope of the charges – if it is relevant and probative for matters which are charged. For instance, the Chamber said this may include for purposes such as “clarifying a given context”; “establishing by inference the elements (in particular, criminal intent) of criminal conduct [occurring within the temporal scope]” or “demonstrating a deliberate pattern of conduct”. See also *Prosecutor v Augustin Ndindiliyamana et al.* ‘Decision on Nzuwonemeye’s Motion to Exclude Parts of Witness AOG’s Testimony’, ICTR-00-56-T, 30 March 2006, para.25, in which the Trial Chamber found admissible like evidence to be relevant to the background and historical context of the charges against the accused. See as well *Prosecutor v Bagosora et al*, Decision on Admissibility of Proposed Testimony of Witness DBY, ICTR-98-41-T, 18 September 2003, para.2; *Prosecutor v Aloys Simba*, ‘Decision on Interlocutory Appeal Regarding Temporal Jurisdiction’, ICTR-01-76-AR72.2, 29 July 2004, p.3.

Contrary to the Defence’s assertion regarding prejudice, the Prosecution observes that the Defence has had ample notice regarding the nature of the testimony of this witness, in particular as set out [REDACTED], and is only now seeking to raise this issue on the eve of his testimony.

Article 69(3) and (4) of the Statute and Rule 63(2) affirms the ability of the Chamber to freely assess all evidence to determine its relevance or admissibility. The Chamber is composed of professional judges who can properly assess the probative value of evidence of [REDACTED], in combination with the totality of evidence, at the end of trial, and in light of the Defence’s concerns. There is not the concern of prejudicial effect as before a jury in national proceedings.

For all these reasons, the Prosecution submits that the Defence’s request be rejected, and that it should be granted authorisation to elicit evidence in relation to P-1707 and P-1717 during [REDACTED]’s testimony.

Kind regards,

[REDACTED]

Trial Lawyer

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From: Taylor, Melinda <[REDACTED]>
Sent: [REDACTED] September 2021 10:48
To: Trial Chamber X Communications <[REDACTED]>
Cc: Al Hassan Prosecution Team <[REDACTED]>; V43 Victims Al Hassan Team
 [REDACTED]; D28 Al Hassan Defence Team <[REDACTED]>
Subject: [REDACTED]

Dear Trial Chamber X,

Pursuant to the Trial Chamber's directive that questioning in examination-in-chief and cross-examination should be restricted to the confirmed charges or matters pertaining to the credibility of the witness, the Defence requests the Trial Chamber to confirm that the Prosecution will not be entitled to elicit evidence from [REDACTED] concerning incidents pertaining to P-1707, P-1717, that the Pre-Trial Chamber explicitly refused to confirm.

Specifically, in Decision ICC-01/12-01/18-767-Conf, the Pre-Trial Chamber found at 55-57 that the evidence adduced by the Prosecution in relation to the charges concerning P-1707 ([REDACTED] [REDACTED]):

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

At paragraphs 72-73, the Chamber reached the same determination concerning the alleged incident concerning P-1717 ([REDACTED]):

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The Chamber's determinations were predicated on an assessment of the sufficiency of the evidence and not the legal qualification of the facts: that is, that the evidence furnished by the Prosecution failed to satisfy the threshold necessary to confirm these incidents for the purpose of adding it to the confirmed charges. As such, this determination is not subject to a potential legal requalification at trial. The Prosecution did not seek leave to appeal this finding and given that the charges cannot be amended after the commencement of the trial, the Defence was entitled to rely on this determination as part of its preparation for trial and for [REDACTED] in particular. In addition, since the incident pertaining to P-1707 concerns allegations concerning the acts and conduct of Mr Al Hassan, it would also be extremely prejudice to introduce this rejected charge as evidence in the case. Apart from the fact that it would be contrary to Article 61(7) and (9) to reintroduce charges that have been rejected, after the commencement of the start of the trial, this would also have significant implications for the Defence's right to notice, and adequate time and facilities to prepare its case regarding the rejected incident.

Kind regards
Melinda Taylor on behalf of the Al Hassan Defence

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■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]
■ [REDACTED]