

Annex I

Public

From: Trial Chamber X Communications
Sent: 06 November 2020 09:21
To: Al Hassan Prosecution Team; V43 Victims Al Hassan Team; 'D28AlHassanDefenceTeam'
Cc: Associate Legal Officer-Court Officer; FS Items Communication; Trial Chamber X Communications
Subject: Decision on submitted material for P-0621 and P-0620

Dear Counsel,

Dear Colleagues,

The Chamber notes the submission of items by the Prosecution (Email from the Prosecution dated 18 September 2020 at 05:48 and corresponding attachment) following the testimony of P-0621. It is noted that the Defence does not submit any item with respect to P-0621.

The Chamber also notes the submission of items by the Prosecution (Email from the Prosecution dated 12 October 2020 at 16:17 and corresponding attachment), as well as by the Defence (Email from the Defence dated 12 October 2020 at 14:21) following the testimony of P-0620.

The Chamber takes note of the Defence's objections to two items related to P-0621 (E-mail from the Defence dated 23 September 2020 at 14:10) and the Prosecution's reply thereto (E-mail from the Prosecution dated 24 September 2020 at 14:51).

The Chamber takes note of the Prosecution's objections to items related to P-0620 (E-mail from the Prosecution dated 13 October at 15:11) and the Defence's reply thereto (E-mail from the Defence dated 14 October 2020 at 15:00).

The Chamber takes note of the Defence's objections to four items related to P-0620 (E-mail from the Defence dated 15 October 2020 at 15:39) and the Prosecution's reply thereto (E-mail from the Prosecution dated 16 October 2020 at 18:24). It is further noted that the Defence requests the Chamber to strike the Prosecution's reply of 16 October (Email from the Defence dated 19 October 2020 at 13:24).

The Chamber has had due regard to the email exchanges between the parties as a result of their respective submission of items following the testimony of P-0621 and P-0620. Noting the overlap between the items related to these two witnesses and the objections and replies thereto, the Chamber has considered them together.

In respect of P-0621, the Chamber notes that the Defence objects to the submission of the joint report co-authored by P-0621 and P-0620 (contained in two volumes: MLI-OTP-0064-0175 and MLI-OTP-0064-0332), contending that the report can only be submitted through P-0621 to the extent of the witness's findings in the report, and that the remainder should be submitted through P-0620. The Prosecution in its reply confirms that, as clarified during the examination in chief of P-0621, the Prosecution is only seeking the submission of sections of the report drafted by P-0621 and intends to submit the remainder of the report through P-0620. As regards item MLI-OTP-0064-0332, the Prosecution submits that this is a catalogue of photographs of material which P-0621 and P-0620 analysed, and given that, as confirmed during P-0621's examination in chief, the pictures were jointly taken by P-0621 and P-0620, this particular piece of item can be submitted through P-0621.

In respect of P-0620, the Chamber notes that the Defence objects to the submission of four items. The Defence submits that the Chamber should not authorise the submission of parts of the expert report (items MLI-OTP-0064-0175, MLI-OTP-0064-0332 and MLI-OTP-0066-0200 (particularly this last item at page 0209) authored by P-0620, as this relies on torture tainted evidence and evidence obtained by other illegal means. Alternatively, the Defence submits that the report should be excluded on the basis that it is insufficiently reliable, given that P-0620 had mistakenly believed that some of the signatures were written in 2012. As regards the fourth item MLI-OTP-0064-0008, the Defence submits that this item was not shown to or confirmed by the witness, and should therefore not be formally submitted. The Prosecution in its reply submits that arguments relating to the underlying material of the expert report are premature, as the Prosecution is not seeking the submission of underlying material at this stage. In any event, the Prosecution contends that the Defence has not established the existence of torture and that reliance on the underlying material does not breach any right of Mr Al Hassan, including his right against self-incrimination. As

regards the alternative objection of the Defence, the Prosecution submits that the Defence objections are inaccurate and misleading and should be rejected. With respect to item MLI-OTP-0064-0008, the Prosecution submits that the item in question was part of the Prosecution's Rule 68(3) request and that it was used or broadly discussed during P-0620's testimony.

The Defence submits that the Chamber should strike the Prosecution's reply of 16 October 2020. The Defence submits that the Prosecution's reply was filed out of time as the reply was due 16 October 2020 at 16:00 whereas the Prosecution sent the email concerned at 18:24. The Defence also contends that given the objections it raised prior to testimony, the Prosecution was under the obligation to satisfy the Chamber of the legality of the evidence, and that the Prosecution was hence barred from raising arguments on legality of the evidence in its reply as these are not arguments which the Prosecution could not have reasonably anticipated.

As a preliminary matter, the Chamber recalls that it has recently provided clarification on the application of time limits to emails on the submission of evidence. In particular, the Chamber clarified that no 16:00 deadline applies to emails sent pursuant to the Chamber's directions on the conduct of proceedings (*see* Email from the Chamber dated 20 October 2020 at 14:48). Moreover, the Chamber notes that the Defence's argument that the Prosecution should have raised issues pertaining to legality in its initial email seeking submission of evidence relates to the issue of burden of proof for establishing allegations of illegality, an issue which the Chamber will decide upon in due course together with any other issues relating to Article 69(7) of the Statute. As such, the Chamber does not consider it appropriate to strike the Prosecution's submissions *in limine* on that particular ground. Accordingly, the Defence request to strike the Prosecution's reply is rejected.

The Chamber has considered the nature and scope of these experts' testimony, particularly that the Chamber previously authorised the introduction of the experts' reports and related material pursuant to Rule 68(3) of the Rules (*see* Decision ICC-01/12-01/18-989-Conf, paras 83-89). The Chamber further notes that the formalities pursuant to this provision were met during their respective testimonies.

While the Defence submits that item MLI-OTP-0064-0008 was not shown to or confirmed by the witness, the Chamber recalls its previous finding that '[w]hen confirming in court that the procedural prerequisites of Rule 68(3) have been fulfilled, it is not required that each piece of document must have been shown and individually confirmed by the witness. Rather, it is sufficient that the witness is given the opportunity to confirm the report and related materials as a whole.' (Email from the Chamber dated 29 October 2020 at 10:01). In the instant case, and as explicitly foreseen by the Prosecution in its application to submit these experts' evidence pursuant to Rule 68(3), the Prosecution proposed that during the witness preparation, the Prosecution would ask the proposed experts, *inter alia*, 'to review their report and associated material, advise of any corrections or clarifications they wish to make, and to confirm the accuracy of the reports' (*see* filing ICC-01/12-01/18-848-Conf, para. 35). Accordingly, the Chamber does not consider it necessary to exclude the item in question.

As regards items submitted by the Prosecution in relation to P-0620 which are not covered by Rule 68(3), the Chamber is satisfied that these items were sufficiently used or discussed in Court and also notes that the Defence does not object to their submission.

Accordingly, the Chamber authorises at this stage the submission of the following items of the Prosecution:

P-0621: MLI-OTP-0064-0174; MLI-OTP-0064-0175; MLI-OTP-0064-0332; MLI-OTP-0065-0181; and MLI-OTP-0065-0183.

P-0620: MLI-OTP-0064-0175; MLI-OTP-0064-0332; MLI-OTP-0066-0200; MLI-OTP-0064-0174; MLI-OTP-0065-0183; MLI-OTP-0065-0181; MLI-OTP-0064-0010; MLI-OTP-0070-1492; MLI-OTP-0064-0008; MLI-OTP-0055-1915; MLI-OTP-0055-1917; and MLI-OTP-0078-9664.

Turning to items which the Defence seeks to submit through P-0620, the Chamber is satisfied that item DRC-OTP-2107-1331-R01 was sufficiently used or discussed in a broad sense during P-0620's testimony. Accordingly, the Chamber directs the Defence to upload item DRC-OTP-2107-1331-R01 to Ecourt and authorises its submission.

The Chamber is satisfied that the remainder of items were also sufficiently used or discussed in Court and also notes that the Prosecution does not object to their submission.

Thus, the following items of the Defence are formally submitted:

P-0620: MLI-D28-0004-1167, MLI- D28-0004-1172, MLI- D28-0004-1173, MLI-D28-0004-1177, MLI-D28-0004-1226, MLI-D28-0004-1320; and the newly uploaded version of item DRC-OTP-2107-1331-R01.

The Registry is directed to proceed in accordance with paragraph 34(vi) of the Directions on the conduct of the proceedings (ICC-01/12-01/18-789-AnxA).

Nonetheless, the Chamber observes that in light of its Directions on the conduct of proceedings, submission and admissibility of evidence must be distinguished. The challenges made by the Defence pursuant to Article 69(7) ultimately refer to the admissibility of the expert reports and the legality of the underlying material relied upon them to prepare their reports. Thus, pursuant to paragraph 32 of its Directions on the conduct of proceedings, the Chamber will render a ruling on the admissibility of the above submitted expert reports in due course. The Chamber may request further submissions from the parties and participants if deemed necessary for its determination.

Kind regards,



On behalf of Trial Chamber X