

ANNEX 1

Public redacted

From: Trial Chamber X Communications
Sent: 01 September 2020 10:28
To: Taylor, Melinda; [REDACTED]
 [REDACTED] Dutertre, Gilles; [REDACTED]
 Doumbia, Seydou; Nsita Luvengika, Fidel; Kassongo, Mayombo; [REDACTED]
Cc: Trial Chamber X Communications
Subject: TC X - Decision on OTP Request to amend the LOE with 5 photographs from P-0007
Follow Up Flag: Follow up
Flag Status: Flagged

Dear Counsel,

The Chamber renders the present ruling applying the principles set out in its decision of 5 August 2020 (decision 988, para. 6) and considers that the Prosecution's request for the late addition to its List of Evidence of five items related to P-0007 should be granted.

Although the Prosecution acknowledges that the photographs were inadvertently not included in its List of Evidence, and the test under Regulation 35(2) is therefore not satisfied, the Chamber considers that it is in the interest of justice and determination of the truth to grant the late addition sought, having notably found that no undue prejudice arises to the Defence. In this regard, the Chamber notes that, as described by the Prosecution, the five items were disclosed in August 2018 as photographs taken by Witness P-0007; they are limited in number and volume; and that they represent similar analogous items already included in the Prosecution's list of evidence.

Specifically, turning to the Defence's submission concerning purported 'new line of evidence' and arguing that a prejudice would arise as a result of the 'proposed expansion of P-0007's testimony to include allegations regarding the accessibility of the ATM room', the Chamber notes that the charges confirmed clearly include allegations that the BMS was one of the premises used by Ansar Dine/AQIM 'to detain or imprison violators of the rules enacted by these groups' (461-Corr-Red, para. 129). The Chamber further observes that, in the summary provided on 15 April 2020, the Prosecution notably indicated that the following were part of the main topics expected to be discussed during P-0007's testimony: i) the photos that P-007 took inside and outside the building; and ii) being 'told by local residents that one of the rooms in this building was used as a jail for female prisoners' (740-Conf-AnxB, pages 17-18). Accordingly, the Defence's submissions in this regard, which the Chamber assessed as being relevant to items MLI-OTP-0001-7299 and MLI-OTP-0001-7265 (both displaying a metal screen door), are dismissed.

The Chamber therefore grants the requested late addition of the following five photographs to the Prosecution's List of Evidence: MLI-OTP-0001-7265, MLI-OTP-0001-7299, MLI-OTP-0001-7328, MLI-OTP-0001-7604, and MLI-OTP-0001-7247.

Kind regards,

[REDACTED]
 On behalf of Trial Chamber X

From: [REDACTED]
Sent: 31 August 2020 12:24
To: Trial Chamber X Communications
Cc: Taylor, Melinda; [REDACTED];
 Dutertre, Gilles; [REDACTED]
 Doumbia, Seydou; Nsita Luvengika, Fidel; Kassongo, Mayombo; [REDACTED]
Subject: RE: Requet to amend the LOE with 5 photographs from P-0007

Dear Trial Chamber X,

The Defence opposes the request by the Prosecution to add the five items listed in the chart to its list of evidence ('Request').

The Defence recalls that the deadline for the Prosecution to disclose material in its possession and provide a list of evidence was originally set as 14 April 2020, which was then, on request by the Prosecution, postponed to 12 May 2020. On 1 June 2020, the Prosecution sought, and was granted in a decision of the Chamber on 5 August 2020, permission to add 11 items to its list of evidence, and an updated list of evidence was filed on 12 August 2020. The Prosecution now seeks, on 18 August 2020, to add an additional five items to the list of evidence on the eve of trial.

For the reasons set out below, and consistently with the Chamber's reasoning in its decision of 5 August 2020, the Request should be denied because:

1. The Request does not comply with the requirements of Regulation 35;
2. It is not in the interests of justice to grant the Request; and
3. Granting the Request will cause prejudice to the Defence.

The Request does not comply with the requirements of Regulation 35

The Prosecution has indicated in the Request that the photographs 'were inadvertently not included in the Prosecution's list of evidence'. The Chamber, in the decision of 5 August 2020 at paragraph 8, stated (emphasis added):

"At the outset, the Chamber notes that for a number of items requested to be added late to the Prosecution's Final List of Evidence, no explanation is given for the failure to include them within the original deadline, or the Prosecution indicates that they were not added within the deadline due to an oversight. The Chamber takes this opportunity to remind the Prosecution of the importance of diligently complying with its disclosure obligations in a timely manner, and the need to sufficiently justify requests pursuant to Regulation 35 of the Regulations. Failing to comply with a deadline due to inadvertence is not a reason outside of the Prosecution's control. The Chamber also emphasises that these late additions are exceptional and should not in any way become the norm during trial."

The Prosecution has failed to demonstrate why this Request is exceptional.

It is not in the interests of justice to grant the Request

The Defence acknowledges that the Chamber has, in the past, permitted the addition of items to the list of evidence, even when Regulation 35 does not apply, where it was in the interests of justice.

However, the Defence submits that it would not be in the interests of justice to grant this Request. The Prosecution has not demonstrated why it is necessary to introduce five new items to its list of evidence, in the days leading up to the commencement of witness testimony from P-0007.

Furthermore, the Request indicates that the purpose of introducing MLI-OTP-0001-7299 and MLI-OTP-0001-7604 is to 'demonstrate that this room [*the ATM room at the BMS*], which was used as a detention cell during the events, was closed and not accessible.' This is a matter not included in P-0007's witness statement, and therefore, the introduction of these images proposes to introduce new lines of evidence not in P-0007's witness statement taken on 20 February 2013, some seven and a half years ago. If the Prosecution wished to expand the scope of P-0007's testimony, it was incumbent on the Prosecution to obtain a new witness statement from P-0007 in a timely manner. Its failure to do so should not be used as an excuse to permit tardy addition of items.

Furthermore, the Prosecution has referred to analogous items already included in the list of evidence for each of the five items, but has not explained the extent to which the Prosecution can raise these new allegations through the evidence already contained in its list of evidence. In the absence of such an explanation, the Prosecution should not be permitted to add these new items to its list of evidence, in circumstances where ample material concerning the BMS and the *Hotel La Maison* will be before the Chamber.

Granting the Request will cause prejudice to the Defence

Contrary to the Prosecution's submission below, addition of the five items will cause prejudice to the Defence. P-0007 is due to commence testimony in eight days, on 8 September 2020, and related witnesses P-0057 and P-0055 are due to testify on 11 September 2020 and 22 September 2020, respectively. The addition of these five new items, and the proposed expansion of P-0007's testimony to include allegations regarding the accessibility of the ATM room, at such a late stage, will cause prejudice to the Defence and, relatedly, Mr. Al Hassan's Statutory right to adequate time and facilities for the preparation of the defence.

In the premises of the above, the Defence respectfully requests that the Chamber reject the Request.

Best regards,

Al Hassan Defence Team

From: Dutertre, Gilles [REDACTED]
 Sent: 18 August 2020 19:03
 To: Trial Chamber X Communications
 Cc: Taylor, Melinda; [REDACTED]
 [REDACTED] Doumbia, Seydou; Nsita Luvengika, Fidel; Kassongo, Mayombo; [REDACTED]
 Subject: Request to amend the LOE with 5 photographs from P-0007

Dear Trial Chamber X,

The Prosecution seeks the Chamber's authorization to add the following five items listed in the chart below to its list of evidence.

In preparation for P-0007's examination, the Prosecution has discovered that among the items it wishes to use during P-0007's examination, there are five (5) photographs which were inadvertently not included in the Prosecution's list of evidence. As shown below, these items are of probative value to the Prosecution case, and do not cause any prejudice to the Defence since, *inter alia*, they have been disclosed under rule 77 almost 2 years ago.

These items are:

- A. Three photographs taken by P-0007 in and of the BMS building (the building which was used during the events as the seat of the Islamic Police before the latter moved to the *Gouvernorat*):
 1. MLI-OTP-0001-7247: This photograph shows the contents of an office in the BMS including many documents (documents were collected in that building by P-0007 which include reports of the Islamic Police relevant to the crimes charged);
 2. MLI-OTP-0001-7265: This photograph shows writings on the walls of a cell inside the BMS and the door of the cell. It corroborates photographs taken of the same location by P-0055/P-0057, and together with other witnesses' evidence identify the BMS building and establish the place where P-0007 and then P-0055/P-0057 did go.
 3. MLI-OTP-0001-7299: This photograph shows the metal door of the ATM room at the BMS chained and locked. It corroborates photographs taken of the same location by P-0055/P-0057 which, together with evidence of other witnesses demonstrate that

this room, which was used as a detention cell during the events, was closed and not accessible.

- B. Two photographs taken by P-0007 in and of the hotel “La Maison” (the building which was used during the events as the seat of the Islamic Tribunal):
4. MLI-OTP-0001-7328: This is a photograph of the hotel “La Maison”. When considered with other evidence, it will identify this building where P-0007 and, subsequently, P-0055/P-0057 collected documents.
 5. MLI-OTP-0001-7604: This photograph from inside the hotel “La Maison” shows the content of a drawer of a desk. As will be shown by other pieces of evidence, this room - with its red carpet - was the room where the Islamic Tribunal used to hear and decide cases during the events. It corroborates photographs subsequently taken of the same location and drawer by P-0055/P-0057 which, together with evidence of other witnesses demonstrate the use of this room by the Islamic Tribunal to pass sentences during the events where many crimes were committed and identifies the drawer and room where documents were collected.

Including these 5 items to the LoE causes no prejudice to the Defence since they are limited in number and volume, were disclosed almost two years ago under rule 77 (since 31 August 2018) and represent similar analogous items already included in the Prosecution’s list of evidence.

Count	Doc ID	Type	Title	Description	Disclosures	Related to Witness	Analogous items
1	MLI-OTP-0001-7265	Photograph/s	Timbuktu bank / IMG_7179.JPG	Photo taken by P-0007 from inside the BMS showing writings on the walls.	Pre-Confirmation Rule 77 package 10 31 August 2018	MLI-OTP-P-0007	MLI-OTP-0006-1514
2	MLI-OTP-0001-7299	Photograph/s	Timbuktu bank / IMG_7214.JPG	Photo taken by P-0007 of the BMS showing a metal door with a chain and a lock.	Pre-Confirmation Rule 77 package 10 31 August 2018	MLI-OTP-P-0007	MLI-OTP-0006-1882, MLI-OTP-0006-1461, MLI-OTP-0006-1460, MLI-OTP-0006-1438, MLI-OTP-0006-1439, MLI-OTP-0001-7303
3	MLI-	Photograph/s	Timbuktu	Photo taken	Pre-	MLI-	MLI-OTP-

	OTP-0001-7328		hotel \ \ IMG_8431.JPG	by P-0007 of the hotel “La Maison”	Confirmation Rule 77 package 10 31 August 2018	OTP-P-0007	0006-2049
4	MLI-OTP-0001-7604	Photograph/s	Timbuktu hotel / IMG_8725.JPG	Photo taken by P-0007 from inside the hotel “La Maison” showing the content of a drawer of a desk.	Pre-Confirmation Rule 77 package 10 31 August 2018	MLI-OTP-P-0007	MLI-OTP-0006-2087, MLI-OTP-0006-2093, MLI-OTP-0006-2103
5	MLI-OTP-0001-7247	Photograph/s	Timbuktu bank / IMG_7158.JPG	Photo taken by P-0007 from inside the BMS depicting the contents of an office notably a desk, cabinet, chairs, and many documents.	Pre-Confirmation Rule 77 package 10 31 August 2018	MLI-OTP-P-0007	

For these reasons, the Prosecution requests the Chamber's authorization to add these 5 photographs to the Prosecution's list of evidence.

Respectfully,
Gilles Dutertre

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