

Annex 8

Public

From: Trial Chamber X Communications
Sent: 15 January 2021 10:38
To: D28 Al Hassan Defence Team; Al Hassan Prosecution Team; VWS Legal; [REDACTED]
Cc: Trial Chamber X Communications; Chamber Decisions Communication
Subject: Decision on Urgent Defence request under paragraph 32 of the Contact Protocol
Attachments: RE: Urgent request under para 32 of Witness Protocol ; RE: TC X: Responses to urgent Defence request under para 32 of Witness Protocol

Dear counsel and colleagues,

The Single Judge refers to the Defence request below for the Chamber to ask VWU to contact witnesses [REDACTED], with a view to scheduling an interview with the Defence during Ms Sutherland's mission to [REDACTED], in accordance with paragraph 32 of the Contact Protocol (filing [674-Anx2](#)) (Request).

The Single Judge has also taken note of the email responses from the Prosecution of 13 January and VWU of 14 January (attached).

The Single Judge notes that both witnesses have consented to such interviews and that the Prosecution has no objection to the Defence meeting with [REDACTED]. From the Prosecution's response, the Single Judge also notes that issues raised by the Defence regarding in person attendance by Prosecution lawyers is moot since the Prosecution has confirmed that its lawyers can attend any such interviews by video link.

The remaining issue seems to be the logistics surrounding these interviews, including notably any COVID-19 requirements.

The Single Judge has taken note of the VWU's advice that it recommends against undertaking any in-person activities with witnesses in any escalated threat environment and especially in the absence of any detailed security assessment, but that stands ready to assist in facilitating an interview in [REDACTED] - although it requires sufficient notice of any proposed meeting in order to make its assessment and propose a proper location if necessary.

The Single Judge also notes that VWU recommends COVID-19 measures which require a likely seven day lead time before a meeting between Defence counsel and witness can take place. The Single Judge notes that this advice seems to be contrary to the Defence's submissions, which refer to no such requirements despite the fact that Defence counsel has stated that the mission plan was formulated in consultation with VWU and OHU.

In view of the information received, the Single Judge grants the Defence Request but directs that its execution be carried out in close consultation between the Defence and VWU - and the Prosecution to the extent necessary. In principle, the Single Judge considers that VWU recommendations should be followed. The Single Judge notes in particular the VWU recommendation that the Prosecution initiate a call or provide a level of introduction to the witnesses before the meeting as they are familiar with them, before the VWU takes care of the witnesses in [REDACTED] to facilitate the meeting. The Single Judge also notes that VWU recommendations related to COVID-19. In addition the Single Judge notes that proceedings are now adjourned by a week to the extent that this allows for further time to accommodate quarantine requirements.

Kind regards,

[REDACTED] on behalf of the Single Judge of Trial Chamber X

From: Taylor, Melinda
Sent: 13 January 2021 15:01
To: Trial Chamber X Communications

Cc: D28 Al Hassan Defence Team ; Al Hassan Prosecution Team
Subject: Re: Urgent request under para 32 of Witness Protocol

I sincerely apologise - there was a cut and paste error and I pasted the content of the same email twice in the procedural history concerning 13 January exchanges. I am therefore pasting a corrected version of my email, and the procedural history below, and would be grateful if the earlier version could be disregarded.

Dear Trial Chamber

In accordance with paragraph 32 of the Witness Protocol, the Defence respectfully requests the Trial Chamber to ask the VWU to contact [REDACTED], with a view to scheduling an interview with the Defence, during Ms. Sutherland's [REDACTED]. Both witnesses have consented to such interviews. The Prosecution has, however, failed to comply with its obligation to act diligently in facilitating contact with these witnesses, with a view to organising specific dates. As set out in the procedural history below, although [REDACTED] consented to be interviewed by the Defence in July, the Prosecution took roughly 5 ½ months to respond with concrete dates. And, although the Prosecution indicated that it would be possible to meet [REDACTED] in person at the end of January, the Prosecution is now resisting Defence attempts to exercise its right to proceed with this interview in person, on the grounds that the Prosecution cannot deploy lawyers [REDACTED]. It seeks to rely on quarantine rules which, the Registry have assured the Defence, do not apply to meetings and activities occurring outside the UN base and field office. The Defence has attempted to resolve this issue on an *inter partes* basis, exchanging multiple emails with the Prosecution. No resolution appears likely, and Ms. Sutherland is scheduled to depart in a matter of hours.

Defence opportunities to investigate *in situ* have been extremely limited: if the Prosecution had reverted to the Defence concerning [REDACTED] in an earlier manner, than the Defence could have travelled during the judicial recess. As things stand, since Ms. Sutherland will not be questioning [REDACTED], this is one of the few periods during which a Counsel can travel to the field.

The Protocol must also be construed and applied in accordance with the well-recognised notion that there is no property in a witness, and that, subject to a witness's consent, the Defence has the right to interview Prosecution witnesses before their testimony, particular, since such witnesses may be able to provide investigative leads, or evidence on other matters (in this case, the 2017 arrest and detention of Mr. Al Hassan). As explained by Trial Chamber I in *Lubanga*, [ICC-01/04-01/06-2192-Red](#), para. 49-52

neither party "owns" the witnesses it intends to call, and there are many reasons why a discussion with some individuals in advance of their testimony may assist in the efficient management of the proceedings, and assist the Chamber in its determination of the truth. For instance, irrelevant lines of questioning may be identified and discarded; lines of further enquiry may become clear, enabling their timely investigation prior to the witness giving evidence; and the opposing party may decide that the witness's evidence is not in dispute and, in consequence, it may be possible to agree his or her statement, along with any relevant documents (thereby obviating the need to bring the witness to court). Important considerations of this kind apply whoever is calling the witness, such as to justify, in principle, discussions in advance of a witness's evidence, so long as the latter consents.

At the same, while the calling party may be present at such interviews (if so requested by the witness), their presence is not tantamount to active participation: to the contrary, the calling party should refrain from intervening or speaking, outside the strict terms of the Protocol. Given that the meetings are recorded, there is also no absolute right to be present: as found in *Bemba* ([ICC-01/05-01/08-2293](#))

31. The Chamber notes its finding above that it is not a pre-requisite that

the calling party attend such meetings; rather the calling party may attend at its discretion. In cases where the calling party does 'not attend such meetings, the Chamber considers the impact on its rights and interests will be minimal due to the requirement that the interviewing party must either arrange for the calling party to be able to observe any interview by videolink, or, at a minimum, provide the calling party with a copy of an audio/video recording of the full interview as soon as practicable after the meeting is concluded.

The Prosecution's argument that it has a right to participate in the same mode as the Defence is thus unfounded. What is at stake is the right of the Defence to investigate, under the same conditions as the Prosecution. The Prosecution interviewed these witnesses in person, and, in the case of ██████ did so on multiple occasions. The Defence has taken extraordinary steps to be able to arrange this mission, and has liaised with the VWU, and OHU in order to do so. Ms. Sutherland has obtained a negative PCR test, and intends to comply fully with ██████ laws and regulations concerning contacts. We would now be grateful if we could be given the necessary assistance to ensure that Ms. Sutherland can in fact meet these witnesses while she is there.

The Defence remains available to provide any further information or details that would be of assistance.

Kind regards
Melinda Taylor on behalf of the Al Hassan Defence

Procedural history

On 26 June 2020, the Defence indicated that it wished to interview ██████, and duly sought the assistance of the Prosecution to obtain his consent for such an interview.

On 5 July 2020, the Prosecution confirmed that ██████ consented to the interview, and indicated that it would facilitate the contact.

On 16 July 2020, the Defence asked for an update as concerns this facilitation.

On 21 July 2020, the Prosecution responded that ██████ would not be available before September (which is when trial hearings started), that he wished for the Prosecution to be present, and that they would revert at the end of August to facilitate the contact.

On 2 January 2021 (that is, almost 5 ½ months later), the Prosecution informed the Defence that after consultation with VWU, they had determined that the Defence could conduct either a brief telephone call with ██████, or they could meet him in ██████ at the end of January, or interview him by video link.

VWU has confirmed to the Defence that it has not been consulted by the Prosecution in relation to issues concerning ██████ for several months, and that it did not expect to be involved in the logistics of organizing the interview although it could assist.

On 6 January, Ms. Sutherland communicated the following to the Prosecution:

we would like to arrange to interview ██████ and would therefore be very grateful if you could ascertain his availability such that this can be scheduled promptly – i.e. such that they may be concluded by 20 January. I am due to conduct the cross-examinations of P-0554, P-0984 and P-0431, which, as you know, are set to commence on 01 February 2021. In view of the quarantine requirements in each direction of travel, you will understand our need for expeditiousness. Ms Taylor is due to conduct the cross-examination of ██████ so of course must remain in The Hague.

On the same day, the Prosecution indicated that they would verify whether the witness was available, and that these dates would depend on the witness.

On 7 January, the Defence again communicated that it would be necessary for the interview with [REDACTED] to be conducted sufficiently in advance of the testimony of P-0554, to allow for Ms. Sutherlands return and quarantine. It therefore inquired as to whether it would be feasible to adjourn the testimony of P-0554 and P-098. The Prosecution responded on the 8 January that this was not possible, and proposed that the interview occur by AVL.

On 8 January, Ms. Sutherland wrote to the Prosecution to inquire as to whether [REDACTED] (who had agreed to be interviewed by the Defence) would be available during her planned mission to [REDACTED]. The Defence further conveyed its position that it would be contrary to equality of arms to require the Defence to interview these witnesses *via* AVL, particularly as, unlike the Prosecution, the Defence has not had an opportunity to establish a rapport with these individuals. Ms. Sutherland further indicated that arrangements had been made for her to travel [REDACTED] the the next week. These arrangements had been made after consulting with VWU, and also with OHU concerning applicable quarantine requirements in [REDACTED].

On the evening of 11 January, the Prosecution indicated that it would not send a lawyer to [REDACTED] and again proposed the use of AVL.

On 12 January, the Defence wrote to underscore that:

All arrangements are in place and I am set to depart for [REDACTED] tomorrow, with a scheduled return on 21 January to accommodate the necessary isolation period in time for the examination of P-0554.

Notwithstanding the logistical and health concerns that you observe, the Defence considers it imperative that we are afforded the opportunity to interview witnesses [REDACTED] and, at least preliminarily, [REDACTED] under the same circumstances as the Prosecution. As you acknowledge in your email, the circumstances of 'in-person' and 'AVL' are materially distinct.

Nothing, however, dictates that the Prosecution must attend the meeting/s held by the Defence in the same mode. Paragraph 36 of the relevant protocol anticipates the instant circumstances: 'If the calling party or participant is unable to travel to the particular location where the interview is conducted, the parties and participants shall endeavour to reach an agreement concerning alternative arrangements for the participation of a representative of the calling party, such as participation by video link or holding the interview with the witness at another location.' Therefore, in circumstances in which the Prosecution decides not to attend in person, the Prosecution may choose to attend via AVL. This is a matter for your office.

The Defence has already endured much erosion of its ability to investigate as a result of the pandemic. This is in no one's proper interest. Please kindly assist us in making the final arrangements to interview [REDACTED] as swiftly as possible. If you are unable to do so, and noting that over five days have now passed since we requested to interview [REDACTED] please let us know forthwith such that we may make the necessary application to the Chamber requesting the instruction of VWS.

At 4pm of the same day, the Defence sent a follow up email seeking a response, as the flight tickets were about to be issued. The Prosecution then responded that they would have an investigator present, and a lawyer would participate by Web-ex. The Prosecution asked for the Defence dates of travel, notwithstanding the fact that they had been transmitted in the earlier email. Thirty minutes later, the Defence wrote again to confirm that:

My planned dates in [REDACTED]th [REDACTED]. There is currently no [REDACTED] requirement to quarantine on arrival, though of course a negative PCR certificate is required on entry and on exit. This has been discussed with the Registry and the medical unit, and all relevant steps have been taken.

On 13 January, the Prosecution wrote to convey their understanding that Ms. Sutherland would need to quarantine for 7 days, upon arrival, and before meeting the witness.

The Defence duly responded that:

I assure you that our mission plan has been formulated in consultation with, and the approval of, both the OHU and the Registry. This has included, of course, explicit discussion regarding necessary Covid measures. The Defence is acutely aware of the pandemic and its continuing impact on investigations and the trial.

As previously explained, the ██████ government requires negative Covid certificates upon both entry and exit, and there is no additional quarantine requirement. Since we will not enter ICC premises, and nor should the witnesses, we are beholden to the ██████ government's requirements. Mindful of the health of all involved, including myself, all necessary hygiene measures will be observed.

We remain anxious for your indication of specific dates for the conduct of these interviews precisely in order that we may organise suitable conference rooms and the assistance of interpreters. Please facilitate this as soon as practicable in order to avoid further delay.

Rather than proceedings to confirm the dates of interview, the Prosecution responded by querying and contesting the advice that had been provided to the Defence, and insisting once more, that the interview be conducted by AVL, even though the Prosecution knew that Ms. Sutherland's flight tickets had already been issued.

Given that Ms. Sutherland's flight departs in a matter of hours, the Defence wrote to the Prosecution to seek an expeditious resolution, noting that:

We have been working hard to arrange this mission in full accordance with all the relevant requirements and restrictions in place, while also mindful of the imminent recommencement of oral hearings. The mission plan is detailed and has been approved. You will of course understand that my interactions with medical personnel are confidential.

Noting that there is no property in a witness, and mindful of the unique investigative opportunity presented, we again request your urgent assistance. We are concerned that the Prosecution has failed to act expeditiously to respond to a request made six months ago; the loss of this opportunity to gather important evidence would be detrimental to the functioning of the Defence and to the interests of the Court.

We have now been anxiously awaiting your facilitation of the meetings for this important mission for over a week. Please facilitate the meetings with the witnesses with the utmost haste. Should we need to apply to the Chamber for the assistance of VWS, please let us know at the earliest opportunity.

The Prosecution responded as follows:

Chere Madame Taylor,

L'Accusation a agi avec diligence. Notamment nous vous avons répondu sur ██████ il y a longtemps.

Par ailleurs, vos dates exactes de mission nous ont été communiquées que hier, et c'était une information préalable incontournable pour organiser utilement les choses avec les témoins.

Faute de clarification sur les questions sanitaires, nous allons saisir VWS sur la base du paragraphe 37 du protocole ICC-01/12-01/18-40-Anx pour aider et en rappelant aussi que l'installation AVL est un lieu ICC avec condidions d'accès.

Cordialement,

Gilles Dutertre

From: Taylor, Melinda

Sent: 13 January 2021 14:46

To: Trial Chamber X Communications <[TrialChamberXCommunications](#) ██████ >

Cc: D28 Al Hassan Defence Team <[D28AlHassanDefenceTeam](#) ██████ >; Al Hassan Prosecution Team <[AlHassanProsecutionTeam](#) ██████ >

Subject: Urgent request under para 32 of Witness Protocol

Dear Trial Chamber

In accordance with paragraph 32 of the Witness Protocol, the Defence respectfully requests the Trial Chamber to ask the VWU to contact ██████████, with a view to scheduling an interview with the Defence, during Ms. Sutherland's mission ██████████. Both witnesses have consented to such interviews. The Prosecution has, however, failed to comply with its obligation to act diligently in facilitating contact with these witnesses, with a view to organising specific dates. As set out in the procedural history below, although ██████████ consented to be interviewed by the Defence in July, the Prosecution took roughly 5 ½ months to respond with concrete dates. And, although the Prosecution indicated that it would be possible to meet ██████████ in person at the end of January, the Prosecution is now resisting Defence attempts to exercise its right to proceed with this interview in person, on the grounds that the Prosecution cannot deploy lawyers to ██████████. It seeks to rely on quarantine rules which, the Registry have assured the Defence, do not apply to meetings and activities occurring outside the UN base and field office. The Defence has attempted to resolve this issue on an *inter partes* basis, exchanging multiple emails with the Prosecution. No resolution appears likely, and Ms. Sutherland is scheduled to depart in a matter of hours.

Defence opportunities to investigate *in situ* have been extremely limited: if the Prosecution had reverted to the Defence concerning ██████████ in an earlier manner, than the Defence could have travelled during the judicial recess. As things stand, since Ms. Sutherland will not be questioning ██████████, this is one of the few periods during which a Counsel can travel to the field.

The Protocol must also be construed and applied in accordance with the well-recognised notion that there is no property in a witness, and that, subject to a witness's consent, the Defence has the right to interview Prosecution witnesses before their testimony, particular, since such witnesses may be able to provide investigative leads, or evidence on other matters (in this case, the 2017 arrest and detention of Mr. Al Hassan). As explained by Trial Chamber I in *Lubanga*, [ICC-01/04-01/06-2192-Red](#), para. 49-52

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multiple occasions. The Defence has taken extraordinary steps to be able to arrange this mission, and has liaised with the VWU, and OHU in order to do so. Ms. Sutherland has obtained a negative PCR test, and intends to comply fully with [REDACTED] laws and regulations concerning contacts. We would now be grateful if we could be given the necessary assistance to ensure that Ms. Sutherland can in fact meet these witnesses while she is there.

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opportunity to establish a rapport with these individuals. Ms. Sutherland further indicated that arrangements had been made for her to travel [REDACTED] the the next week. These arrangements had been made after consulting with VWU, and also with OHU concerning applicable quarantine requirements [REDACTED]

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Nothing, however, dictates that the Prosecution must attend the meeting/s held by the Defence in the same mode.

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Cordialement,

Gilles Dutertre

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