

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/12-01/18

Date: 6 September 2021

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
*THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Confidential

**Decision on Prosecution request for leave to redact the image of P-0520 from two
disclosed Rule 77 items**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Karim A. A. Khan
James Stewart

Counsel for the Defence

Melinda Taylor

Legal Representatives of Victims

Seydou Doumbia
Mayombo Kassongo
Fidel Luvengika Nsita

Legal Representatives of Applicants**Unrepresented Victims****Unrepresented Applicants for
Participation/Reparations****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States Representatives*****Amicus Curiae***

REGISTRY

Registrar

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

Detention Section**Victims Participation and Reparations
Section****Other**

Judge Kimberly Prost, acting as Single Judge on behalf of Trial Chamber X of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, having regard to Article 54(3)(f), 64, 67, 68(1) of the Rome Statute (the ‘Statute’), Rules 77 and 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), and pursuant to her ‘Decision on the evidence disclosure protocol and other related matters’,¹ issues the following decision.

1. On 28 July 2021, the Office of the Prosecutor (the ‘Prosecution’) filed a request under Rule 81(4) of the Rules seeking the Single Judge’s authorisation to apply redactions to the image of Witness P-0520 from two identity cards disclosed to the Defence pursuant to Rule 77 of the Rules.² The Prosecution argues that the redactions sought are necessary to avoid exposing P-0520, a victim of sexual violence, to a risk of further ostracism and rejection, as well as to protect her well-being and privacy under Article 68(1) of the Statute. In its Request, the Prosecution further explains that it sought, in vain, confirmation from the Defence that the images disclosed would not be shared with or accessed by individuals beyond the Defence’s legal team based in The Hague.³
2. On 25 August 2021, the Defence filed its response,⁴ seeking that the Single Judge denies the Request and orders the prompt disclosure of the fully unredacted versions of P-0520’s identity cards pursuant to Rule 77 of the Rules. For the Defence, the remedy sought by the Prosecution would ‘overstep the parameters of the Confidential Information Protocol and be inimical to a fair trial’.⁵ The Defence submits that P-0520’s image is material to Defence preparation,⁶ recalls that all members of the Defence team are subject to strict confidentiality

¹ 30 December 2019, ICC-01/12-01/18-546 (‘Decision on the Evidence Disclosure Protocol’).

² Prosecution Request for leave to redact the image of Prosecution Witness MLI-OTP-P-0520, ICC-01/12-01/18-1613-Conf-Exp, with two confidential annexes. A confidential redacted version of the Request was filed on 29 July 2021.

³ Request, ICC-01/12-01/18-1613-Conf-Red, paras 10-12 and annex A to the Request, ICC-01/12-01/18-1613-Conf-AnxA.

⁴ Defence Response to ‘Prosecution Request for leave to redact the image of Prosecution Witness MLI-OTP-P-0520’, ICC-01/12-01/18-1664-Conf.

⁵ Response, ICC-01/12-01/18-1664-Conf, para. 14, referring to the Protocol on the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 19 March 2020, ICC-01/12-01/18-674-Anx2 (the ‘Confidential Information Protocol’).

⁶ Response, ICC-01/12-01/18-1664-Conf, para. 4.

obligations,⁷ and argues that redaction of P-0520's images will have an 'unacceptably deleterious impact on the ability of the Defence to conduct necessary investigations'.⁸

3. The Single Judge incorporates by reference the applicable law and principles set out in her decision of 27 March 2020.⁹
4. At the outset, the Single Judges notes that it appears uncontested that P-0520's identity cards are material to the Defence preparation and therefore disclosable under Rule 77 of the Rules. The Single Judge recalls in this regard that, once materiality has been established, the burden is on the Prosecution to demonstrate that specific restrictions on disclosure are warranted.¹⁰
5. Turning to P-0520's personal circumstances, the Single Judge refers back to the Chamber's decision granting her in-court protective measures.¹¹ In this decision, the Chamber ordered that measures under Rule 87 of the Rules be implemented to avoid impermissible risks to her well-being and privacy, risks which the Chamber found would arise should her identity and cooperation with the Court become known to the public. The Single Judge stresses that, while her anonymity *vis-à-vis* the public was found to be necessary, the Chamber was not presented at the time – nor is it now – with information indicating that there are specific and objective risks to P-0520's safety or security. Furthermore, in the view of the Single Judge, the risks to P-0520's well-being and privacy associated with the disclosure of her unredacted identity cards *to the Defence* are substantially lower than, and must be differentiated from, the impermissible risks which would arise from her identity and cooperation with the Court becoming known to the public.
6. The Single Judge further notes that the relevant provisions of the Confidential Information Protocol are consistent with the special protection to be accorded to

⁷ Response, ICC-01/12-01/18-1664-Conf, para. 15. *See also*, paras 6-8.

⁸ Response, ICC-01/12-01/18-1664-Conf, paras 2 and 14.

⁹ Confidential Redacted Version of Decision on the Prosecution requests concerning the variation of protective measures for screened individuals P-0105, P-0120, P-0129, P-0140 and P-0154, ICC-01/12-01/18-684-Conf-Red, paras 11-17.

¹⁰ Decision on the Evidence Disclosure Protocol, ICC-01/12-01/18-546, para. 16.

¹¹ Eighth Decision on in-court protective measures for witnesses, 14 April 2021, ICC-01/12-01/18-1414-Conf-Red, paras 36-40.

victims of crimes of sexual or gender-based violence under Article 68 of the Statute. It is recalled that the Protocol provides that parties and participants ‘must exercise particular caution in investigating the allegations [of sexual or gender based crimes]’¹² and that, unless it can be done without revealing that the witness is a witness of the Court and if there are no suitable alternative investigative avenues, ‘[p]arties and participants shall not reveal information about the witness’s alleged victimization to the family members of the witness or to persons who can reasonably be expected to communicate it to family members.’¹³

7. Moreover, the Single Judge notes that the Confidential Information Protocol also ensures that photographs of witnesses are only shown to a third party ‘when no satisfactory alternative investigative avenue is available’, as well as that these are shown ‘together with other photographs of the same kind’.¹⁴ In this regard, the Single Judge agrees with the Defence and finds speculative and unsupported the Prosecution’s submission that use of P-0520’s images in Defence field investigations could result in P-0520’s identity becoming known to the public.¹⁵ The Single Judge also considers as irrelevant to the present assessment the Prosecution’s related submissions that the abovementioned risk could ‘in turn affect her cooperation and willingness to testify in the case’.¹⁶
8. In the view of the Single Judge, the Request does not provide satisfactory justification for a deviation from the provisions of the Confidential Information Protocol. The Single Judge being unconvinced by the Prosecution’s arguments on the necessity and appropriateness of the redactions sought to the image of P-0520, the Request is therefore dismissed.
9. The Single Judge welcomes the Defence’s proposal to seek the Chamber’s prior authorisation in the event that disclosure of P-0520’s image to a third party is the only satisfactory alternative investigative avenue,¹⁷ but does not find that such a

¹² Confidential Information Protocol, ICC-01/12-01/18-674-Anx2, para. 15.

¹³ Confidential Information Protocol, ICC-01/12-01/18-674-Anx2, para. 15.

¹⁴ Confidential Information Protocol, ICC-01/12-01/18-674-Anx2, para. 13.

¹⁵ Request, ICC-01/12-01/18-1613-Conf-Red, para. 9.

¹⁶ Request, ICC-01/12-01/18-1613-Conf-Red, para. 9.

¹⁷ Response, ICC-01/12-01/18-1664-Conf, para. 15.

course of conduct is necessary in the case at hand. It is recalled that, should the Defence have any doubt or questions regarding the implementation of the Confidential Information Protocol, it may seek the advice of the VWS.¹⁸ The Single Judge also remains available to provide specific instructions on an ad hoc basis should this be preferable.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DISMISSES the Request;

ORDERS the Prosecution to disclose at the earliest opportunity lesser redacted versions of the identity cards of P-0520, lifting all non-standard redactions (Code F);¹⁹

ORDERS the Prosecution and the Defence to respectively file a public redacted version of the Request and the Response.

Done in both English and French, the English version being authoritative.



Judge Kimberly Prost, Single Judge

Dated this Monday, 6 September 2021

At The Hague, The Netherlands

¹⁸ Confidential Information Protocol, ICC-01/12-01/18-674-Anx2, para. 14.

¹⁹ Other standard redactions applied to P-0520's identity cards, notably to her contact details, should remain as they are covered by standard justifications detailed in the Evidence Disclosure Protocol and not sought to be lifted.