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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**

Public

**Public Redacted Version of “Defence Response to ‘Prosecution Request for leave to
redact the image of Prosecution Witness MLI-OTP-P-0520’”**

Source: Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Prosecution seeks the redaction of photographic material relating to P-0520 on the basis that it considers that such material ought not to be disclosed to members of the Defence not based in The Hague.¹ In so doing, the Prosecution seeks deviation from the applicable 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 ('Confidential Information Protocol').²
2. The Prosecution fails to justify such an extraordinary deviation from the Confidential Information Protocol, which applies to all 'persons properly designated as members of the Defence team.'³ It is not for the Prosecution to dictate the internal functioning of the Defence team, including through demanding – whether implicitly or explicitly – an arbitrary delineation be carved between the Defence team members operating in The Hague and those elsewhere. This would have an unacceptably deleterious impact on the ability of the Defence to conduct necessary investigations, and thus be inimical to a fair trial.

II. Confidentiality

3. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially as it responds to a filing of the same classification.

III. Submissions

4. P-0520's credibility is materially in question. Her identity has been disclosed to the Defence and her image is material to Defence preparations. In view of the similarity and fluidity of names in the region, a single name is often inadequate for determining identity. Images of persons are crucial to enable the Defence to, for example, cross-check against photographic and video material in the possession of the Defence, match persons to visual descriptions, or identify persons in other media sources. Thus, and unlike her name, P-0520's image enables the Defence to conduct crucial investigations into her without disclosing her identity to any third party. Previous

¹ ICC-01/12-01/18-1613-Conf-Red, para. 16.

² ICC-01/12-01/18-674-Anx2.

³ ICC-01/12-01/18-674-Anx2, para. 4(a).

Trial Chambers have found that photographs used for identification purposes, including for the purposes of comparing the witness's physical features with other material admitted into the case, were *prima facie* relevant.⁴ As similar material, P-0520's images therefore satisfy the materiality threshold for disclosure pursuant to Rule 77. The burden lies with the Prosecution to demonstrate that the material is not disclosable, which the Prosecution has failed properly to do. P-0520's image is thus material to Defence preparations. It is therefore disclosable.

5. Trial Chamber III previously held that the presumption is that disclosable material will be provided in its 'entirety' and that any redactions may be applied only where there is good cause 'if this step is not inimical to a fair trial.'⁵ Where material is disclosable, it is disclosable to all members of the Defence team, all of whom are subject to strict protocols of conduct, including the Confidential Information Protocol.

The Defence is indivisible

6. At the outset, it is not for the Prosecution to seek to render the Defence team divisible.⁶ Fundamentally, to limit necessary disclosure to 'those in The Hague' is to impose a crudely and arbitrarily-drawn constraint clearly designed to preclude the use of such material for the purposes of substantive investigation. The Prosecution's demands would render it impossible for the Defence to ask its own members outside The Hague even whether they recognise a witness. In view of the severe constrictions on the Defence's ability to investigate, which are in this instance compounded by telecommunication connection issues as well as the coincidence of these trial proceedings with the ongoing pandemic, this would unduly and unfairly further undermine Defence investigative abilities.
7. The Prosecution's reliance on the Defence's previous specific request for a photograph of P-0580 [REDACTED].⁷ The Defence sought to use the photograph taken by the Prosecution for the purposes of verification and assessments of credibility [REDACTED]. The attempt to use these singular *inter partes* conditions (themselves drawn by the Prosecution and applied in highly unusual circumstances)

⁴ Ntaganda, [ICC-01/04-02/06-2201-Red](#), para. 36; Katanga and Ngudjolo, [ICC-01/04-01/07-2148](#), para. 7.

⁵ Bemba, [ICC-01/05-01-08-813-Red](#), para. 85.

⁶ ICC-01/12-01/18-1613-Conf-Red, para. 10.

⁷ ICC-01/12-01/18-1613-Conf-Red, para. 10, ICC-01/12-01/18-1613-Conf-AnxB.

as a precedent to shift the parameters of the Confidential Information Protocol and permit the Prosecution to dictate the functioning of the Defence should not be countenanced.

8. To the extent that the Prosecution's argument is predicated on the assumption that members of the Defence team not based in The Hague do not fall under the purview of the applicable Protocol, it is mistaken. The Confidential Information Protocol anticipates and governs the disclosure of confidential information to third parties. It does not envisage or accommodate any disaggregation of the Defence team.

The Prosecution's argument is speculative and excessive

9. Without substantiation, the Prosecution makes the bare assertion that '[t]here is an objectively justifiable risk that if the images contained in [P-0520's] identity cards were disclosed to the Defence and used in its investigations in the field, P-0520's cooperation with the Court and/or sexual violence committed against her could become known to the public' and that this 'may in turn affect her cooperation and willingness to testify in this case.'⁸ This is wholly speculative. Moreover, these concerns are merely general and do not go beyond the premise for the protections stipulated by the Confidential Information Protocol.
10. Fluidity of names and movement of people in an already very challenging investigative environment means visual identification may be particularly important for the verification of a witness's account. All these difficulties are compounded by the delayed disclosure of P-0520's identity to the Defence. The Prosecution has failed to justify its refusal to permit the proper use of P-0520's image for necessary investigative purposes within the parameters of the Confidential Information Protocol.
11. The Confidential Information Protocol already strictly dictates the parameters of the use of material identifying witnesses whose identity has not been made public. These strictures include that 'visual and/or non-textual material depicting or otherwise identifying witnesses shall only be shown to a third party when no satisfactory alternative investigative avenue is available,' and that '[w]hen a photograph of a witness is used, it shall only be shown together with other photographs of the same

⁸ ICC-01/12-01/18-1613-Conf-Red, para. 9.

kind.’⁹ In relation to those who have ‘stated that he or she has suffered sexual or gender based crimes and it is apparent that the witness has not discussed the violence with members of his or her family,’ the Protocol prevents the parties and participants, including all members of the Defence, from revealing ‘information about the witness’s alleged victimisation to the family members of the witness or to persons who can reasonably be expected to communicate it to family members.’¹⁰ The Defence notes that the Prosecution states that P-0520’s alleged victimisation is known [REDACTED].¹¹ In any event, and in all such circumstances, the Confidential Information Protocol prohibits the disclosure of the witness’s status as a witness of the Court to third parties.

12. The Prosecution also implicitly contends that the Defence is obliged to demonstrate at this stage that there is no ‘satisfactory alternative investigative avenue’ to justify the fulfilment of the Prosecution’s disclosure obligations.¹² This is wholly misguided because it seeks to impose an additional threshold with reference to a requirement emanating from the conditions for *use* of the material, and, since this is already regulated by the Confidential Information Protocol, is a redundant consideration for assessment of the Prosecution’s disclosure obligations at this stage. It is also undermined by the repeated, consistent findings of Trial Chambers of this Court that it is unduly onerous to require that the parties seek the leave of the Chamber before using an image of a witness in investigations within the parameters of the Protocol.¹³

As articulated by Trial Chamber III in Bemba:

Once disclosure has occurred, the Chamber does not consider it appropriate to order a party or participant to make a discrete application in advance, whenever a photograph is to be shown during the course of investigations - this proposal does not sufficiently reflect the exigencies of in situ enquiries which have a significant degree of unpredictability. Indeed, this suggestion would frequently render the investigations ineffective. However, the Chamber emphasises that a very high degree of care is to be taken to ensure that the use of photographs does not unnecessarily link the individuals depicted therein with the Court, and particularly the way in which they are involved with the ICC. They should only be used when no satisfactory alternative investigative avenue is available. As with all other non-public

⁹ ICC-01/12-01/18-674-Anx2, para. 13.

¹⁰ ICC-01/12-01/18-674-Anx2, para. 15.

¹¹ ICC-01/12-01/18-1613-Conf-Red, para. 6.

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

¹³ Ntaganda, [ICC-01/04-02/06-412](#), para. 14; Bemba, [ICC-01/05-01-08-813-Red](#), para. 87; Bemba, [ICC-01/05-01/13-1093](#), para. 22; Banda and Jerbo, ICC-02/05-03/08-451, para. 28.

information, a detailed record of the disclosure shall be kept by the investigating party.¹⁴

13. The Prosecution does not demonstrate a causal nexus between the disclosure of P-0520's image to the Defence and the asserted risk to her that would justify deviation from the Protocol. Since the Prosecution's arguments at paragraph 15 relate only to disclosure to third parties, they are inapposite, extraneous and redundant and should be dismissed as such. They cannot justify a refusal to disclose *to the Defence* material relevant to defence preparations.

Conclusion

14. The application of redactions to the images of P-0520 in her identity cards would overstep the parameters of the Confidential Information Protocol and be inimical to a fair trial. Mr Al Hassan is fundamentally entitled, *inter alia*, to adequate facilities for the preparation of his defence, to examine witnesses against him, and to the disclosure of any evidence that may affect the credibility of Prosecution evidence *as soon as practicable*.¹⁵ As information that is material to the preparation of the Defence, the images of P-0520 contained in her identity documents are disclosable pursuant to Rule 77. The redaction of her image will curtail Defence investigative activities beyond the restrictions of the Confidential Information Protocol and thus be unduly inimical to a fair trial. The Prosecution's Request should therefore be dismissed.
15. In the event that the Chamber considers that the possibility of disclosure of P-0520's image to a third party carries with it an inherent and unacceptable risk to her security, there remains *no* risk arising from disclosure to the Defence in its entirety. All persons properly designated as members of the Defence are subject to strict confidentiality obligations and protocols, including the Confidential Information Protocol. In view of the Prosecution's concerns, and despite the previous case-law outlined herein, the Defence is willing to undertake to seek the prior authorisation of the Chamber in the event that there is indeed no satisfactory alternative investigative avenue to the disclosure of P-0520's image to a third party. This would conform to the requirements of the Confidential Information Protocol and constitute a less prejudicial course of conduct than that proposed by the Prosecution.

¹⁴ Bemba, [ICC-01/05-01-08-813-Red](#), para. 87.

¹⁵ Article 67(1)(b),(e) and (2), emphasis added.

IV. Relief

16. For all the reasons herein, the Defence requests that the Single Judge:

- a. **DENY** the Prosecution's request to redact the images of P-0520 on her identity cards; and
- b. **ORDER** the prompt disclosure of the fully unredacted versions of P-0520's identifying documents pursuant to Rule 77.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 25th Day of August 2021
At The Hague, The Netherlands