

Annex 16

**PUBLIC
REDACTED**

From: Trial Chamber X Communications
Sent: 13 October 2020 11:54
To: Chamber Decisions Communication
Cc: Trial Chamber X Communications
Subject: FW: List of material for Witness MLI-OTP-P-0653

From: Trial Chamber X Communications
Sent: 13 October 2020 11:50
To: [REDACTED] Trial Chamber X Communications ; Al Hassan Prosecution Team ; D28 Al Hassan Defence Team ; V43 Victims Al Hassan Team ; Associate Legal Officer-Court Officer
Subject: RE: List of material for Witness MLI-OTP-P-0653

Dear counsel,
 Dear colleagues,

The Chamber notes that the Defence objects to the use and admissibility of certain items on the Prosecution's list of material for P-0653.

The Chamber recalls that it has previously authorised P-0653 to testify as an expert witness and also to the use of the report she drafted. In particular, as regards the Defence's submissions as to the legality of the report and its reliance on Mr Al Hassan's attendance at court hearings, the Chamber noted that these images are publicly available. The Chamber also stated it did not consider the use of a recent publicly available image of the accused to compare it with other available images in the possession of the Prosecution, infringes the accused's rights, particularly in relation to self-incrimination. The Chamber however noted, 'this is without prejudice to the ultimate finding of the Chamber as regards the expert report's evidentiary weight and the admissibility of any audio-visual material, which as the Prosecution submits, will be introduced through other witnesses' (ICC-01/12-01/18-989-Conf, para. 59).

For these reasons, the Chamber confirms that the material in question may be used with P-0653. However, this is without prejudice to any eventual determination on admissibility pursuant to Article 69(7) of the Statute, which will be made at the appropriate time and in due course.

Kind regards,

[REDACTED]
 (on behalf of Trial Chamber X)

From: [REDACTED]
Sent: 12 October 2020 14:54
To: Trial Chamber X Communications [REDACTED] Al Hassan Prosecution Team
 [REDACTED] D28 Al Hassan Defence Team [REDACTED]
 V43 Victims Al Hassan Team [REDACTED] Associate Legal Officer-Court Officer
 [REDACTED]
Subject: RE: List of material for Witness MLI-OTP-P-0653

Dear Trial Chamber X,
 Dear Colleagues,

Pursuant to paragraph 60 of ICC-01/12-01/18-789-AnxA, the Defence provides notice of its objection to the use of the following material with Witness P-0653:

Tab (Count)	Document ID	Title	Type	Main Date	To Be Tendered as Evidence	To Be Submitted under Rule 68(3) through P-0653
3 (3)		RAPPORT D'EXPERTISE / [REDACTED]	Forensic Records or Reports	04-Mar-20	Yes	Yes
4 (5)		Confirmation of Charges Hearing / Al Hassan ICC-01/12-01/18 / Session 1	Court document - ICC	08-Jul-19	Yes	No
4 (6)		ICC-01/12-01/18 / Al Hassan / Confirmation of Charges	Court document - ICC	17-Jul-19	Yes	No
4 (7)		ICC-01/12-01/18 / Al Hassan / First Appearance	Court document - ICC	04-Apr-19	Yes	No

Relief sought

Article 69(7) of the Statute states that '[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.'

The three items under Tab 4 are the video recordings of public court hearings in the present case, which show Mr. Al Hassan, and which were used for P-0653's facial recognition analysis. Mr. Al Hassan's presence at these hearings, and therefore his appearance in these videos, was for the purposes of the legal proceedings and as a result of the Chamber's compulsion of his presence as a criminal accused. Tab 3 is the report prepared by P-0653 relying on these items.

The Defence objects to these items on the basis that using these videos for an incriminating purpose in the report is in violation of Mr. Al Hassan's right to privacy and privilege against self-incrimination. Use of the videos is in breach of internationally recognized human rights and their admission would be antithetical to and would seriously damage the integrity of the proceedings. While the right to privacy is not absolute, the admission of these items as evidence to incriminate Mr. Al Hassan is contrary to the integrity of the proceedings because it creates a 'chilling effect' for the defendant as it disincentivises his attendance at court (and therefore, his exercise of his Statutory right under Article 67(1)(d) 'to be present at the trial'). This is particularly so as the use of these images to instruct a Prosecution expert was done without Mr. Al Hassan's knowledge or consent, and in the absence of any legal order authorising such use, and because the resulting use of those images, which depict Mr. Al Hassan as a defendant involved in court proceedings, to produce incriminating expert evidence raise concerns about the methodology adopted by P-0653, as these images prejudice the mind of the examiner, and therefore the position of the Defence.

Right to privacy

The Council of Europe has recognised that the right to private life, enshrined regionally in Article 8 of the [European Convention on Human Rights](#), encompasses 'a person's right to their image, for example by means of photographs and video-clips' ([Explanatory Memorandum on Privacy and Data Projection](#), para. 2). As the ECHR stated in [Reklos and Davourlis v. Greece](#), '[a] person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image' (para. 40). Furthermore, as the Appeals Chamber in [Prosecutor v. Bemba et al](#)

identified, ‘detained persons also benefit from the internationally recognised human right to privacy’, albeit with certain limitations ‘necessarily result[ing]’ from the fact of incarceration (para. 372 and fn. 807).

The European Court of Human Rights has upheld that video surveillance of public places where the visual data is recorded, stored and disclosed to be in breach of Article 8 ([Peck v. United Kingdom](#), paras. 57-63). As previously held in [P.G. and J.H. v. United Kingdom](#), ‘[a] person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain’ (paras. 56-57).

Human rights courts have adopted a two-part test to interferences with privacy.

Article 8(2) of the ECHR provides (emphasis added):

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

On the basis of this rule, human rights courts have held that measures must have ‘some basis in domestic law’ and must be ‘compatible with the rule of law’, which means that they should comply with the twin requirements of ‘accessibility’ and ‘foreseeability’ ([Sunday Times v. United Kingdom](#), paras. 49-50; [Silver and Others v. United Kingdom](#), paras. 86-88; and [Malone v. United Kingdom](#), paras. 66-67). ECHR jurisprudence was referred to, and analysed by reference to the provisions of the Rome Statute, by the Appeals Chamber in [Prosecutor v. Bemba et al](#), paras. 285-286. The case of [Bemba et al](#) can be distinguished as in that case there was a legal basis provided for the transmission to the Prosecutor of the records of Mr Bemba’s non-privileged phone calls; in this case, no legal basis has been provided for this violation of Mr. Al Hassan’s rights.

Similarly, under Article 17 of the [International Covenant on Civil and Political Rights](#), no person shall be subjected to ‘arbitrary or unlawful interference with [their] privacy’. The Human Rights Committee has interpreted the term “unlawful” as meaning ‘that no interference can take place except in cases envisaged by the law’ and ‘on the basis of law’ ([General Comment No. 16](#), para. 3). The prohibition on “arbitrary” interferences further guarantees that even interference provided for by law is intended to ensure that such interference is consistent with the provisions, aims and objectives of the Covenant, and reasonable in the particular circumstances (para. 4).

The infringement of the right needs to have occurred pursuant to a law which is accessible and foreseeable. The criterion of legality is not satisfied, as there is no law which permits Mr. Al Hassan’s image to be used for that purpose so when he attended the hearing, he was not able to make an informed decision and/or be aware that his image would be used for that purpose. Furthermore, the interference is not consistent with the aims of the human rights treaties, as it has been used to abrogate Mr. Al Hassan’s privilege against self-incrimination.

Privilege against self-incrimination

At trial, pursuant to Article 67(1)(g), Mr. Al Hassan maintains this right ‘not to be compelled to testify or to confess guilt and to remain silent’ (emphasis added). In its decision in [Prosecutor v. Delalic et al](#), rejecting a request for a defendant to produce a handwriting sample on the basis of the privilege against self-incrimination, the ICTY Chamber referred to a variety of comparative domestic and regional human rights decisions, including [Funke v. France](#) (European Court of Human Rights), and [Miranda v. Arizona](#) and [Gilbert v. California](#) (Supreme Court of the United States).

Under international human rights jurisprudence, ‘the right to silence and the right not to incriminate oneself ... lie at the heart of the notion of a fair procedure’ and the ‘right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused’ ([Funke v. France](#), para. 68; see also [Saunders v. United Kingdom](#), para. 60; [O’Halloran and Francis v. United Kingdom](#), para. 45).

This privilege against self-incrimination, consistently with [Prosecutor v. Delalic et al](#) at para. 58, is not confined to testimonial evidence. This is consistent with the findings of Trial Chamber VII in [Prosecutor v. Bemba et al](#) that, *first*, the right to silence and privilege against self-incrimination under the Statute meant that the defendant was not required to produce evidence to the Prosecution that could be potentially incriminating and *second*, that such a right applied in circumstances where the Prosecution sought the production of real evidence in the possession of the Defence (para. 14). Therefore, the privilege against self-incrimination extends to the protection of Mr. Al Hassan's image.

The burden to prove its case beyond a reasonable doubt lies with the Prosecution alone. Its duty to meet this burden cannot unlawfully include the use of Mr. Al Hassan's image, obtained due to his presence at court hearings, in circumstances in which the Prosecution had not expressly informed that this could be used for incriminating purposes.

Conclusion

Pursuant to Article 21(3) of the Rome Statute, the Chamber's application and interpretation of law must be consistent with internationally recognized human rights, and this includes Mr. Al Hassan's Statutorily enshrined right to a fair trial (pursuant to Article 64(2), which provides that '[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused' and Article 67(1), which provides that '[i]n the determination of any charge, the accused shall be entitled to ... a fair hearing conducted impartially, and to [specific] minimum guarantees, in full equality'.)

The Prosecution has not established the legality of the proposed items and thus should not be permitted to use these items with the witness.

Best regards,

[REDACTED] (on behalf of the Al Hassan Defence)

-----Original Message-----

From: Dutertre, Gilles [REDACTED]

Sent: 05 October 2020 17:14

To: Trial Chamber X Communications; Taylor, Melinda; Nsita Luvengika, Fidel; Kassongo, Mayombo; Doumbia, Seydou

Cc: [REDACTED]
[REDACTED] D28 Al Hassan Defence Team; [REDACTED]
[REDACTED]

Subject: List of material for Witness MLI-OTP-P-0653

Chère Chambre de Première Instance X et Chers Collègues,

Conformément au paragraphe 57 de l'annexe ICC-01/12-01/18-789-AnnA, l'Accusation vous prie de bien vouloir trouver en pièce jointe la "List of Material" concernant le témoin P-0653.

Respectueusement,

Gilles Dutertre

Dévouement - Intégrité -
Respect

Dedication - Integrity - Respect

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