

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/12-01/15**

Date: **27 June 2022**

TRIAL CHAMBER VIII

Before:

**Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Bertram Schmitt
Judge Socorro Flores Liera**

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF *THE PROSECUTOR* v. *AHMAD AL FAQI AL MAHDI*

Confidential

**Decision on the Al Hassan Defence Request to Lift Redactions of ICC-01/12-01/15-
214-AnxII-Red2**

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

The Office of the Prosecutor
Mr Karim A. A. Khan

Counsel for the Defence
Mr Mohamed Aouini

Legal Representative of Victims
Mr Mayombo Kassongo

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

The Office of Public Counsel for the Defence

States Representatives

Others
Trust Fund for Victims
Al Hassan Defence

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Mr Philipp Ambach

Others

Trial Chamber VIII of the International Criminal Court, in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (the 'Al Mahdi case'), having regard to articles 64(2), 64(6)(f), and 68(1) of the Rome Statute ('Statute') and regulation 42 of the Regulations of the Court ('Regulations') issues this Decision on the Al Hassan Defence Request to Lift Redactions of ICC-01/12-01/15-214-AnxII-Red2 (the 'Decision').

I. PROCEDURAL HISTORY

1. On 19 January 2017, the Chamber issued a Decision appointing experts for the reparations proceedings, including Dr Marina Lostal ('Expert'), and directed them to submit reports on topics previously identified by the Chamber.¹ On 1 May 2017, the Registry transmitted,² *inter alia*, a report from the Expert ('Expert Report').³
2. On 5 May 2022, the Defence in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* ('Al Hassan case') submitted a request for the lifting of certain redactions in part III of the Expert Report ('Request').⁴
3. On 9 and 19 May 2022, the legal representative for victims ('LRV')⁵ and the Registry,⁶ in accordance with the Chamber's instructions,⁷ submitted their observations on the Request.
4. On 9 June 2022, following the Chamber's instructions,⁸ the Registry transmitted the Expert's views on the Request.⁹

¹ Decision Appointing Reparations Experts and Partly Amending Reparations Calendar, 19 January 2017, [ICC-01/12-01/15-203-Red](#), paras 1, 4, 8.

² Transmission of Experts' Reports pursuant to Trial Chamber Decision ICC-01/12-01/15-203-Red of 19 January 2017, 1 May 2017, [ICC-01/12-01/15-214](#), para. 5.

³ Corrected Version of Annex II to "Transmission of Experts' Reports pursuant to Trial Chamber Decision ICC-01/12-01/15-203-Red of 19 January 2017", 4 May 2017, ICC-01/12-01/15-214-Conf-Exp-AnxII-Corr. The confidential version was filed on 3 May 2017 (ICC-01/12-01/15-214-Conf-AnxII-Red) and was reclassified public on 11 August 2017 ([ICC-01/12-01/15-214-AnxII-Red2](#)).

⁴ Al Hassan Defence Request to Lift Redactions of ICC-01/12-01/15-214-AnxII-Red2 ('Request'), 5 May 2022, ICC-01/12-01/15-444-Conf, paras 1-3.

⁵ Observations du Représentant légal des victimes sur la «Demande de la Défense d'Al Hassan de lever les expurgations de ICC-01/12-01/15 214-AnxII-Red2 » ('LRV Observations'), 9 May 2022, ICC-01/12-01/15-445-Conf.

⁶ Registry Observations on the Al Hassan Defence Request to Lift Redactions of ICC-01/12-01/15-214-AnxII-Red2 (ICC-01/12-01/15-444-Conf) (With one Confidential *Ex Parte* Annex, only available to the Registry, ICC-01/12-01/15-446-Conf-Exp-Anx) ('Registry Observations'), 19 May 2022, ICC-01/12-01/15-446-Conf.

⁷ E-mail from the Chamber's Legal Officer, 10 May 2022, 15:05.

⁸ E-mail from the Chamber's Legal Officer, 26 May 2022, 17:43; and e-mail from the Chamber's Legal Officer, 31 May 2022, 11:21.

⁹ Transmission of Expert's Views on the Defence Request to Lift Redactions of ICC01/12-01/15-214-AnxII-Red2 (ICC-01/12-01/15-444-Conf) (With one Confidential *Ex Parte* Annex, available only to the Registry, ICC-01/12-01/15-448-Conf-Exp-Anx), 9 June 2022, ICC-01/12-01/15-448-Conf.

II. SUBMISSIONS

5. In its Request, the *Al Hassan* Defence asks the Chamber the lifting of redactions in part III of the Expert Report,¹⁰ submitting that the information contained therein is relevant to better substantiate the defence case.¹¹ Specifically, the section of the report for which lifting of redactions is requested focuses on several aspects of the traditional justice mechanisms of conflict resolution and reparations in Mali, which, the *Al Hassan* Defence submits, is highly relevant, *inter alia*, to the affirmative defence of superior orders that Mr Al Hassan intends to raise during the presentation of his case.¹²

6. The *Al Hassan* Defence further submits that the Request is consistent with the Court's and *ad hoc* tribunals' jurisprudence for disclosure between connected cases,¹³ being relevant, defined, limited in scope, and determined to a particular context.¹⁴ As to the security of victims and witnesses that may be impacted by the lifting of restrictions, the *Al Hassan* Defence submits that the protective measures granted in the *Al Mahdi* case would continue to apply in the *Al Hassan* case, as the Defence would access the document on a confidential basis.¹⁵

7. In their observations, both the LRV and the Registry oppose the request.¹⁶ The LRV submits that, in light of the degrading security situation in Mali and Timbuktu, lifting the redactions would pose a risk to the third parties who engaged with the Expert solely for consultative purposes to inform the Chamber as to the harm of victims and the related reparations,¹⁷ unnecessarily exposing them.¹⁸ The Registry agrees with the LRV and is in favour of maintaining all the redactions, providing justifications on each of them.¹⁹

8. The Expert submits that most of the information protected by the redactions should remain confidential, in light of the security situation in Mali or to protect the integrity and

¹⁰ Request, ICC-01/12-01/15-444-Conf, para. 1.

¹¹ Request, ICC-01/12-01/15-444-Conf, para. 2.

¹² Request, ICC-01/12-01/15-444-Conf, para. 19.

¹³ Request, ICC-01/12-01/15-444-Conf, para. 23.

¹⁴ Request, ICC-01/12-01/15-444-Conf, paras 2, 23.

¹⁵ Request, ICC-01/12-01/15-444-Conf, paras 23, 24.

¹⁶ LRV Observations, ICC-01/12-01/15-445-Conf, para. 5; Registry Observations, ICC-01/12-01/15-446-Conf, para. 10.

¹⁷ LRV Observations, ICC-01/12-01/15-445-Conf, paras 5, 8-20.

¹⁸ LRV Observations, ICC-01/12-01/15-445-Conf, paras 19-20.

¹⁹ Registry Observations, ICC-01/12-01/15-446-Conf, para. 10; *see also* Annex to the Registry Observations on the Al Hassan Defence Request to Lift Redactions of ICC-01/12-01/15-214-AnxII-Red2 (ICC-01/12-01/15-444-Conf), 19 May 2022, ICC-01/12-01/15-446-Conf-Exp-Anx.

safety of the ongoing implementation of reparations in the *Al Mahdi* case.²⁰ However, the Expert indicates that two redactions could be lifted, as they refer to a series of interviews and a statement cited in an open-source publication,²¹ namely the redaction in paragraph 98 and the second redaction in footnote 174.

III. ANALYSIS

9. At the outset, the Chamber, aware of the terms of regulation 42(3) of the Regulations and the different interpretations in the Court's prior jurisprudence,²² notes that it is competent to rule on the Request, as the redactions sought to be lifted were ordered by this Chamber, although in a different composition, during the reparation stage of the proceedings of which the Chamber continues being seized.

10. Further, the Chamber notes that the *Al Hassan* Defence Request refers indeed to a variation of protective measures in the sense of regulation 42 of the Regulation, as the Request refers to lifting of redactions which continue to apply in the *Al Mahdi* case.²³ In accordance with the Court's jurisprudence, requests under regulation 42 of the Regulations must be read and applied subject to article 68(1) of the Statute.²⁴ According to the latter, the Chamber has

²⁰ Confidential *Ex Parte* Annex, ICC-01/12-01/15-448-Conf-Exp-Anx, paras 3-16. The Chamber notes the classification of this annex and to the extent it refers to it, the Chamber considers that it does not undermine the confidentiality of the information concerned

²¹ Confidential *Ex Parte* Annex, ICC-01/12-01/15-448-Conf-Exp-Anx, para. 18.

²² See, for instance, Trial Chamber VI's finding that if the trial chamber which issued the protective measures has been recomposed for the purpose of reparations proceedings, the request under regulation 42 of the Regulations request would have to be submitted before a new chamber in the connected case, on an understanding that the initial chamber is no longer seized of the proceedings. Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution's requests for authorisation to lift Category 'F' redactions, 5 December 2016, ICC-01/04-02/06-1671-Conf-Exp, 12 December 2016, ICC-01/04-02/06-1671-Red2, para. 7; See also the Trial Chamber VIII's Single Judge decision declaring inability to rule on a regulation 42 of the Regulations request in light of the Chamber's role limited to the oversight of the implementation of its reparations order. Decision on Prosecution's Requests for Variation of Protective Measures, 10 February 2020, [ICC-01/12-01/15-344](#), para. 9.

²³ See, for instance, previous jurisprudence indicating that information in a case could be share in a connected case as long as the protective measures ordered by the Chamber remain unchanged and the information protected by such measures is not released to the public, press and information agencies, as parties or participants in different proceedings before the Court, are all bound to respect the confidentiality of such information. Decision on "Prosecution's Urgent Further Request for Disclosure of Evidence in a Related Article 70 Proceeding", 27 May 2014, [ICC-01/05-01/08-3074](#), para. 17.

²⁴ See, for instance, Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, 3 July 2014, [ICC-01/04-02/06-63-Red2](#), para. 8; Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Prosecution Request for a Variance of Protective Measures of Trial Witnesses to Allow Access to Transcripts of Evidence in a Related Article 70 Proceeding", 12 March 2014, [ICC-01/05-01/08-3014](#), para. 17; Trial Chamber VI, *Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution's requests for authorisation to lift Category 'F' redactions, 5 December 2016, ICC-01/04-02/06- 1671-Conf-Exp, 12 December 2016, ICC-01/04-02/06-1671-Red2, paras 12, 13, 17, 21, 22.

the responsibility to take 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.

11. The Chamber also recalls that pursuant to Regulation 42(3) of the Regulations, before making a determination on an application to vary a protective measure, the Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made.

12. In the present case, in light of the applicable legal framework and having regard to the LRV's and the Registry's submissions as well as the Expert's views, the Chamber considers that the lifting of the redactions would expose the third parties who collaborated in the Expert Report to considerable security risks. Therefore, the Chamber rejects the Request. However, the Chamber notes that the *Al Hassan* Defence could obtain access to the type of information it seeks by conducting its own open-source research, as this is the methodology applied by the Expert conducting her research for the Expert Report.²⁵

13. Finally, having regard to the Expert's indications that two redactions in part III of the Expert Report could be lifted, the Chamber hereby orders the Registry to lift the two redactions in part III of the Expert Report as indicated at paragraphs 9 above.

²⁵ Confidential *Ex Parte* Annex, ICC-01/12-01/15-448-Conf-Exp-Anx, paras 3-16.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY,

REJECTS the Request; and

ORDERS the Registry to lift the two redactions in part III of the Expert Report as indicated at paragraph 8 above;

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



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Bertram Schmitt



Judge Socorro Flores Liera

Dated this Monday, 27 June 2022

At The Hague, The Netherlands