

Annex 8

PUBLIC REDACTED

From: Trial Chamber X Communications
Sent: 02 October 2020 15:30
To: D28 Al Hassan Defence Team; VWS Legal
Cc: Chamber Decisions Communication; Trial Chamber X Communications
Subject: RE: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Dear counsel,
 Dear colleagues,

The Chamber notes the Defence's emails seeking reconsideration (and subsequent filing attaching the said e-mails ICC-01/12-01/18-1085-Conf-Exp+Anx).

The Chamber reiterates its decision that the redactions proposed by the Defence are not warranted. Furthermore, the Chamber considers that the Prosecution should be fully informed of this matter.

Accordingly, pursuant to Regulation 23bis of the Regulations of the Court, the Chamber instructs the Registry to immediately implement the reclassification of filing ICC-01/12-01/18-1080-Conf-Exp as *ex parte*, available to the Registry, the Prosecution and the Defence.

Kind regards,

(on behalf of Trial Chamber X)

From: Taylor, Melinda
Sent: 02 October 2020 11:02
To: Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team; VWS Legal; Chamber Decisions Communication
Subject: RE: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Dear Trial Chamber X,

Further to the email below, the Defence submits the following request for reconsideration.

The Chamber has the power to reconsider its decisions upon request of the parties or *proprio motu*. The Chamber has found that it may do so where there has been a clear error of reasoning or to prevent an injustice (ICC-01/12-01/18-734, para.11).

The Defence hereby respectfully requests that the Chamber reconsider its decision to reclassify filing ICC-01/12-01/18-1080-Conf-Exp as *ex parte* in an entirely unredacted form on the basis that these redactions are necessary to prevent an injustice and preserve to the highest extent possible the confidentiality of the Defence's communications with VWS.

Pursuant to Rule 18(a) and (b), the Defence and other parties must benefit from confidence in the confidential nature of their communications with VWS. The disclosure of the information contained in the passages which the Defence requested be redacted would undermine this confidence. Further, the Defence considers the material to be (i) prejudicial and (ii) irrelevant to the matter of concern to the Prosecution.

The report submitted by the VWS is not based on documentation or email exchanges. The VWS also did not verify the accuracy of this account with the Defence, or [REDACTED], before submitting it directly to the Trial Chamber. The Defence was afforded no opportunity to [REDACTED]. There are elements that the Defence considers to be de-contextualised. For example, the Report states that:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

To clarify, the Report omits the important point that this discussion occurred within the context of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Discussions on such matters should necessarily be privileged in order to ensure that individuals working for, and with the Defence can ask questions in confidence. This goes to the heart of the VWS's mandate in providing confidential protection advice.

Further, the Defence was addressing an urgent situation, with full candour, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

The VWS is a neutral service provider, which is mandated to provide confidential protection advice to both Prosecution and Defence witnesses. Rule 18(a) and (b) of the Rules of Procedure and Evidence thus equates to a principle of confidentiality that necessarily maintains "an appropriate separation of services provided to the prosecution and defence witnesses". ICC case law also establishes the confidential, non-disclosable nature of communications between individuals and the VWU for the purposes of conducting a security assessment, particularly in circumstances where the individuals concerned are unaware of the possibility that the communicated information could be disseminated further, including to other parties in the proceedings.

The ability of the Defence to rely on its services is thus contingent on the extent to which defence witnesses and third persons affected by the activities of the Court can be assured that information provided to the VWS for the sole purpose of making a security or protection assessment will not be

disclosed to other parties in a manner which is not foreseen or explained to the individual in question. For this reason, a presumption of confidentiality attaches to communications with the VWS. The burden is thus not on the Defence to demonstrate that the information should not be disclosed; rather, the question is whether there is a legitimate forensic basis to transmit the information to the Prosecution, and, in light of the prejudice that might arise vis-à-vis the Defence relationship with the VWS, the disclosure of information is restricted to that which is both necessary and proportionate to the identified legitimate forensic basis.

In the present instance, the Defence is unaware of any legitimate forensic basis for the Prosecution to access the information in question. The Prosecution has not listed this individual on its list of witnesses, and as such, the individual ceased to be a Prosecution witness for the purposes of this case (ICC-01/12-01/18-674, para. 28: “After the filing of the Prosecution’s final list of witnesses, only those individuals appearing on the list shall qualify as Prosecution ‘witnesses’ for the purpose of this protocol.”). Thus, whereas it is appropriate for the Prosecution, as the organ entrusted with investigating offences against the administration of justice, to investigate any potential unlawful disclosures that might arise in relation to [REDACTED], the Prosecution has no right to intercede in issues concerning unrelated interactions [REDACTED]. The Defence has no general right to access Prosecution communications with VWS in relation to its intermediaries or witnesses. Given that Defence disclosure obligations are of a much more restricted nature than those of the Prosecution, the presumption against disclosure is even higher in respect of the Prosecution accessing the equivalent communications concerning the Defence.

The unredacted transmission of the VWS’s unverified account of its interactions with the Defence will also set a precedent, which will have a chilling effect as concerns witness protection for Defence witnesses in this case. Put simply, the possibility, that information provided to the VWS for this discrete purpose, could be transmitted directly to the Prosecution, without the prior knowledge or consent of these individuals, will have a chilling effect as concerns the ability of the Defence to obtain the consent of potential and actual Defence witnesses and sources to share information with the VWS. This will undermine equality of arms in this case: the Defence will not be able to call witnesses under the same conditions as the Prosecution, as Defence witnesses, resources persons, and sources will have a legitimate concern that information provided on a strictly confidential basis to the VWS could, at any point, be disclosed to the Prosecution.

From: Taylor, Melinda
Sent: 02 October 2020 09:41
To: Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team; VWS Legal; Chamber Decisions Communication
Subject: RE: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry’s Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Dear Trial Chamber X,

The Defence intends to request reconsideration of the instruction below, and will submit the argumentation in support of this request in the next 40 minutes. The Defence therefore requests that the reclassification be suspended pending the submission of this request.

Kind regards

Melinda Taylor, on behalf of the Al Hassan Defence

From: Trial Chamber X Communications [REDACTED]
Sent: 02 October 2020 09:22
To: Taylor, Melinda; Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team; VWS Legal; Chamber Decisions Communication
Subject: RE: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Dear colleagues,
 Dear counsel,

The Chamber does not consider that the proposed redactions are necessary. Pursuant to Regulation 23bis of the Regulations of the Court, the Chamber instructs the Registry to reclassify filing ICC-01/12-01/18-1080-Conf-Exp as *ex parte*, available to the Registry, the Prosecution and the Defence.

Kind regards,

[REDACTED] (on behalf of Trial Chamber X)

From: Taylor, Melinda
Sent: 01 October 2020 16:24
To: Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team; VWS Legal; Chamber Decisions Communication
Subject: RE: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Dear Trial Chamber X,
 Dear Colleagues,

The security incident referred to in paragraphs 4, 5, 8, 9 and 10 relates to the redacted version of the statement ('the document in question').

The Defence requests that the following portions of the confidential redacted version be redacted for the Prosecution, as they concern internal Defence team functioning: paragraphs 6, 7, 11, 12, 15(b) and 17. An annotated version of the *ex parte* filing as provided via email from [REDACTED] today at 15:36 is **attached**, with the portions for redaction highlighted.

These paragraphs relate to a document other than the document in question and [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

The Defence also requests the VWU to specify the basis for their submission that this individual, who is not on the Prosecution's list of witnesses, is a "Prosecution witness". [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED].

Kind regards

Melinda Taylor, on behalf of the Al Hassan Defence

From: Trial Chamber X Communications [REDACTED]
Sent: 01 October 2020 15:13
To: Taylor, Melinda
Cc: D28 Al Hassan Defence Team; VWS Legal; Chamber Decisions Communication; Trial Chamber X Communications
Subject: RE: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement
Importance: High

Dear colleagues,
 Dear counsel,

Pursuant to Regulation 23bis of the Regulations of the Court, the Chamber hereby direct the Registry to reclassify filing ICC-01/12-01/18-1080-Conf-Exp, available to the Registry and the Defence. A courtesy copy of the said filing shall be made available to the Defence immediately.

Furthermore, the Chamber considers that the report must be notified to the Prosecution. Accordingly, the Chamber directs the Defence to indicate no later than COB today, whether there are any passages related to internal Defence team functioning it would like to redact for the Prosecution. On that basis, the VWU is instructed to file a confidential ex parte redacted version, available to the Prosecution no later than 12.00, tomorrow Friday, 2 October 2020. Otherwise, the report shall be reclassified as available to the Registry, Defence and the Prosecution by the same deadline.

Kind regards,

[REDACTED]
 (on behalf of Trial Chamber X)

From: Taylor, Melinda
Sent: 01 October 2020 11:17
To: Trial Chamber X Communications
Cc: D28 Al Hassan Defence Team
Subject: FW: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Dear Trial Chamber X,

The Defence notes that notwithstanding the fact that the Registry Report concerns a Defence witness, paragraph 14 of the observations below was redacted from the Defence. The Defence is extremely concerned by the fact that it appears that [REDACTED]

[REDACTED]. Although the Defence [REDACTED]
 [REDACTED]
 [REDACTED] In light of the possible implications that unlawful disclosures, leaks, or hacks might have for the security and safety of not just this witness, but other Defence witnesses (and the confidentiality of Defence files), it is essential that the Defence is apprised of all relevant information. The Defence therefore respectfully requests the Trial Chamber to grant the Defence access to the unredacted version of the Report, so that firstly, the Defence is aware of all issues that might be relevant to the security and safety of [REDACTED], and secondly, the Defence can make informed submissions as concerns [REDACTED]

Kind regards

Melinda Taylor, on behalf of the Al Hassan Defence



Subject: The Prosecutor v. Al Hassan: ICC-01/12-01/18-1080-Conf-Exp+Anx - Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

<https://edms.icc.int/RMWebdrawer/Record/2719134>

The purpose of this email is to inform you that the document mentioned below has been registered in ICC-01/12-01/18.

Le but de ce courriel est de vous informer que le document mentionné ci-dessous a été enregistré dans ICC-01/12-01/18.

Registry's Report pursuant to regulation 24bis of the Regulations of the Court regarding the transmission to the Court of an email containing a Defence witness statement

Submitted by the Registrar / Déposé par le Greffier

Reception Date/hour / Reçu le date/heure : 30/09/2020 16:11:26

Registration Date / Enregistré le : 01/10/2020

Notification Date / Notifié le : 01/10/2020

.....
*This constitutes the official notification form foreseen in Regulation 31 of the Regulations of the Court.
 La présente tient lieu de formulaire de notification tel que prévu à la norme 31 du Règlement de la Cour.*

Only documents satisfying the requirements set by Regulations 23, 26 and 36 of the Regulations of the Court will be registered in the relevant record.

Seuls les documents répondant aux critères énoncés aux normes 23, 26 et 36 du Règlement de la Cour sont enregistrés dans le dossier correspondant.

The Court Management Section shall not have any input into formatting, editing and any other alterations to documents received for registration.

La Section de l'administration judiciaire ne procède à aucune mise en forme, édition ou autre modification des documents reçus aux fins d'enregistrement.

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la

personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.

This message contains information that may be privileged or confidential and is the property of the International Criminal Court. It is intended only for the person to whom it is addressed. If you are not the intended recipient, you are not authorized by the owner of the information to read, print, retain copy, disseminate, distribute, or use this message or any part hereof. If you receive this message in error, please notify the sender immediately and delete this message and all copies hereof.

Les informations contenues dans ce message peuvent être confidentielles ou soumises au secret professionnel et elles sont la propriété de la Cour pénale internationale. Ce message n'est destiné qu'à la personne à laquelle il est adressé. Si vous n'êtes pas le destinataire voulu, le propriétaire des informations ne vous autorise pas à lire, imprimer, copier, diffuser, distribuer ou utiliser ce message, pas même en partie. Si vous avez reçu ce message par erreur, veuillez prévenir l'expéditeur immédiatement et effacer ce message et toutes les copies qui en auraient été faites.