

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 July 2016

TRIAL CHAMBER VIII

Before: Judge Raul C. Pangalangan, Single Judge

SITUATION IN THE REPUBLIC OF MALI

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

Public

With three public redacted annexes

Public redacted version of

**'Decision on Legal Representative of Victims' access to the case record', 22 July
2016**

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

The Office of the Prosecutor

Fatou Bensouda
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Counsel for the Defence

Mohamed Aouini
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Legal Representatives of Victims

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

Amicus Curiae

REGISTRY

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Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Raul C. Pangalangan, acting as Single Judge on behalf of Trial Chamber VIII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court') having regard to Rules 92(5) and 131(2) of the Rules of Procedure and Evidence ('Rules'), Regulation 23 *bis* of the Regulations of the Court ('Regulations') and Article 7 of the Code of Professional Conduct for counsel ('Code of Conduct') issues the following 'Decision on Legal Representative of Victims' access to the case record'.

I. Procedural History

1. On 8 June 2016, the Chamber set a deadline of 20 June 2016 for the parties and the Registry to review their confidential filings and evidence, and to explain whether any of these materials cannot be notified to the newly appointed Legal Representative of Victims ('LRV').¹
2. On 10 June 2016, the Chamber ordered the Registry to make five filings and the transcript of the hearing on the confirmation of charges available to the LRV ('Six Documents'), unless any of the parties objected thereto within 10 days.²
3. On 17 June 2016, the parties objected to the Six Documents being communicated to the LRV.³
4. On 21 June 2016, the Chamber partly granted the parties' request for non-communication of the Six Documents ordering them to submit a confidential redacted version of two of the Six Documents and granting the LRV with access

¹ Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims', ICC-01/12-01/15-97-Red, para. 43 ('Decision on Victim Participation').

² Email from Chamber to parties, participants and Registry on 21 June 2016 at 15:07.

³ Email from Prosecution on 17 June 2016 at 14:37; Email from Defence on 17 June at 18:20.

to a lesser redacted version of the transcript of the hearing on the confirmation of charges.⁴

5. Also on 21 June 2016, by way of email,⁵ the Chamber ordered the LRV to file a copy of the log of disclosure of confidential information to his clients ('Disclosure Log') on the 30th of each month ('Order on Filing of Disclosure Logs').⁶
6. On the same day, the Registry submitted its observations on the LRV's access to its filings ('Registry Observations').⁷
7. On 22 June 2016, the Chamber rejected the reconsideration request from the Office of the Prosecutor ('Prosecution')⁸ of the decision granting the LRV access to a lesser redacted version of the transcript of the confirmation hearing.⁹
8. On 23 June 2016, the LRV submitted a request seeking that: (i) redactions be maintained to the public redacted versions of the victims' applications; (ii) the identity of victims admitted to participate in the proceedings not be disclosed to the Defence and to the public; (iii) the victims be granted an extension of deadline to take full knowledge of the case record; and (iv) the victims be granted a broad access to all confidential documents prior to the appointment of a legal representative ('LRV Filing').
9. On 24 June 2016, having been granted an extension of time to do so,¹⁰ the Prosecution¹¹ and the defence team for Mr Al Mahdi ('Defence')¹² submitted their observations on the LRV's access to the case record.

⁴ Email from Chamber to parties, participants and Registry on 21 June 2016 at 10:04, annexed to the present decision as Annex 1.

⁵ Annexed to the present decision as Annex 2.

⁶ Email from Chamber to LRV, copying parties and Registry on 21 June 2016 at 10:17.

⁷ Registry's Observations pursuant to Trial Chamber VIII's "Decision on Victims Participation at Trial and on Common Legal Representation of Victims" (ICC-01/12-01/15-97-Red), ICC-01/12-01/15-107.

⁸ Email from Prosecution to Chamber on 21 June 2016 at 17:57.

⁹ Email from Chamber to parties on 22 June 2016 at 12:24, annexed to the present decision as Annex 3.

¹⁰ Decision on Prosecution Request for an Extension of Time to Conduct the Review of the Case Record to be Made Available to the Legal Representative of Victims, 20 June 2016, ICC-01/12-01/15-106.

10. On 29 June 2016, the Prosecution responded to the LRV Filing, opposing the third and the fourth limbs of the LRV Filings, namely the victims' request to be granted a broad access to confidential documents in the case record and what appears to be a request for postponement of the start of trial.¹³
11. On 30 June 2016, in breach with the Order on Filing of Disclosure Logs, the LRV failed to file a copy of the Disclosure Log. It has not been filed at the date of issuance of the present decision.

II. Applicable Law

12. The Chamber has noted the Prosecution's submissions on the law applicable to the LRV's access to the case record.¹⁴ The Chamber stresses that it is cognisant of the approach taken by other chambers of the Court. The Chamber also notes that in the case of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Bosco Ntaganda*, trial chambers I and VI, granted the LRV with full access to confidential filings and evidence.¹⁵ Further, Trial Chamber I decided that access must be retroactive.¹⁶ The Chamber also recalls that the issue of the LRV's case access has already been decided upon in the Decision on Victim Participation, whereby the Chamber decided that the LRV has a right to access the confidential

¹¹ Prosecution's report on the review ordered by the Trial Chamber on 8 June 2016 in ICC-01/12-01/15-97-Conf-Exp, ICC-01/12-01/15-110-Conf-Exp. A confidential redacted version was filed on 27 June 2016 (ICC-01/12-01/15-110-Conf-Red). (The Prosecution had also been granted an extension of page limit by way of email sent on 21 June 2016 at 10:45).

¹² *Observations de la Défense sur la communication d'éléments confidentiels du dossier au représentant légal des victimes, conformément à la décision ICC-01/12-01/15-106 de la Chambre*, ICC-01/12-01/15-111.

¹³ Prosecution's response to the Request of Legal Representative of Victims, 23 June 2016, ICC-01/12-01/15-109-Conf, ICC-01/12-01/15-114-Conf.

¹⁴ Prosecution Observations, ICC-01/12-01/15-110-Conf-Red, paras 19-32.

¹⁵ *The Prosecutor v. Laurent Gbagbo*, Trial Chamber I, Decision on the Legal Representative of Victims' access to certain confidential filings and to the case record, 19 January 2015, ICC-02/11-01/11-749 ('Gbagbo Access Decision'); *The Prosecutor v. Bosco Ntaganda*, Trial Chamber VI, Decision on victims' participation in trial proceedings, 6 February 2015, ICC-01/04-02/06-449, para. 55.

¹⁶ Gbagbo Access Decision, ICC-02/11-01/11-749, para. 15.

documents and evidence in the record of the case, including retroactively, unless the parties provide a good reason for withholding access to the LRV.¹⁷

III. Objections to LRV access to confidential filings

13. As a preliminary matter and in relation to Confidential *ex parte* filings, the Single Judge clarifies that there is no readily apparent indication that the appointment of the LRV changes the bases for their classification. Accordingly, all confidential, *ex parte* documents should maintain their current level of classification.
14. With regard to confidential filings, the Prosecution submits that three types of confidential filings cannot be communicated to the LRV: (i) filings containing [REDACTED]; (ii) annexes to the Prosecution's communications of materials disclosed to the Defence ('Disclosure Notes'); and (iii) filings containing references to protected witnesses. The Defence also objects to the communication of filings relating to the [REDACTED] and to protected witnesses that will not appear at trial.¹⁸
15. With regard to filings relating to the [REDACTED], the Single Judge finds that they ought not to be communicated to the LRV, noting in particular that: (i) public redacted versions of these filings exist in most cases; and (ii) the LRV already has access to a redacted version of [REDACTED] (ICC-01/12-01/15-78-Conf-Red).
16. With regard to the annexes to the Disclosure Notes, they contain the titles of the materials disclosed, as well as references to protected witnesses. The Single Judge further notes that not all of the materials identified in these notes can be made available to the LRV.¹⁹ Accordingly, the Chamber finds it appropriate that the

¹⁷ Decision on Victim Participation, ICC-01-12-01/15-97-Red, paras 42-43 and disposition.

¹⁸ Defence Observations, ICC-01/12-01/15-111, paras 10-12, requesting that filings ICC-01/12-01/15-49-Conf, ICC-01/12-01/15-69-Conf-Exp and ICC-01/12-01/15-89-Conf be withheld from the LRV.

¹⁹ See below.

annexes to the Disclosure Notes be withheld from the LRV and reclassified as Confidential, *ex parte* available to the Prosecution and Defence.

17. With regard to filings containing references to protected witnesses, the Single Judge considers that they should be withheld from the LRV to the extent that they do not pertain to witnesses that will appear at trial.²⁰ In reaching this conclusion, the Single Judge has considered the particular nature of the case, specifically the fact that the accused expressed his intention to plead guilty, and the limited scope of the trial. However, when confidential filings pertain to witnesses that will appear at trial, the Single Judge finds that the LRV has an interest to access them. Accordingly, the Chamber considers that ICC-01/12-01/15-95-Conf and ICC-01/12-01/15-95-Conf-AnxB shall be notified to the LRV.

18. Further, the Single Judge notes that the parties' requested that the 'Joint Submissions by the Office of the Prosecutor and the Defence in compliance with the "Order Scheduling First Status Conference"' ²¹ not be notified to the LRV. However, the Single Judge notes that the LRV has already been notified of all information contained therein by way of filing ICC-01/12-01/15-118 and annexes. Accordingly, access should be granted to the LRV.

19. With regard to filings emanating from the Registry, the Single Judge finds that a confidential redacted version of ICC-01/12-01/15-24-Conf shall be made available to the LRV, redacting information as indicated in the annex to the Registry Observations. ICC-01/12-01/15-24-Conf shall be reclassified as Confidential, *ex parte* available to the Prosecution, Defence and Registry. All other Registry filings shall be reclassified as suggested by the Registry itself, namely as follows: (i) the Registry shall notify the LRV of filings for which access to the LRV is recommended; and (ii) filings for which access to the LRV is not recommended,

²⁰ This applies to Prosecution's filings listed in Annex A to Prosecution Observations as well as to Defence's filing ICC-01/12-01/15-49-Conf.

²¹ ICC-01/12-01/15-89-Conf.

shall be reclassified as Confidential, *ex parte*, available to the appropriate recipient(s).

IV. Objections to LRV access to confidential ‘evidence’

20. With regard to the evidence disclosed *inter partes*, the Single Judge understands that all evidence disclosed as public have already been made available to the LRV, regardless of whether or not the parties relied on it or intend to rely on it.²²
21. With regard to confidential evidence disclosed, the Single Judge considers that the particular nature of the present case does not make it strictly necessary for the LRV to have access to the confidential ‘evidence’ disclosed unless the parties intend to rely on them at trial. Further, the reasons why the Single Judge limited LRV access to certain confidential filings above also apply for certain pieces of confidential evidence relied upon at trial. Accordingly, the Registry shall provide access to the LRV to evidence disclosed in accordance with the recommendations set out in annexes B, C, D and E to the Prosecution Observations. The Chamber stresses that all evidence referred to in ICC-01/12-01/15-119-Conf-AnxA and ICC-01/12-01/15-130-Conf-AnxA should also be disclosed to the LRV, subject to the same limitations accepted in the present decision for the materials in annexes B-E of the Prosecution Observations.

V. LRV Filing

22. With regard to the first two limbs of the LRV Filing, namely that (i) redactions be maintained to the public redacted versions of the victims’ applications; and (ii) the identity of victims admitted to participate in the proceedings be withheld from the Defence and from the public, nowhere did the Chamber order that redactions be lifted to the public redacted versions of victims’ application. On the contrary, in the Decision on Victims Participation, the Chamber ordered the

²² Email from Prosecution to LRV on 11 July 2016 at 18:17.

Registry to apply redactions.²³ The purpose of ordering these redactions is precisely to avoid identification of the victims by the public. With regard to communication of victims' identities to the Defence, the Chamber also recalls that this issue has been decided upon in the Decision on Victims Participation, whereby the Chamber ordered the Registry to apply redactions to victims' applications prior to transmitting them to the Defence when necessary.²⁴ These requests in the LRV filing are therefore moot.

23. Further, with regard to the third limb of the request, namely that the victims be granted an extension of deadline to take full knowledge of the case record, the Single Judge fails to understand the scope of this limb of the LRV Request. Should the request be a request that the victims be granted sufficient time to take knowledge of the case record *prior* to the appointment of a legal representative in the case, the request is moot as the Chamber has already appointed a legal representative by way of the Decision on Victims Participation. Should the request consist of a request for a postponement of trial, the Chamber considers that the LRV has not shown good cause in accordance with Regulation 35 of the Regulations of the Court.

24. In relation to the LRV Request for a broad access to the confidential case record, the Single Judge has already partly granted it by way of the Decision on Victims Participation. Further, pursuant to the present decision, the LRV will be notified shortly of additional confidential documents and materials.

25. Finally, the Single Judge notes with concern that the LRV has failed to comply with the Order on Filing of Disclosure Logs. The Single Judge hereby reiterates its order and instructs the LRV to file the Log of Disclosure or a notice that no disclosure of confidential information took place forthwith.

²³ Decision on Victims Participation, ICC-01/12-01/15-97-Red, disposition.

²⁴ Decision on Victims Participation, ICC-01/12-01/15-97-Red, para. 13.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DIRECTS the Registry to:

- Maintain the current classification of all Confidential, *ex parte* filings;
- Notify ICC-01/12-01/15-89-Conf, ICC-01/12-01/15-95-Conf and ICC-01/12-01/15-95-Conf-AnxB to the LRV;
- Provide access to the LRV of the confidential evidence relied upon at trial, in consultation with the parties and subject to the limitations specified in paragraph 21 of the present decision;
- Reclassify all other confidential filings for which the Prosecution opposes communication to the LRV in annex A to the Prosecution Observations as Confidential, *ex parte* available to the Prosecution and the Defence only;

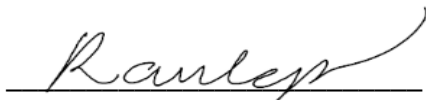
DIRECTS the Registry to reclassify Defence filing ICC-01/12-01/15-49-Conf as Confidential, *ex parte* available to the Prosecution and Defence only;

DIRECTS the Registry to reclassify the Registry's filings in accordance with paragraph 19 above and to prepare a Confidential redacted version of ICC-01/12-01/15-24-Conf;

DISMISSES the LRV Filing as moot; and

ORDERS the LRV to comply forthwith with the Chamber's order to file copy of the Disclosure Log, in accordance with paragraph 25 of the present decision.

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

A handwritten signature in black ink, appearing to read 'Raul C. Pangalangan', is written over a horizontal line.

Judge Raul C. Pangalangan, Single Judge

Dated 22 July 2016

At The Hague, The Netherlands