

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/15**
Date: **10 February 2020**

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

Decision on Prosecution's Requests for Variation of Protective Measures

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

The Office of the Prosecutor

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James Stewart
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Counsel for the Defence

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Legal Representative 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

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber X
Al Hassan Defence

Judge Raul C. Pangalangan, acting as Single Judge on behalf of Trial Chamber VIII of the International Criminal Court, issues the following ‘Decision on Prosecution’s Requests for Variation of Protective Measures’, in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, having regard to Regulation 42 of the Regulations of the Court (the ‘Regulations’).

1. On 27 September 2016, the Chamber issued its judgment and sentence in this case.¹ The judgment and sentence became final after no appeal was filed.²
2. On 17 August 2017, the Chamber issued its reparations order.³ The reparations order has since become final following an Appeals Chamber judgment.⁴
3. On 31 January 2020, the Office of the Prosecutor (the ‘Prosecution’) raised two requests for variation of protective measures (the ‘Requests’).⁵ The Prosecution seeks these measures so as to fulfil its disclosure obligations in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (the ‘*Al Hassan case*’).
4. The Prosecution frames its Requests as variations of protective measures under Regulation 42 of the Regulations.⁶ The question then becomes whether the relief sought should be considered by this Chamber or Trial Chamber X (which is responsible for the *Al Hassan case*).
5. Regulation 42 of the Regulations governs the application and variation of protective measures. Subject to revision by a chamber, protective measures once ordered continue to have full force and effect in relation to any other proceedings.⁷ Any application to vary protective measures shall first be made to the chamber which issued the order.⁸ If that chamber ‘is no longer seized of the proceedings’ in which the protective measure

¹ Judgment and Sentence, ICC-01/12-01/15-171.

² Rule 150(4) of the Rules.

³ Reparations Order, ICC-01/12-01/15-236.

⁴ Public redacted Judgment on the appeal of the victims against the “Reparations Order”, 8 March 2018, ICC-01/12-01/15-259-Red2, A.

⁵ ICC-01/12-01/15-342-Conf-Exp (with two annexes); ICC-01/12-01/15-343-Conf-Exp (with annex). The Prosecution initially requested part of this relief via email, but was directed to file a formal request. Email from Trial Chamber VIII Communications, 11 December 2019, at 16:54.

⁶ For the same reasons provided in paragraph 9 below, the Single Judge takes no position on whether this is the correct legal basis for the relief sought.

⁷ Regulation 42(1) of the Regulations.

⁸ Regulation 42(3) of the Regulations.

was ordered, application may be made to the Chamber before which a variation of the protective measure is being requested.⁹

6. Two principles can be derived from the relevant jurisprudence: (i) if the trial chamber issuing the order understood as a protective measure has not issued its judgment, then variance requests first go to that chamber¹⁰ and (ii) if the trial chamber which issued such measures has been recomposed for post-judgment reparations proceedings, then Regulation 42 requests go to the new chamber on an understanding that the original chamber is no longer seized of the proceedings.¹¹ There is no precedent for what happens in circumstances - like the present - when a trial chamber retains authority over post-judgment reparations proceedings while not being recomposed.
7. Regulation 42 of the Regulations ensures that victims and witnesses whose identities are protected from the public have the assurance that their protection will be taken seriously in future cases. Varying such orders is first tasked to the Chamber which initially ordered the protective measures. This Chamber does not divest itself lightly of its protective responsibilities, and recognises its paramount obligation to protect victims and witnesses.¹² This Chamber affirms its solicitude in this instance for the witnesses who, in order to assist this Chamber in ascertaining the truth, assumed certain risks to their personal safety and that of their families.
8. However, a chamber also cannot be seized of proceedings indefinitely. Cases must end, and there must be an identifiable moment when a chamber can no longer be reasonably seized of the proceedings. That is the situation contemplated by Regulation 42(3) when it provides that, when such moment is reached, the protective responsibility shifts to the

⁹ Regulation 42(3) of the Regulations.

¹⁰ See Trial Chamber III, *The 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. 13; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the application to disclose the identity of intermediary 143, 10 December 2009, ICC-01/04-01/06-2190-Red, paras 22, 30.

¹¹ See 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 Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the “Prosecution’s Application for Variation of Protective Measures Pursuant to Regulation 42 of the Regulations of the Court by Lifting Certain Redactions Authorised Pursuant to Rule 81(4) of the Rules of Procedure and Evidence”, 13 July 2012, ICC-02/05-03/09-368, para. 7 (considering that Pre-Trial Chamber I was no longer seized of the *Abu Garda* proceedings – by this point Pre-Trial Chamber I had declined to confirm all charges against Mr Abu Garda and was in a new composition).

¹² Article 68(1) of the Statute.


new chamber hearing the case in which the protective measure is sought to be varied. This also recognises the wisdom that this new chamber will be in a better position to appreciate the new circumstances giving rise to the variation sought, and whether it is necessary and fair in the case before it.

9. At the very least, the Single Judge considers that a trial chamber can clearly no longer be ‘seized of the proceedings’ when the trial judgment, sentence and reparations order are all final. These are precisely the present circumstances – this Chamber’s current responsibilities are limited to oversight of its reparations order implementation.¹³ The Single Judge considers that the Requests, and any related requests concerning the *Al Mahdi* case record, must instead be brought before Trial Chamber X in the *Al Hassan* case.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DECLARES this Chamber unable to rule on the Requests.

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



Judge Raul C. Pangalangan, Single Judge

Dated 10 February 2020

At The Hague, The Netherlands

¹³ Decision on the Updated Implementation Plan from the Trust Fund for Victims, 4 March 2019, ICC-01/12-01/15-324-Red, para. 14.