

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **25 February 2020**

Submission date: **25 Mars
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

Public redacted version of “Trust Fund’s response to the “Prosecution’s Request regarding applications for individual reparations” (ICC-01/12-01/15-345)”

Source: The Trust Fund for Victims

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

Office of the Prosecutor

Mr Gilles Dutertre

Counsel for the Defence

Mr Mohamed Aouini

Legal Representatives of Victims

Mr Mayombo Kassongo

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for

Participation/Reparation

**Office of Public Counsel for
Victims**

Office of Public Counsel for the Defence

States' Representatives

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Esteban Peralta Losilla

Victims and Witnesses Section

Mr Nigel Verrill

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

Other (Country Office)

I. BACKGROUND

1. On 18 February 2020, Trial Chamber X, currently seized of the case against Mr Al Hassan, held a status conference during which the defence team of Mr Al Hassan (“*Al Hassan* Defence”) raised concerns as to the potential impact of the reparations proceedings in the present case.¹
2. On 20 February 2020, the Office of the Prosecutor (“Prosecution”) submitted a request regarding applications for individual reparations (“Request”),² asking the Single Judge of Trial Chamber VIII (“Trial Chamber”) to direct the Victims Participation and Reparations Section (“VPRS”) of the Registry to assist the Prosecution in identifying any applicants for individual reparations in *Al Mahdi* who are also Prosecution witnesses in *Al Hassan*, and to provide it with unredacted versions of applications of such individuals, if any.
3. On the same day, the Trial Chamber established the response deadline of Tuesday 25 February 2020.³
4. [REDACTED],⁴ [REDACTED].⁵
5. The Trust Fund hereby submits its response to the Request.

II. SUBMISSIONS

6. As a preliminary matter, the Trust Fund notes that the Request is addressed to the VPRS, while, in relation to the treatment of reparations applications and the related verification procedure, it is the Trust Fund that has a primary responsibility for the procedure. This includes the responsibility towards applicants to inform them about the confidentiality relating to their personal information and status, as well as to any event or prospect that may affect this.
7. The Trust Fund also wishes to underline that it understands the present Request as having been made in the interest of caution and of avoiding disclosure litigation in

¹ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Transcript of hearing of 18 February 2020.

² Prosecution’s Request regarding applications for individual reparations, 20 February 2020, [ICC-01/12-01/15-345](#).

³ Email from Trial Chamber VIII to the parties and participants on 20 February 2020 at 14:13.

⁴ [REDACTED].

⁵ [REDACTED].

the *Al Hassan* case. At this point, it appears that the *Al Hassan* Defence did not substantiate the relevance of the information sought and did not argue why such disclosure would be material to the Defence. While the Trust Fund does not oppose the Request, it wishes to underline that it may have serious impacts on the rights of (potential) reparations beneficiaries in the *Al Mahdi* case and proposes that, as mitigating measure, they are at least informed and given the opportunity to react prior to any disclosure being effectuated.

I. The Request negatively impacts the rights to reparations of victims in the present case

8. The Appeals Chamber ruled that individuals applying for reparations do not have the obligation to reveal their identity to the defence team of Mr Al Mahdi (“*Al Mahdi* Defence”) as a precondition to have their claim treated, as it essentially created an unnecessary obstacle to certain victims to receive reparations.⁶

9. This ruling importantly informed the way that the Trust Fund conducted its outreach and explained the reparations proceedings to the community of Timbuktu, and in particular the potential beneficiaries of individual awards. All potential beneficiaries met were clearly explained that they have the right to conceal their identity from Mr Al Mahdi. The confidential nature of their application was strongly emphasised. In the context of Timbuktu, which is a very volatile environment in terms of security and personal safety of its inhabitants, this message enabled to encourage the engagement of the targeted communities and played an important role in the general and personal acceptance and support of the eligibility screening process. All persons applying for individual reparations awards have received strong and unequivocal assurances that their identity would not be disclosed to the *Al Mahdi* Defence, unless they expressly indicated otherwise. Most of the applicants opted to conceal their identity from Mr Al Mahdi on the basis that they were scared for their personal safety. Disclosure to the Prosecution or other parties in the context of a different case and at a different phase was not mentioned to any of the applicants, as at the time of collecting applications this was an unforeseen scenario. Would any of the individuals met have received information according to which their identity could be disclosed to the defence team of

⁶ Public redacted Judgment on the appeal of the victims against the “Reparations Order”, 8 March 2018, [ICC-01/12-01/15-259-Red2](#), para. 87.

another accused, also a former member of Ansar Eddine, it is submitted that this may well have influenced their final decision to submit an application form, which, if not pursued, would constitute an abdication of their right to reparations in the *Al Mahdi* case. This also applies to the limited number of individuals who consented to disclose their identity to Mr Al Mahdi, as this choice has been made in relation to him only and not to any other accused.⁷

10. On this point, the Trust Fund wishes to note that, despite the concurring charge concerning the destruction of cultural property, the nature of the cases and -thus far- of the alleged criminal responsibilities of the accused and their judicial positions are different. The *Al Mahdi* case solely concerned crimes against property, the accused pled guilty and issued an apology, whereas the scope of crimes for which Mr Al Hassan is accused is more expansive and, for now, there are no indications of remorse. Therefore, even when an applicant for reparations would have consented to the disclosure of his identity to the *Al Mahdi* Defence, this consent cannot logically be understood to be automatically extended to the Prosecution or the *Al Hassan* Defence. By the same token, those pools of applicants who chose not to disclose their identity to Mr Al Mahdi, will very likely have the same reservations to do so in relation to Mr Al Hassan.

11. The way an individual may react to disclosure of their identity to the *Al Hassan* Defence cannot be predicted and may depend on many circumstances, such as the place of residence of this individual or whether or not he or she benefits from the protection of the Victims and Witnesses Unit. It is not far-fetched however to imagine that, if disclosures are enacted, some may prefer to withdraw their reparations application thereby abdicating their right to reparations in the *Al Mahdi* case. By way of example, the Trust Fund wishes to report that one individual refused to participate in the present reparations proceedings, in spite of the opportunity to not divulge his identity to Mr Al Mahdi, because his family is well-known in Timbuktu and that the mere act of lodging an application may expose them. Moreover, in some circumstances, the withdrawal may no longer be feasible as the procedure to issue administrative decisions on beneficiary eligibility has already begun.

⁷ This decision may have been taken on the basis that Mr Al Mahdi pleaded guilty and took responsibility for his acts.

12. On a general note, the Trust Fund wishes to highlight that the form of disclosure solicited, during the implementation phase of reparations, sets a precedent that may have an impact on future similar occasions. The Trust Fund anticipates that exposing victims applying to reparations to the prospect of divulgation of their application for reparations in another case at the trial phase, carries the risk of compromising victims' rights to reparations and may thus affect the integrity and effectiveness of the Rome Statute's reparations system.

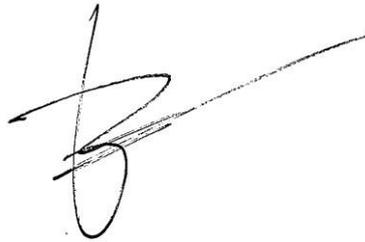
II. Proposed mitigating measure: inform the concerned victims of the prospect of disclosure and allow for their reaction to such a prospect

13. Any victim applicant in the *Al Mahdi* reparations proceedings who would also happen to be a Prosecution witness in the *Al Hassan* case must be placed in a position to choose the course of conduct he or she wants to adopt, and to be clearly explained the implications of their choice. Should the identity, application form and related Trust Fund's administrative decision be disclosed to the Prosecution, it is submitted that victims have the right to be informed by the LRV in this case prior to any disclosure taking place to the Prosecution, and *a fortiori* to the *Al Hassan* Defence.

14. In practice, this would require the VPRS to notify -first the LRV and the Trust Fund- of the applicant's identity. The LRV should be then awarded a reasonable time to inform his client, for example, by telephone to ensure the expeditiousness of the process. In such conversation, it would be critical that victims understand the potential impact of this disclosure, for instance the fact that they may be cross-examined by the *Al Hassan* Defence on their application for reparations in the context of the *Al Mahdi* case.

RELIEF SOUGHT

The Trust Fund respectfully requests the Trial Chamber to amend the procedure proposed by the Prosecution, as set out in paragraph 7 above, that is making sure that the victim applicant is informed of and given the opportunity to react to the upcoming disclosure.



Pieter W.I. de Baan
Executive Director of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 25 March 2020
At The Hague, The Netherlands