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TRIAL CHAMBER VIII

Before: Judge Raul C. Pangalangan, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Bertram Schmitt

SITUATION IN THE REPUBLIC OF MALI
IN THE CASE OF
THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI

PUBLIC

**Public redacted version of "Prosecution's submissions in
support of conviction under Article 65(2) of the Statute",
1 July 2016, ICC-01/12-01/15-120-Conf**

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Introduction

1. On 22 August 2016, the Accused in this case, Ahmad AL FAQI AL MAHDI (“Mr AL MAHDI” or “the Accused”) is expected to make an admission of guilt under articles 64(8)(a) and 65 of the Rome Statute (“the Statute”). If accepted by Trial Chamber VIII (“the Chamber”) under article 65(2) of the Statute, it will be the first admission of guilt by an accused before this Court.
2. Mindful of the impact the expected admission of guilt will have on the present case, and also of the precedential value these proceedings may have for future cases, the Office of the Prosecutor (“Prosecution”) offers the following submissions in support of a conviction under article 65(2) of the Statute.
3. As set forth below, the Prosecution submits that the requirements for conviction under article 65 are met in this case. The Accused understands the nature and consequences of an admission of guilt; his admission is voluntary and made after sufficient consultation with Defence Counsel; and the admission of guilt is fully supported by the facts of the case, which establish all the elements of the charged crime and the Accused’s individual criminal responsibility under article 25. Acceptance of the admission of guilt and conviction under article 65(2) are also in the interests of justice.

Confidentiality

4. Pursuant to regulation 23bis of the Regulations of the Court, the present submissions are filed confidentially because they refer *inter alia* to the still-confidential agreement between the Parties regarding the Accused's admission of guilt. A public redacted version will be filed later.

Background

5. On 1 September 2015, the Prosecution met for the first time with Mr AL MAHDI, who at the time was detained on domestic criminal charges in Niger. After an initial explanation of the purpose of the meeting (an interview pursuant to articles 55(2) and 56 of the Statute), and after consultation with duty Counsel provided by the Court,¹ Mr AL MAHDI agreed to proceed with a voluntary interview. The subsequent interview lasted five days and covered a range of topics, including Mr AL MAHDI's association with the armed groups occupying Timbuktu in 2012, and his participation in the destruction of a number of mausoleums and the door of a mosque during June and July 2012, which he fully admitted.
6. The Prosecution subsequently applied under article 58 for an arrest warrant, which was granted by the Single Judge of Pre-Trial Chamber I on 18 September 2015.² Mr AL MAHDI was transferred to The Hague on 26

¹ Article 55(2) duty Counsel at the interview was Mr Mohamed Aouini, now lead Defence Counsel for the Accused.

² ICC-01/12-01/15-01-Red.

September 2015 and made his initial appearance on 30 September 2015.³ On 17 December 2015, the Prosecution filed a document containing the charge (“DCC”),⁴ which was confirmed in its entirety by Pre-Trial Chamber I on 24 March 2016.⁵ The DCC contains one count of directing an attack against buildings dedicated to religion and historic monuments, a war crime under article 8(2)(e)(iv) of the Rome Statute, and alleges that the Accused is individually criminally responsible for that crime under articles 25(3)(a), (b), (c), and (d) of the Statute.⁶

7. Between the time of Mr AL MAHDI’s initial appearance and the article 61 confirmation hearing held on 1 March 2016,⁷ the Prosecution and Counsel for the Accused met on numerous occasions to discuss possible areas of agreement and eventually the possibility of an admission of guilt in this case. Those discussions resulted in two sets of agreed facts⁸ and an agreement regarding admission of guilt (“the Agreement”), which was signed by the Prosecutor, the Accused, and counsel on 18 February 2016 and filed with Pre-Trial Chamber I on 25 February 2016.⁹ In the Agreement, Mr AL MAHDI

³ ICC-01/12-01/15-T-1-ENG ET WT.

⁴ ICC-01/12-01/15-62.

⁵ ICC-01/12-01/15-84-Red.

⁶ ICC-01/12-01/15-62.

⁷ ICC-01/12-01/15-T-2-CONF-ENG CT and, in its redacted form, -T-2-Red-ENG WT.

⁸ ICC-01/12-01/15-54-Conf & Conf-AnxA; ICC-01/12-01/15-83-Conf & Conf-AnxA.

⁹ ICC-01/12-01/15-78-Conf-Exp.

agreed to make an admission of guilt accepting his individual criminal responsibility for the charge contained in the DCC.¹⁰

8. Trial in this case is set to commence on 22 August 2016. The Accused has confirmed his intention to make an admission of guilt.¹¹

Applicable Law

9. Admissions of guilt are expressly contemplated by articles 64(8)(a) and 65 of the Rome Statute. Article 65(1) establishes three requirements for a Trial Chamber to convict an accused on the basis of an admission of guilt:

- First, the accused must understand the nature and consequences of the admission of guilt;
- Second, the admission must be voluntarily made after sufficient consultation with defence counsel; and
- Third, the admission must be supported by the facts of the case.

10. Subsections (2), (3), and (4) of article 65 offer the Trial Chamber three options, depending on whether the requirements in article 65(1) are met:

- If all three requirements are met, a Trial Chamber is authorised by article 65(2) to consider the admission of guilt, together with any other evidence presented, as establishing all the essential facts of the charged offense and to enter a conviction on that basis;

¹⁰ ICC-01/12-01/15-78-Conf-Exp.Anx1, para. 4.

¹¹ ICC-01/12-01/15-T-2-CONF-ENG CT, p. 70, ll. 14-25. *See also* ICC-01/12-01/15-T-3-CONF-ENG ET, pp. 22-24.

- If, on the other hand, the Trial Chamber determines that any of the three requirements is not met, it is required by article 65(3) to consider the admission as having not been made and order that the trial proceed; or
 - As a third option, if the Trial Chamber feels that the interests of justice require a more complete presentation of the evidence, under article 65(4) the Trial Chamber may either request additional evidence from the Prosecution or order that the trial proceed as if the admission had not been made.
11. Article 65(5) expressly contemplates the possibility of agreements between the Parties regarding modification of the charges, the admission of guilt, or the penalty to be imposed. It makes clear that any such agreements shall not bind the Trial Chamber.

Application

12. Applying article 65 to the present case, the Prosecution submits that all three requirements of article 65(1) are met, and that the Trial Chamber should convict the Accused on the basis of his admission of guilt and the evidence presented.

A. The Accused understands the nature and consequences of the admission of guilt

13. The first requirement under article 65(1)(a) is that the Accused understands the nature and consequences of the admission of guilt. This Trial Chamber (“the Chamber”) suggested during the status conference on 24 May 2016 that

this provision requires that the Accused be informed of a) the rights that he would waive by making an admission of guilt; b) any possible defences that he may have; c) the maximum possible sentence that could be imposed by the Chamber; d) the possibility of an order for reparations issued against him; and e) the fact that the Chamber is not required to accept the admission of guilt or the recommended sentencing range.¹²

14. The Prosecution first notes that lead Defence Counsel for Mr AL MAHDI responded at the May 2016 status conference, in the presence of the Accused and in Arabic, that he had fully discussed these matters with the Accused.¹³

The Accused himself similarly stated at the confirmation hearing that he had been “made fully aware of the scope of the charges brought against [him],” and that he was “fully aware of the meaning of pleading guilty and the consequences that are – [he is] likely to face as a result of these charges.”¹⁴

15. The Prosecution also recalls that all but one of these topics (that of reparations) are expressly addressed in the Agreement.

- Regarding the waiver of rights, paragraph 21 of the Agreement makes clear that the Accused’s admission of guilt will impact several important rights, including the right to plead not guilty and be proven

¹² ICC-01/12-01/15-T-3-CONF-ENG ET, p. 22, ll. 17-25.

¹³ ICC-01/12-01/15-T-3-CONF-ENG ET, pp. 23-24. *See also* the transcript of the confirmation hearing, ICC-01/12-01/15-T-2-CONF-ENG CT, p. 100, l.12 (Mr Aouini: “He [the Accused] is also aware of the legal implications.”).

¹⁴ ICC-01/12-01/15-T-2-CONF-ENG CT, p. 70, ll.20-24.

guilty beyond reasonable doubt by the Prosecution at trial; the right to remain silent, without such silence being a consideration in the determination of guilt or innocence; the right to raise applicable defences and grounds for excluding criminal responsibility, as well as the right to present evidence at a full trial (without prejudice to the presentation of admissible evidence under article 65 or with respect to sentencing); the right to examine witnesses and to obtain the presence and examination of defence witnesses on the same conditions as witnesses against him (again without prejudice to his rights related to Article 65 proceedings and sentencing); and his right to appeal a conviction, confirmation of the charges, pre-trial rulings related to admissibility or jurisdiction, or a sentence within the range specified in the Agreement;¹⁵

- On the specific issue of possible defences, the Accused's declaration at paragraph 28 of the Agreement, and Defence Counsel's declaration at paragraph 29, both reflect the fact that possible defences were discussed with the Accused before he signed the Agreement;
- With regard to the maximum possible sentence, paragraph 10 of the Agreement sets out the maximum applicable sentence under Article 77 of the Statute; and

¹⁵ ICC-01/12-01/15-78-Conf-Exp-Anx1, para. 21.

- Finally, in relation to the fact that the Agreement does not bind the Chamber to accept the admission of guilt or to impose a sentence within the range recommended in the Agreement, this fact is included in paragraphs 11, 24 and 25 of the Agreement.

16. Lastly on this issue, the Prosecution submits that Mr AL MAHDI is an educated man, fully capable of understanding the nature and consequences of an admission of guilt. The arrest warrant and DCC have been translated into Arabic, the Agreement and its factual annex were translated into Arabic for the Accused's review and signature,¹⁶ and the Accused is able to consult directly with lead Defence counsel in Arabic. The Prosecution has no reason to question the Accused's understanding of the nature and consequence of his decision to admit guilt.

B. The admission of guilt is voluntarily made after sufficient consultation with Defence counsel

17. Article 65(1)(b) next requires that the admission of guilt be "voluntarily made by the accused after sufficient consultation with defence counsel."

18. This issue was addressed at the May 2016 status conference, when lead Defence counsel Mr Aouini, in the presence of the Accused, described to the Chamber his consultations with the Accused, starting on the first day of the

¹⁶ ICC-01/12-01/15-78-Conf-Exp-Anx2-Corr.

September 2015 interview.¹⁷ Specifically with respect to voluntariness, lead Defence Counsel recounted that “since the first instance, the accused was telling me that he was a Muslim who believes in justice and he wants to be truthful to himself and he wants to admit the acts that he has committed.”¹⁸ Lead Defence Counsel informed the Chamber that the Accused at the interview appeared to be “honest and truthful and he was talking as if he wanted to inform or tell anyone that he really regrets his actions and he will fully be held responsible of his actions.”¹⁹ Mr AL MAHDI echoed these remarks in his own voluntary statement at the confirmation hearing, before the Judges and in the presence of his counsel and the Prosecution, when he referred to the legal advice given him by counsel and clearly stated: “I would like to plead guilty. I have not come under any pressure.”²⁰

19. Again, the voluntariness of the admission of guilt and the Accused’s opportunity to consult with Defence Counsel are also addressed in the Agreement. In particular, paragraph 23 of the Agreement records Mr AL MAHDI’s acknowledgement “that he has entered into this Agreement freely and voluntarily after sufficient consultation with his counsel, that no threats were made to induce him to make an admission of guilt, and that the only promises made to him are those set forth in this Agreement.” The Accused’s

¹⁷ ICC-01/12-01/15-T-3-CONF-ENG ET, pp. 23-24. Mr Aouini had been appointed as duty Counsel for the September 2015 interview. *See* ICC-01/12-01/15-7.

¹⁸ ICC-01/12-01/15-T-3-CONF-ENG ET, p. 23, ll. 5-7.

¹⁹ ICC-01/12-01/15-T-3-CONF-ENG ET, p. 23, ll. 22-24.

²⁰ ICC-01/12-01/15-T-2-CONF-ENG CT, p. 70, ll. 19-22.

and Defence counsel's declarations at paragraphs 28 and 29 of the Agreement also confirm the voluntariness of the Accused's admission, as well as the sufficiency of consultation with Counsel.

20. The Prosecution has directly observed the Accused's demeanour and his opportunities to consult with Counsel (who speaks Arabic), both during the September 2015 interview and subsequently. Based on its observations, the Prosecution believes that the Accused's admission of guilt is voluntary and made after sufficient consultation with Defence Counsel.

C. The admission of guilt is supported by the facts of the case

1. *The materials supporting the admission of guilt*

21. The third requirement for conviction, under Article 65(1)(c), is that the admission of guilt be supported by the facts of the case that are contained in i) "the charges brought by the Prosecutor and admitted by the accused," ii) "[a]ny materials presented by the Prosecutor which supplement the charges and which the accused accepts," and iii) "[a]ny other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused." In this case, the admission of guilt is supported by material falling into all three categories.

22. First, the core facts of the case are articulated with particularity in the DCC confirmed by the Pre-Trial Chamber.²¹ The DCC sets forth relevant information about the occupation of Timbuktu and the armed groups involved; about the Accused's role in the groups and in the common plan devised and implemented by the groups; about the destruction of religious buildings and historic monuments identified by name; and about the Accused's role in the destruction.²² The DCC charges the Accused with individual criminal responsibility under article 25 of the Statute for one count of directing an attack against buildings dedicated to religion and historic monuments, a war crime under article 8(2)(e)(iv) of the Statute. The Agreement, in turn, specifically references the DCC and makes clear that the Accused admits and accepts individual criminal responsibility for precisely the offense charged in the DCC.²³ However, the Agreement does not stop at a general admission of responsibility, but includes an agreed factual narrative of more than twenty pages in which Mr AL MAHDI admits in detail the basis for his admission of guilt.²⁴ All of this information, upon which the Prosecution and the Defence agree, strongly supports the admission of guilt.

23. Second, the admission of guilt is supported by numerous supplementary materials presented by the Prosecution and accepted by the Accused. As the

²¹ ICC-01/12-01/15-84-Conf.

²² ICC-01/12-01/15-62.

²³ ICC-01/12-01/15-78-Conf-Exp-Anx1, para. 4.

²⁴ ICC-01/12-01/15-78-Conf-Exp-Anx1, paras. 5-8 & Anx2.

Parties confirmed to the Trial Chamber at the status conference in May, all of the evidence on the Prosecution's List of Evidence for the confirmation hearing is accepted by the Defence.²⁵ The Parties have also jointly filed two sets of agreed facts covering all of the essential facts of the case.²⁶

24. The Prosecution submits that its written submissions²⁷ in support of the DCC and its oral submissions at the confirmation hearing²⁸ should also be considered under article 65(1)(c)(ii). Although these have not been expressly accepted by the Defence, they closely reflect the facts set forth in the agreed factual narrative annexed to the Agreement. Moreover, the Accused himself stated at the confirmation hearing, after hearing the Prosecution's oral submissions, that "the information provided reflect[s] the truth."²⁹

25. Third, the Prosecution intends to offer a limited amount of additional material at trial, including the testimony of three witnesses, each of whose testimony goes in part to the elements of the charged crime or the Accused's individual criminal responsibility:

- The first Prosecution Witness, MLI-OTP-P-0182, will provide a summary of the Prosecution's investigation of the charged crime and

²⁵ ICC-01/12-01/15-T-3-CONF-ENG ET, pp. 21-22. The Parties will jointly submit a limited number of additional items by 1 July 2016, also under the category of article 65(1)(c)(ii) materials.

²⁶ ICC-01/12-01/15-54-Conf & Conf-AnxA; ICC-01/12-01/15-83-Conf & Conf-AnxA.

²⁷ ICC-01/12-01/15-66-Conf.

²⁸ ICC-01/12-01/15-T-2-CONF-ENG CT.

²⁹ ICC-01/12-01/15-T-2-CONF-ENG CT, p. 70, 1.24. To whatever extent the Chamber may consider the Prosecution's written submissions in support of the DCC and oral submissions at the confirmation hearing not to be accepted by the Accused within the meaning of article 65(1)(c)(ii), the Prosecution submits that they should be considered under article 65(1)(c)(iii).

testify, *inter alia*, regarding the Accused's statements and demeanour during the September 2015 interview. The latter information in particular goes to the Accused's guilt, to modes of liability, and also to the voluntariness and the informed nature of his admission of guilt;

- The second Prosecution Witness, MLI-OTP-P-0431, will testify, *inter alia*, regarding the status of the sites as buildings dedicated to religion and historic monuments, not military objectives, and their protection under Malian law; and
- The third and final Prosecution Witness, MLI-OTP-P-0151, will testify, *inter alia*, regarding the inclusion of sites named in the DCC on UNESCO's World Heritage List, including the basis for such designation. This evidence goes to the fact that the buildings were dedicated to religion and historic monuments.

26. Finally, the Prosecution will present public and confidential versions of an interactive software tool comprised of video and photographic evidence taken from the Parties' List of Evidence which depicts the sites [REDACTED] [REDACTED] [REDACTED]. This audio-visual evidence, the authenticity of which is recognised by the Defence, is extremely strong corroboration of the Accused's admission of guilt.

27. It is the Prosecution's submission that the various materials referenced above strongly, and indeed overwhelmingly, support the admission of guilt, because together they demonstrate beyond reasonable doubt that the elements of the charged crime are established and that the Accused's individual criminal responsibility is also proven.

2. *The facts establish the elements of the crime*

28. With regard to the elements of the charged crime,³⁰ the Prosecution relies upon the detailed discussion of the evidence in its written submissions in support of the DCC,³¹ all of which is directly applicable at trial. Those submissions, together with the agreed facts,³² the Agreement and its annexed factual narrative,³³ and all the other evidence before the Chamber establish beyond reasonable doubt that the Accused directed an attack; that the object of the attack were the buildings dedicated to religion and historic monuments specified in the DCC, which were not military objectives; that the Accused intended those buildings to be the object of the attack; that his conduct took place in the context of an armed conflict not of an international character; and that the Accused was aware of the factual circumstances that established the existence of an armed conflict and the nexus between such armed conflict and his own conduct.

³⁰ See Elements of Crimes, art. 8(2)(e)(iv).

³¹ ICC-01/12-01/15-66-Conf.

³² ICC-01/12-01/15-54-Conf-AnxA.; ICC-01/12-01/15-830Conf-AnxA.

³³ ICC-01/12-01/15-78-Conf-Exp-Anx1.

3. *The facts establish the Accused's direct co-perpetration under article 25*

29. The materials before the Chamber also support a finding that the Accused is individually criminally responsible for the charged crime. Indeed, in the Prosecution's submission, the facts support a finding that Mr AL MAHDI is individually criminally responsible under any, and indeed all, of the four subsections of article 25(3) of the Statute: direct co-perpetration under article 25(3)(a); solicitation or inducement of the crime under article 25(3)(b); aiding and abetting and otherwise assisting in the commission of the crime under article 25(3)(c); and contributing in other ways to the commission of the crime under article 25(3)(d).

30. However, it is the Prosecution's position that the Accused's participation in the attack on protected buildings in Timbuktu in June and July 2012 is best captured by the concept of direct co-perpetration under article 25(3)(a). The material before the Chamber leaves no reasonable doubt that there existed a common plan or agreement among a number of members of the armed groups occupying Timbuktu, including the Accused, to commit the charged crime.³⁴ Mr AL MAHDI's contribution to that common plan was essential³⁵ in many ways, from his selection of sites to his statements publicly justifying the

³⁴ The common plan need not be specifically directed at the commission of the crime, nor need it be intrinsically criminal, so long as it includes a "critical element of criminality." See *Lubanga Appeal Judgment*, ICC-01/04-01/06-2121-Red, paras. 445-51. In this case, however, the common plan focused directly on the destruction of the mausoleums (and later the door of the Sidi Yahia Mosque), in full knowledge of, and indeed motivated by, their religious use by the local population.

³⁵ See, e.g., *Lubanga Appeal Judgment*, ICC-01/04-01/06-2121-Red, paras. 473.

attack as it occurred, but most fundamentally in his admitted role of organising, supervising, supplying, and assisting the direct perpetrators at the various sites. There is no question that the crime would have been “frustrated”³⁶ or would have occurred in a substantially different way³⁷ without the participation of the Accused. Meanwhile, the Accused and the other co-perpetrators intended to attack and destroy the identified religious buildings and historic monuments, and the Accused was aware of the factual circumstances which enabled him and the other co-perpetrators to jointly control the crime.³⁸ The elements of direct co-perpetration are therefore met.

31. The evidence makes plain that the Accused also was a direct physical perpetrator at some sites; that he induced and solicited the crimes through his statements prior to and during the attack; that he provided material and moral assistance to other perpetrators; and that he contributed in other ways cognisable under article 25(3)(d). However, the Prosecution’s view is that conviction as a co-perpetrator under article 25(3)(a) would fully and accurately reflect the Accused’s individual criminal responsibility.

D. Acceptance of the admission of guilt is in the interests of justice

32. The Prosecution submits that the Trial Chamber’s acceptance of Mr AL MAHDI’s admission of guilt, and his conviction without the need for a “more

³⁶ See *Lubanga Appeal Judgment*, ICC-01/04-01/06-2121-Red, para. 473.

³⁷ See *Blé Goudé Confirmation Decision*, ICC-01/11-02/11-186, paras. 141-48.

³⁸ See *Lubanga Trial Judgment*, ICC-01/04-01/-06-2842, para. 1018.

complete” presentation of the facts of the case under article 65(4), would further the interests of justice in this case, including the interests of the victims.

33. First, a conviction will send an important message that the intentional destruction of cultural heritage is a serious crime of concern to the entire international community. This message is in no way diminished if the conviction results from an admission of guilt rather than from a contested trial. For some, the message may even be more difficult to dismiss.

34. Second, a conviction without the need for the presentation of additional evidence would conclude these proceedings in a reasonably prompt fashion, offering finality and certainty to all those involved. Rather than waiting years for a verdict, the Accused, the victim participants, and everyone affected by this case will know its outcome within a matter of months.

35. Third, the Accused’s full acceptance of responsibility, and a statement of remorse if he makes one, may offer some measure of closure and recognition for the victim participants and others, and hopefully contribute to peace and reconciliation in Timbuktu and Mali. The Accused’s recognition of the charged attack on buildings dedicated to religion and historic monuments, particularly in such a detailed fashion (*e.g.*, the factual narrative annexed to the Agreement), will also make it more difficult for others to deny or justify the commission of that crime.

36. Fourth, conviction without a full trial will greatly reduce the need for witnesses to undergo the hardships and risk associated with testifying at the

Court. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Conclusion and Relief Requested

38. For the reasons stated above, the Prosecution urges the Chamber to conclude that the matters referred to in article 65(1) of the Statute are established, and to convict the Accused of the war crime of directing an attack against buildings dedicated to religion and historic monuments as charged in the DCC.



Fatou Bensouda, Prosecutor

Dated this 1st day of July 2016

At The Hague, The Netherlands