

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 June 2016

**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 'Decision on Victim Participation at Trial and on  
Common Legal Representation of Victims'**

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

**The Office of the Prosecutor**

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**Counsel for the Defence**

Mohamed Aouini  
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**Legal Representatives of Victims**

Magombo Kassongo

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Isabelle Guibal

**Others**

**Trial Chamber VIII** ('Chamber') of the International Criminal Court ('Court') having regard to Articles 64(2) and (6)(e), 67(1) and 68(1) and (3) of the Rome Statute ('Statute'), Rules 16, 85, 86 and 89-92 of the Rules of Procedure and Evidence ('Rules') and Regulations 79-80, 81(4) and 86 of the Regulations of the Court ('Regulations'), issues the following 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims'.

## **I. Procedural History**

1. On 20 May 2016, the Chamber was informed that three applications ('Applications') to participate as victims during the trial were transmitted to the Court.<sup>1</sup>
2. On 25 May 2016, in accordance with a Chamber's instruction,<sup>2</sup> the Registry transmitted unredacted versions of the Applications to the Office of Prosecutor ('Prosecution') and the Chamber and redacted versions to the defence team for Mr Al Mahdi ('Defence').<sup>3</sup>
3. On 31 May 2016 and 1 June 2016 respectively, pursuant to a Chamber's order,<sup>4</sup> the Prosecution<sup>5</sup> and the Defence<sup>6</sup> submitted their observations on the Applications.
4. On 1 June 2016, in accordance with a Chamber's instruction to this effect,<sup>7</sup> the Registry submitted its report pursuant to Regulation 86(5) of the Regulations

<sup>1</sup> Email from Registry to Chamber at 17:15.

<sup>2</sup> Email from Chamber to Registry on 23 May 2016 at 15:55.

<sup>3</sup> Transmission to the Chamber, the Office of Public Counsel for Victims and the Office of the Prosecutor of three unredacted applications to participate in the proceedings, 25 May 2016, ICC-01/12-01/15-90 (with three annexes, all with confidential *ex parte* and confidential redacted versions); Transmission to the Defence of redacted versions of three applications to participate in the proceedings, ICC-01/12-01/15-91.

<sup>4</sup> Transcript of hearing on 24 May 2016, ICC-01/12-01/15-T-3-CONF-ENG ET, page 25, lines 9-14.

<sup>5</sup> Prosecution's Observations on Three Applications for Victims' Participation in the Proceedings, ICC-01/12-01/15-92-Conf-Exp.

<sup>6</sup> *Observations de la Défense sur les demandes de participation présentées à la Chambre, conformément aux instructions de la Chambre en date du 24 mai 2016*, ICC-01/12-01/15-94-Conf.

of the Court, including its observations on the system for common legal representation ('Registry Report').<sup>8</sup>

5. In the present decision, the Chamber will: (i) set out the procedure for admission to participate in the proceedings against Mr Al Mahdi; (ii) rule on the Applications; and (iii) decide on the system to be put in place for common legal representation of victims.

## II. Procedure for admission to participate in the trial proceedings of the *Al Mahdi* case

6. Rules 89 to 91 of the Rules outline the procedure to be followed in the implementation of the regime of victim participation under Article 68(3) of the Statute.

7. Rule 89, in relevant part, provides:

In order to present their views and concerns, victims shall make written application to the Registry, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber.

8. As concerns this application procedure, Regulation 86 of the Regulations provides for the way the written applications shall be presented, including their timing, the information to be presented, as well as for the manner in which the applications received are to be managed by the Registry and assessed by the Chamber.

9. In the present proceedings, victims will be admitted to participate in

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<sup>7</sup> Email from Chamber to Registry on 26 May 2016 at 11:31; Transcript of hearing on 24 May 2016, ICC-01/12-01/15-T-3-CONF-ENG ET, page 25, line 20 to page 26, line 2.

<sup>8</sup> Report on Applications to Participate in the Proceedings and observations on the issue of the legal representation of victims, ICC-01/12-01/15-96 with three annexes.

accordance with the following procedure.

10. The Registry shall transmit to the Chamber all applications, which in the Registry's assessment are complete and that fall within the scope of the charges as defined by the Decision on the confirmation of charges against Ahmad Al Faqi Al Madhi ('Confirmation Decision').<sup>9</sup> Such transmissions must be effectuated on a rolling basis and, in any case no later than 25 July 2016.<sup>10</sup> The Registry shall transmit all applications to the Chamber together with an *ex parte* report, available to the Prosecution and the Legal Representative of Victims ('LRV') pursuant to Regulation 86(5) of the Regulations. This deadline is without prejudice to receipt and review of subsequent applications to participate in any reparations proceedings which could occur in this case.
11. The applications that, in the view of the Registry, are incomplete and/or fall outside the scope of the charges as confirmed shall not be transmitted to the Chamber. The Registry shall inform those applicants accordingly.
12. Where the Registry is not in a position to determine whether an applicant qualifies as a victim, it shall transmit the application to the Chamber with an indication of the unclear status of the applicant.
13. In accordance with Rule 89(1) of the Rules, the Registry shall transmit the applications to the parties, who shall have an opportunity to submit observations on the applications for participation. Consistent with Article 68(1) of the Statute, applications should be transmitted in unredacted form to the Prosecution and in redacted form to the Defence, when the applicant has expressed some security concern. Observations, if any, shall be filed within

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<sup>9</sup> 24 March 2016, ICC-01/12-01/15-84-Conf. A public redacted version was filed on the same day. See also: *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 124.

<sup>10</sup> See Decision Setting the Commencement Date of the Trial, 1 June 2016, ICC-01/12-01/15-93, paras 8-9 and page 6.

seven days of notification of the applications.

14. Unless objections are raised within this timeframe to the admission of certain applicants by any of the parties, applications transmitted to the Chamber will be admitted.<sup>11</sup>

15. For the purpose of the present proceedings, standard forms covering both participation and reparation applications shall be used by applicants.

### III. Determination of the Chamber with regard to a/35000/16, a/35001/16, a/35002/16

#### A. Relevant applicable law

16. Under Article 68(3) of the Statute, the Chamber shall permit victims whose personal interests are affected at stages of the proceedings determined to be appropriate to have their views and concerns presented and considered in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Under Rule 85 of the Rules, victims may be individuals or organisations.

#### 1) Individual victims

17. Individuals seeking to be admitted as participating victims must demonstrate that they are victims within the meaning of Rule 85(a) of the Rules. In order to qualify as victims in the present case, an applicant will have to establish, *prima facie*, the following criteria:

- i) his or her identity as a natural person must be established;
- ii) he or she has suffered personal harm; and
- iii) the harm suffered is as a result of an incident falling within

<sup>11</sup> See *The Prosecutor v. Dominic Ongwen*, Pre-Trial Chamber II, Decision concerning the procedure for admission of victims to participate in the proceedings in the present case, 3 September 2015, ICC-02/04-01/15-299, paras 7-8.

the parameters of the confirmed charges.<sup>12</sup>

*i. Identity as a natural person*

18. In regards to the first requirement, the Chamber adopts the flexible approach other chambers of this Court have followed and accepts distinct forms of identification.<sup>13</sup>

19. The Chamber also believes it necessary, as have other chambers in the past, to extend this flexible approach to possible discrepancies between the application and identity document(s) submitted. Thus, minor discrepancies which do not call into question the overall credibility of the information provided by the applicant may be accepted.<sup>14</sup>

*ii. Harm*

20. The Chamber recalls that other chambers have considered that ‘harm’, under Rule 85(a) of the Rules can include not only physical harm, but also emotional suffering and economic loss.<sup>15</sup> The Chamber stresses that applicants must have *personally* suffered harm.<sup>16</sup>

<sup>12</sup> See *The Prosecutor v. Laurent Koudou Gbagbo*, Trial Chamber I, Decision on victim participation, 6 March 2015, ICC-02/11-01/11-800, para. 30 and footnotes contained therein (‘Gbagbo Victim Decision’).

<sup>13</sup> Gbagbo Victim Decision, ICC-02/11-01/11-800, para. 31 and footnotes contained therein. This may include: passport; birth certificate; national identity card; driving license; electoral card; marriage certificate; consular identity card; death certificate; document pertaining to medical treatment, rehabilitation or education; church membership card; family registration booklet; employee identity card; political party membership card; pension booklet; or a signed declaration from two witnesses accompanied by their proof of identity, attesting the identity of the applicant.

<sup>14</sup> Gbagbo Victim Decision, ICC-02/11-01/11-800, para. 32 and footnotes contained therein.

<sup>15</sup> Gbagbo Victim Decision, ICC-02/11-01/11-800, para. 33.

<sup>16</sup> Amended order for reparations in *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012, 3 March 2015, ICC-01/04-01/06-3129-AnxA, paras 6 and 10; *Lubanga* OA9-OA10 Judgment, ICC-01/04-01/06-1432, para. 32.

iii. *The harm is a result of a crime charged*

21. As concerns the third requirement, the Chamber considers that, as stated by the Appeals Chamber, a confirmation decision 'defines the parameters of the charges at trial.'<sup>17</sup>
22. The link between the commission of the crime and the harm suffered by the applicant shall be assessed in light of the information available and established on a *prima facie* basis. The Chamber finds it sufficient that an applicant demonstrates, for example, that the alleged crimes could have objectively contributed to the harm suffered. Accordingly, the crimes charged do not have to be the only cause of the harm suffered by the applicant.<sup>18</sup>

## 2) Organisations or institutions

23. Organisations or institutions seeking to be admitted as participating victims must demonstrate that they are victims within the meaning of Rule 85(b) of the Rules, namely that they sustained 'direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes'. In order to qualify as victims in the present case, an organisation will have to establish, *prima facie*, the following criteria:

- i) Its quality of organisation/institution must be established;
- ii) The individual acting on behalf of the organisation/institution must demonstrate his or her capacity to represent the organisation;
- iii) The individual acting on behalf of the organisation/institution must establish his or her identity;
- iv) The organisation/institution has suffered direct harm; and
- v) The harm suffered is as a result of an incident falling within the parameters of the confirmed charges.

<sup>17</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 124.

<sup>18</sup> Gbagbo Victim Decision, ICC-02/11-01/11-800, para. 36 and footnote contained therein.



*i. Quality of organisation/institution*

24. The Chamber will consider any document as evidence of the establishment, creation or registration of the organization/institution.

*ii. Individual acting on behalf of the organisation/institution*

25. The individual acting on behalf of the organisation/institution must provide information on his capacity to do so.<sup>19</sup> His or her identity must also be established in accordance with the criteria set out above for individual applicants.<sup>20</sup> Should the person acting on behalf of the organisation/institution also wish to apply as an individual victim, he or she must also fill in a separate form for individual applicants.

*iii. Direct harm suffered as a result of a crime charged*

26. Pursuant to Rule 85(b) of the Rules, the Chamber will only accept applications emanating from organisations/institutions which properties have sustained direct harm.

**B. Determination of the Chamber on the Applications**

27. The Chamber will now turn to the ruling on the individual applications. The arguments raised by the parties in their observations are addressed in the course of the analysis.

28. As a preliminary matter, the Chamber notes that the three applicants filled in the application form for organisations. The Chamber notes that the applications are incomplete if they were to be assessed as organisations, as no proof is provided that the buildings mentioned are organisations/institutions

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<sup>19</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, First Decision on Victims' Participation in the Case, 30 March 2011, ICC-04/09-02/11-23, para. 10 and footnotes contained therein.

<sup>20</sup> See above, paragraphs 18-19.

within the meaning of Rule 85(b) of the Rules and that the individuals submitting the applications have capacity to represent the organisations/institutions. However, the Chamber considers that the content of the Applications, in particular the description of the harm suffered and of the reparation sought,<sup>21</sup> shows that the applicants intended to apply as individuals rather than as acting on behalf of an organisation/institution. In light of this, the Chamber will assess the Applications in light of the criteria set in Rule 85(a) of the Rules. This is without prejudice of the applicants resubmitting a participation form as individuals acting on behalf of the organisations/institutions mentioned in their respective applications.

29. The Chamber is satisfied that the individual applicants – whose names appear at point 7 of their respective application forms – provided a document establishing their identity.<sup>22</sup>
30. The three applicants indicate that they are “[REDACTED]” of respectively the [REDACTED], the [REDACTED] and the [REDACTED] (“Buildings”). Applicants a/35000/16 and a/35001/16 indicate that they are also a [REDACTED] and [REDACTED], respectively. The Chamber notes that the destruction of the mentioned Buildings in the Applications has been confirmed in the Confirmation Decision.<sup>23</sup>
31. With regard to the temporal scope of the events described in the Applications, the Chamber notes that the applicants indicate that they took place in 2012 without further precision. However, in light of the description provided by the applicants in point 17 of the applications and of the location of the alleged destructions, the Chamber is satisfied that the events described in the

<sup>21</sup> Points 22 and 26 of the application forms.

<sup>22</sup> The Applications are submitted together with an ID.

<sup>23</sup> Confirmation Decision ICC-01/12-01/15-84-Red, para. 23 of disposition.

Applications correspond to an incident confirmed in the Confirmation Decision.

32. The applicants all report having suffered material harm as a result of the destruction of the Buildings, [REDACTED]. The Chamber does not find that the absence of a specific timeframe in which the applicants suffered material harm warrants rejecting the Applications. The Chamber further notes that the description of the events provided by a/35000/16 and a/35001/16 in point 17 and by a/35002/16 in point 22 of their respective applications appear to show that the applicants have also suffered moral harm as a result of the destruction of the Buildings.
33. The Chamber also notes that all three applicants sign their applications, certifying that all the information contained in the applications is accurate to the extent of their knowledge. There is no information in the record contradicting these certifications, and the applications all appear to have been prepared in consultation with a lawyer.
34. In light of the above, the Chamber considers that the applicants have suffered personal economic and moral harm as a result of the events that come within the parameters of the charges confirmed against Mr Al Mahdi, namely the destruction of the Buildings in July 2012.<sup>24</sup> Accordingly, the Chamber admits them to participate in the present proceedings.
35. For future applications, the Chamber stresses that it expects the appointed common legal representative and the Registry to ensure that applications are presented in the most accurate and complete possible manner, using the correct form. Supporting materials should be provided whenever possible,

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<sup>24</sup> Confirmation Decision ICC-01/12-01/15-84-Red, para. 23 of disposition.

particularly in order to establish that the harm suffered is a result of a crime charged.

#### IV. Common legal representation of victims

36. Pursuant to Rule 90(1) of the Rules, '[a] victim shall be free to choose a legal representative'. However, the Chamber is of the view that the remainder of Rule 90 of the Rules makes it clear that this right is not absolute and that, 'where there are a number of victims' and 'for the purposes of ensuring the effectiveness of the proceedings', a legal representative can be chosen by the Court, taking into consideration the distinct interests of the victims and avoiding any conflict of interest.<sup>25</sup>

37. The Chamber notes that the three applicants appear to have designated Mr Magombo Kassongo as the Counsel of their choice. The Chamber further observes that in its report, while declining to make any specific recommendation, the Registry indicated that the lawyer who the applicants appear to have designated is currently on the Court's List of Counsel and immediately available.<sup>26</sup> The Registry further indicates that it is in the process of verifying the consent of the victims to Mr Kassongo representing them but that, lacking any contradictory information, it has no reason to question it at that stage.<sup>27</sup>

38. For these reasons, the Chamber decides that Mr Kassongo shall represent all victims admitted to participate in the present proceedings. In light of the nature of the charges confirmed, the Chamber does not consider it necessary to

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<sup>25</sup> See also Regulation 80 of the Regulations of the Court.

<sup>26</sup> Annex C to Registry Report, ICC-01/12-01/15-96-Conf-AnxC, paras 10-11.

<sup>27</sup> Annex C to Registry Report, ICC-01/12-01/15-96-Conf-AnxC, para. 11.

appoint more than one legal representative.<sup>28</sup> Accordingly, unless compelling reasons are shown, any victim subsequently admitted to participate in the case shall be represented by Mr Kassongo.

39. Finally, in accordance with Regulation 81(4)(a) of the Regulations of the Court, if so requested, the Office of Public Counsel for Victims should provide general support and assistance to the LRV.

40. The LRV shall have the general right to: (i) consult the record of the case; (ii) attend all public and non-public hearings in the case; and (iii) make written submissions to the Chamber, and the right to response as provided for in Regulation 24(2) of the Regulations.

41. As for the extent to which the LRV may discuss confidential information in the case record with his clients, the Chamber fully endorses the approach taken by Pre-Trial Chamber II in the case of *The Prosecutor v. Dominic Ongwen*, namely that the LRV is permitted to communicate confidential information to his clients when necessary, provided that he acts prudently and takes measures not to cause prejudice to the reasons warranting confidentiality of certain information. Accordingly, the LRV should not disseminate physical or electronic copies of confidential documents but rather inform his clients orally and inform them of the confidential nature of the information communicated. Further, the LRV shall maintain a log of disclosure of confidential information to his clients.<sup>29</sup>

42. As for consulting the case record, this extends to decisions of the Chamber, submissions of the parties, participants and the Registry, transcripts and

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<sup>28</sup> This determination is made in awareness that the Office of Public Counsel for Victims also claims to represent one additional applicant whose application is not currently before the Chamber. Annex C to Registry Report, ICC-01/12-01/15-96-Conf-AnxC, para. 14.

<sup>29</sup> Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November 2015, ICC-02/04-01/15-350, para. 31.

evidence disclosed by the parties and communicated to the Chamber, and shall receive notification of documents filed. This right shall extend to public as well as confidential documents or evidence in the record of the case. Notification of documents or access to evidence communicated to the Chamber shall only be withheld from the LRV if there are specific reasons warranting this measure. Documents filed in the record of the case which cannot be notified to the LRV must be marked 'confidential, *ex parte* Prosecutor and Defence' or more restrictively if appropriate. The mark 'confidential' shall in general include the LRV.

43. To this end, the Chamber considers it necessary to order the parties and the Registry to review their confidential filings already in the record of the case and identify those for which there are specific reasons why they cannot be notified to the LRV. The parties shall also review the evidence that they have thus far communicated to the Chamber. This review must be conducted within 10 days of notification of the present decision. Any documents or evidence will then be notified to the LRV, subject to any objections being raised. The LRV shall in any case immediately be provided with access to the applications of their clients.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**DIRECTS** the Registry to transmit the applications in accordance with paragraphs 10-13 above, on a rolling basis, and no later than 25 July 2016;

**DIRECTS** the parties to file their observations, if any, on the applications transmitted, within seven days of transmission, in accordance with paragraph 13 above;

**ADMITS** a/35000/16, a/35001/16, and a/35002/16 to participate in the proceedings as individual victims and without prejudice of submission of a new application as representative of organisations;

**DIRECTS** the Prosecution to file a confidential redacted version and a public redacted version of its observations within 10 days of notification of this decision;

**DIRECTS** the Registry to file public redacted versions of the Applications within 10 days of notification of this decision;

**APPOINTS** Mr Magombo Kassongo as the Legal Representative of Victims admitted to participate in the case; and

**DIRECTS** the Registry to give Mr Magombo Kassongo immediate access to public filings in the case record and to confidential filings in accordance with paragraph 43 of the present decision.

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



**Judge Raul C. Pangalangan, Presiding Judge**



**Judge Antoine Kesia-Mbe Mindua**



**Judge Bertram Schmitt**

Dated 8 June 2016

At The Hague, The Netherlands