

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 8 August 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 redacted version of**

**'Decision on Defence's Request for Postponement of Trial Commencement',  
8 August 2016**

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

**The Office of the Prosecutor**

Fatou Bensouda  
James Stewart  
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**Counsel for the Defence**

Mohamed Aouini  
Jean-Louis Gilissen

**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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**Registrar**

Herman von Hebel

**Counsel Support Section**

Esteban Peralta Losilla

**Victims and Witnesses Unit**

Nigell Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Judge Raul C. Pangalangan**, acting as Single Judge on behalf of Trial Chamber VIII ('Single Judge') of the International Criminal Court ('Court') issues the following 'Decision on Defence's Request for Postponement of Trial Commencement', in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* ('Al Mahdi case'), having regard to Articles 64(2) and 67 of the Rome Statute ('Statute') and Regulation 35 of the Regulations of the Court of the Regulation.

## **I. Background and Submissions**

1. On 25 July 2016, by way of email, the defence team for Mr Al Mahdi ('Defence') made what appeared to be requests for the post-deadline addition of witnesses, post-deadline addition of witness statement summaries and the postponement of the trial.<sup>1</sup>
2. On 27 July 2016, in light of the nature of the requests contained in the Defence's email, the Single Judge ordered the Defence to submit them by 29 July 2016 by way of a formal filing, containing: (i) summaries of the anticipated testimony for both witnesses; (ii) the estimated length of their testimony and, if the Chamber ultimately decides the testimony of these witnesses must be received in written form, (iii) the estimated time by which the Defence could provide written witness statements in a working language of the Court. The Single Judge further instructed the Office of the Prosecutor ('Prosecution'), the Legal Representative of Victims ('LRV') and the Victims and Witnesses Section ('VWS') to respond to the formal filing by 3 August 2016. Specifically, he instructed the Prosecution to indicate whether it contests any of the points in the anticipated testimony summaries.<sup>2</sup>
3. On 29 July 2016, the Defence filed its requests formally. The Defence seeks (i) an extension of the 1 July 2016 deadline to file its list of witnesses, its list of

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<sup>1</sup> Email from Defence to Chamber on 25 July at 19:48.

<sup>2</sup> Email from Chamber to parties and participants on 27 July 2016.

evidence and the summaries of the witness' statements until 19 August 2016; and (ii) and the postponement of the commencement date of trial, initially scheduled to start on 22 August 2016, to 5 September 2016 at the earliest ('Request').<sup>3</sup> The Defence indicates that it has identified two potential character witnesses whose testimony will be of relevance for the determination of the appropriate sentencing but that due to various security and logistical issues, it is not in a position to meet with them sufficiently in advance of the trial to secure their timely appearance at trial.<sup>4</sup> The Defence further submits that should the Chamber be willing to admit their statements in written form, a second mission will be necessary so as to make sure that the statements will not be found inadmissible.<sup>5</sup>

4. On 1 August 2016, the Legal Representative of Victims ('LRV') indicated that it does not oppose the Request.<sup>6</sup>
5. On 2 August 2016, the Defence sent an email to the Chamber and the Registry underlining further security and logistical issues and requesting: (i) authorisation to assist the witnesses financially in the administrative steps [REDACTED] and to get reimbursement from the Counsel Support Section *a posteriori* ('Payment Request'); (ii) that 'the Chamber will bear with Defence the delay that is foreseeable in the fulfilment of the mission, which seems no longer possible in the period of 10-16 August 2016 but slightly later...'; and (iii) any other form of guidance to facilitate the interview of the witnesses (altogether 'Further Request').<sup>7</sup>

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<sup>3</sup> *Requête urgente de la Défense aux fins de prorogation de délai et de report du début du procès*, ICC-01/12-01/15-134-Conf-Exp. Upon instruction of the Chamber sent by way of email on 29 July 2016 at 14:35, the Defence filed a Confidential redacted version, available to the Legal Representative of Victims (ICC-01/12-01/15-137-Conf-Red, also filed on 29 July 2016).

<sup>4</sup> Request, ICC-01/12-01/15147-Conr-Red, paras 13-28.

<sup>5</sup> Request, ICC-01/12-01/15147-Conr-Red, para. 30.

<sup>6</sup> Email from LRV to Chamber on 1 August 2016 at 12 :31.

<sup>7</sup> Email from Defence to Chamber and Registry on 2 August 2016 at 16:03.

6. On 3 August 2016, the Single Judge instructed the Registry to submit observations on the Payment Request.<sup>8</sup>
7. On 3 August 2016, the Office of the Prosecutor ('Prosecution') responded to the Request ('Response').<sup>9</sup> The Prosecution indicates that it is not in a position yet to specify whether it contests certain aspects of the expected testimony.<sup>10</sup> It further submits that it does not oppose the Defence's request for extension of deadline until 19 August 2016 for disclosure of the list of witnesses, list of evidence and witnesses' statements summaries.<sup>11</sup> However, the Prosecution requests that the trial commencement date be maintained even if an adjournment is necessary after the appearance of the Prosecution witnesses.<sup>12</sup>
8. Also on 3 August 2016, the Registry filed its observations on the Request ('Registry Observations'), indicating that the arrangements for the appearance of the two potential witnesses either in person or by way of video-link were unlikely to be made prior to the start of trial.<sup>13</sup> Further, in relation to the Payment Request, the Registry indicates that it is willing to financially assist the witnesses in [REDACTED] once a cost estimate has been received.<sup>14</sup>

## II. Analysis

9. The Single Judge first notes that the Defence does not provide specific information demonstrating why postponing the trial until 5 September 2016 at the earliest would guarantee that the two potential character witnesses would be in a position to appear at trial.

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<sup>8</sup> Email from Chamber to Defence and Registry on 3 August 2016 at 11:40.

<sup>9</sup> *Observations du Procureur sur la "Requête urgente de la Défense aux fins de prorogation de délai et de report du début du procès"*, ICC-01/12-01/15-150-Conf.

<sup>10</sup> Response, ICC-01/12-01/15-150-Conf, paras 16-18. See also para. 19.

<sup>11</sup> Response, ICC-01/12-01/15-150-Conf, para. 6.

<sup>12</sup> Response, ICC-01/12-01/15-150-Conf, paras 7-15.

<sup>13</sup> Registry Observations, ICC-01/12-01/15-151-Conf, paras 4-11.

<sup>14</sup> Registry Observations, ICC-01/12-01/15-151-Conf, para. 3. See also, email from Registry to Defence on 8 August 2016 at 14:25.

10. The Single Judge emphasises that the deadline for the Defence to secure the testimony of its witnesses was 1 July 2016. The Defence previously requested to postpone this deadline to 1 August, and this request was rejected on grounds that '[e]ven if [the Defence could identify prospective witnesses] by 1 August 2016, the Registry would then be put under considerable strain to make all the necessary logistical arrangements for these persons prior to the 22 August 2016 trial commencement'.<sup>15</sup> The Defence and Registry's latest submissions fail to show any improvement in this regard. On the contrary, the information provided in the Further Request tends to indicate that the logistical difficulties appear more problematic to overcome than expected and that a postponement until 5 September 2016 may not be sufficient to secure the appearance of the witnesses. Indeed, the Single Judge notes that the mission has not been rescheduled yet and that logistical constraints may not be overcome in the near future.
11. The right of the Defence to have witnesses testify *viva voce* is not absolute. The Chamber has set deadlines for the conduct of this trial in accordance with its obligations to ensure the fair and expeditious conduct of the proceedings. Accepting the Defence's arguments means to wait on a speculative hope that these witnesses may be available to testify in the near future. This is tantamount to accepting an indefinite postponement of the trial, and the Single Judge cannot accept such a course in conformity with the Chamber's obligations under Article 64(2) of the Statute.
12. Furthermore, the Single Judge notes that the two potential witnesses the Defence seeks to call are character witnesses whose testimony will relate to the appropriate sentence to be imposed. The Single Judge also observes that

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<sup>15</sup> Decision on Requests for Extension of 1 July 2016 Deadline, 7 July 2016, ICC-01/12-01/15-126, para. 4.

[REDACTED].<sup>16</sup> Without prejudice to how the Chamber will evaluate any particular sentencing consideration, the testimony of character witnesses does not appear to be a highly contested issue in the Chamber's determination of the appropriate sentencing.

13. The trial commencement date was set more than two months ago, on 1 June 2016. In setting the commencement date, the Chamber considered that starting on 22 August 2016 would 'ensure that the parties have a reasonable opportunity to secure the testimony of their witnesses'.<sup>17</sup> Indeed, all Prosecution witnesses have made themselves available and are ready to appear in the week of 22 August 2016.
14. In light of the above, the Single Judge finds that the Defence's right to present witnesses is outweighed by countervailing considerations.
15. However, the Single Judge is mindful of the right of the accused to present evidence in relation to the sentencing. Accordingly, the Single Judge is willing to entertain a request to introduce the two witnesses' statements in writing even after the completion of the trial.<sup>18</sup>
16. With regard to the Payment Request, the Single Judge appreciates that the Defence may incur routine expenses to arrange for the witnesses to be interviewed or to testify and considers that it is for the Defence and Registry to work out all appropriate arrangements in the present circumstances.

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<sup>16</sup> [REDACTED], ICC-01/12-01/15-139-Conf, para. 67.

<sup>17</sup> Decision Setting the Commencement Date of the Trial, 1 June 2016, ICC-01/12-01/15-93.

<sup>18</sup> In relation to the Defence's submission that two missions may be necessary to not run the risk that the Chamber declares the statements inadmissible (Request, ICC-01/12-01/15-147-Conf, para. 30), the Chamber invites the Defence to seek the assistance of the Registry to ensure that one mission will prove sufficient. Further, the Chamber notes that the formal record of questioning requirements in Rule 111 and Rule 112 of the Rules do not apply to the Defence.

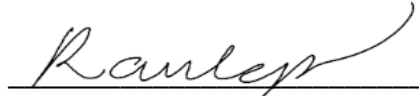
**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Request;

**REJECTS** the Further Request; and

**DIRECTS** the parties and the Registry to file public redacted versions of their respective observations as soon as practicable.

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

A handwritten signature in cursive script, appearing to read 'Raul C. Pangalangan', is written above a solid horizontal line.

**Judge Raul C. Pangalangan, Single Judge**

Dated 8 August 2016

At The Hague, The Netherlands