

Negotiated Justice in the ICC: Following the Al Mahdi case, a Proposal to Enforce the Rights of the Accused

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By: Giovanni Chiarini

1. INTRODUCTION: THE EXISTING LAW AND THE AL MAHDI JUDGMENT

The International Criminal Court (ICC), with the case of Mr Ahmad Al Faqi Al Mahdi ("Al Mahdi case"), faced negotiated justice for the first time in its history. In this article I will be proposing amendments to the Rome Statute ("Statute"), to the Rules of Procedure and Evidence ("Rules") and to the Regulations of the Court ("Regulations"). This proposal is based on the issues arising out of the Al Mahdi

Judgment.

Al Mahdi was convicted by the Trial Chamber of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute and was given a nine-year prison sentence in judgment ICC-01/12-01/15 dated September 2016. Al Mahdi had pleaded guilty before the trial by signing the 'Agreement regarding the confirmation of the charge and admission of guilt' ("Agreement"). Nonetheless, the Trial Chamber decided to hold a three-day hearing on 22-24 August 2016 for cross-examination of the witnesses and the evaluation of the evidence.

2. A HISTORICAL ACCOUNT: THE ORIGINS OF THE PROCEEDINGS WITH AN ADMISSION OF GUILT

The proceedings with an admission of guilt in the ICC was the result of a long debate eventually resulting in what is now article 65 of the Rome Statute.

The 1994 *International Law Commission Draft Statute* (p. 54) provided that the Trial Chamber, at the commencement of the trial, could allow the accused "to enter a plea of guilty or not guilty". Contrary to this draft, the *Ad Hoc Committee* (para. 169-170) observed that this provision "was not explicit enough on procedures and that more details should be provided". Moreover, it was claimed that the notion of "plea of guilty or not guilty" gave rise to criticism. This declaration would need to be "spelled out in view of the differences between civil-law and common-law systems". Furthermore, considering the gravity of the crimes within the jurisdiction of the Court, plea bargaining "would be inappropriate".

In 1996, the *Preparatory Committee* (vol. I, para 263) suggested the introduction of an "abbreviated proceeding" with the purpose of hearing a summary of the evidence presented by the prosecution as the accused must fully understand the nature and consequences of admission of guilt, whether made voluntarily or not. The Court would then decide either to conduct an expedited proceeding or to proceed with the full trial. Moreover, "attention was drawn to the need to bridge the gap between different legal systems (...), with emphasis being placed on finding the common denominators in different legal systems". As a result, with this proposal, the Committee allowed the idea of negotiated justice, but at the same time highlighted the necessity to have judicial approval by the Court.

In the *Argentine Working Paper* (p. 8, note on Rule 74), distributed on 13 August 1996, it was highlighted that a "guilty plea" is not a device that is accepted by legal systems based on the European-Continental model and a summary procedure could be considered an "intermediate solution". The follow-up *proposal submitted by Argentina and Canada* (p. 1-2) on 20 August 1996 introduced Article 38bis entitled "Abbreviated proceedings on an admission of guilt". It was observed that "This proposal intended to serve as an intermediate solution that blended traditional common and civil law concepts".

The final decision was taken on 14 August 1997 by the *Preparatory Committee* (p. 32-33), based on the Argentina-Canada proposal. A paragraph 5 was added, which provides that discussions between the Prosecutor and the defence regarding a modification of the charges in the indictment, the

acceptance of the admission of guilt by the accused, or the penalty to be imposed should not be legally binding on the Court. As observed in the judgment (para. 25), this paragraph was introduced to ease the concerns of those delegations which wanted to ensure that the admission of guilt procedures did not open the way to the introduction of plea bargaining. The final Article 65 of the Rome Statute is substantially Article 38bis.

3. ARTICLE 65 IN PRACTICE: THE DECISION TO HOLD A HEARING NOTWITHSTANDING THE AGREEMENT BETWEEN AL MAHDI AND THE PROSECUTOR

The agreement between Al Mahdi and the Prosecutor is the first case of proceedings in the history of the ICC using article 65. In “exchange’” for Al Mahdi's admission of guilt, the Prosecutor agreed to a nine-to-eleven year sentence range, and recommended that Al Mahdi be given credit for the time served in the custody of the Court. Regarding the determination of the sentence, he was warned that the Trial Chamber would be take into consideration the gravity of the crime and the individual circumstances of the convicted person, in addition to mitigating or aggravating circumstances, as provided in article 78 of the Statute and Rule 145. As well, Al Mahdi was told about the penalties, as provided by article 77 of the Statute, including the possibility of a fine as provided in rule 146 of the Rules, as well as a forfeiture of proceeds, property, and assets derived directly or indirectly from the crime of conviction. As noted earlier, the agreement was not binding on the Court, and the parties maintained the right of appeal if the sentence is outside the range. The agreement does not in any way limit the parties’ ability to offer admissible evidence or make submissions to the Trial Chamber regarding the determination of an appropriate sentence, as long as such evidence and submissions are not inconsistent with the agreement.

After the agreement was signed, the decision of the conformation of the charges was taken by Pre-Trial Chamber I on 1 March 2016. The decision constituting Trial Chamber VIII was taken by the Presidency on 02 May 2016. The trial was held on 22-24 August 2016. The evidence presented by the prosecutor was analyzed and the witnesses were examined and cross-examined. Finally, the parties presented their final arguments, mainly in respect to the sentence criteria, and the Court set the date for the judgment for September 27. The Chamber convicted Al Mahdi of the war crime of attacking protected objects as a co-perpretator under articles 8(2)(e)(iv) and 25(3)(a) of the Statute and sentenced him to nine years of imprisonment. The Chamber was satisfied that the accused understood the nature and consequences of the admission of guilt and that the admission was voluntarily made after sufficient consultation with Defence counsel and also that the admission of guilt was supported beyond a reasonable doubt by the facts of the case (trial, paras 42-44).

The determination of the relatively short sentence was justified because the Chamber had found no aggravating circumstances but five mitigating circumstances, namely: (i) the admission of guilt; (ii) the cooperation with the Prosecution; (iii) the remorse and the empathy he expressed for the victims; (iv) his initial reluctance to commit the crime and the steps he took to limit the damage caused; (v) his good behaviour in detention (judgment, para. 109-110). The Court also found that imprisonment was a

sufficient penalty and decided not to issue a fine or order of forfeiture. Moreover, pursuant to Article 78(2) of the Statute, the convicted person was entitled to have a reduction of sentence for the time spent in detention since his arrest pursuant to the warrant of arrest issued on 18 September 2015. A reparation order was issued by the same Chamber on 17 August 2017, concluding that Al Mahdi was liable to 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu. (for an analysis, see here)

4. A "THIRD AVENUE" BETWEEN COMMON LAW AND CIVIL LAW:

In the judgment the Court expressly said that the solution reflected in article 65 of the Statute follows a "*third avenue*" between the traditional common law and civil law approaches. Not dissimilar to the traditional common law "guilty plea" is the opportunity for the accused to make an admission of guilt at the commencement of the trial; analogous to civil law systems it is required that the admission is "supported by the facts of the case", specifically requiring it to consider the admission of guilt "together with any additional evidence presented" (judgment, paras 27-28). Indeed, "unlike civil law systems, which conceive criminal proceedings as a search for truth, common law systems conceptualize criminal law as an adversarial dispute be-tween the prosecutor, representing the state, and the defendant." (Kyle McCleery, *Guilty Pleas and Plea Bargaining at the Ad Hoc Tribunals. Lessons from Civil Law Systems*. Journal of International Criminal Justice 14 (2016), 1099–1120, p. 1110).

Let us consider why the Court decided to hold a trial. Considering the silence of article 65, the Court could have decided to issue the Judgment without the hearings and the examination of the witnesses and to use the evidence that the Prosecutor had presented to the Pre-Trial Chamber. Moreover, Pre-Trial Chamber had confirmed the charges, thus eliminating the doubt about possible groundlessness of the accusations. Why was it necessary to have a process similar to an ordinary trial? In my opinion, we could find the underlying reason in the justification of the "third avenue" of the proceedings on an admission of guilt in the Statute. The Preamble to the Statute says, among other things: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished' and "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". This can be compared with similar ethicical consideration in other international criminal institutions. With reference to the Ad Hoc Tribunals, for example, Antonio Cassese said that the work of the ICTY was an "*extraordinary exercise in international morality*". Other authors generally declared that international criminal trials "*should be seen as transformative structures whose primary function is to provide the means of reconciling the ideology and the morality of punishment for victims and post-conflict societies* " (Ralph Henham, The Ethics Of Plea Bargaining In International Criminal Trials, Liverpool Law Review 26 (2005), 209–224, p. 210), and "*international criminal procedure also has an important and often overlooked intrinsic value not reducible to its instrumental value: it vindicates the Rule of Law*" (Jens David Ohlin, A Meta-Theory Of International Criminal Procedure: Vindicating The Rule Of Law, UCLA Journal of International Law and Foreign Affairs 14 (2009), 77–120, p. 77). Fausto Pocar wisely highlighted that "written evidence only supplements viva voce evidence" (Fausto Pocar, *Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?* in Janet Walker –

Oscar G. Chase (eds), *Common Law, Civil Law and the Future of Categories*, Markham, Ontario: Lexis Nexis, 2010, p. 450).

This is why it is not possible to accept a model of negotiated justice totally left to the parties. Judges need to have the power to refuse the proposed agreement as well as to accept it after carrying hearings in the presence of the victims, because "*a legal system is much more than a set of procedures for determining guilt and deciding on sentences. It is tied to important cultural, historical, and political values" (William T. Pizzi Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, Ohio State Law Journal 54 (1993), 1325–1373, p. 1373). Other authors emphasize "the rule-of-law impact and normative symbolism" of the international criminal trials, and they said that "public and oral trial debates on evidence are crucial to the enterprise of adjudication of international crimes" (Sergey Vasiliev, International criminal trials: A normative theory, PhD thesis, University of Amsterdam, April 25, 2014, p. 884). In this context "guilty pleas and plea agreements as lacking in moral legitimacy*" (Ralph Henham, above, p. 210). Also in this context, it is significant that in a dissenting opinion the ICTY Judge Wolfgang Schomburg compared charge bargains to 'd*e facto granting partial amnesty/impunity by the Prosecutor, particularly not in an institution established to avoid impunity*' (dissenting opinion, case IT-02-61-S, para. 11).

The proceedings set out in article 65, as interpreted and applied by the Trial Chamber VIII in the *Al Mahdi case*, could be a third suitable avenue for the ICC, far from national "*procedural chauvinism*" (Sergey Vasiliev, *The Structure and Management of International Criminal Trials*, Guest Lecture, ICC Office of the Prosecutor, 26 March 2015, p. 8). Indeed, on one hand, the need for speedy proceedings is safeguarded; on the other hand, an abbreviated trial prevents the agreement from becoming a pure bargain between prosecution and defense, and "*rejects a party-driven model of negotiated justice*" (Jenia I. Turner, Article 65, *Commentary on the law of International Criminal Court (TOAEP, M. Klamberg, eds.)* p. 480). This is not an unusual approach, as indicated by one author who said: "*the architects of the international criminal process would be well advised to follow the motto: as many trials as possible, as much bargaining as necessary" (Mirjan Damaška, Negotiated Justice in International Criminal Courts*, Journal of International Criminal Justice 2 (2004), 1018–1039, p. 1039).

What emerges from this case is that the 'third avenue' is not only a path between common law and civil law, but, on a much larger scale, an emancipation based on the intrinsic ethical imperative of international criminal justice.

5. CONCLUSION: THE "REASONABLE TIME" REQUIREMENT, A PROPOSAL TO ENFORCE THE RIGHTS OF THE ACCUSED

After the *Al Mahdi case*, in November 2020 the OTP published the Guidelines for agreement regarding admission of guilt. In my view, these guidelines are insufficient to clarify the complicated mechanism of this procedure. Therefore, the following proposed amendments to the Rome Statute, to the Rules of Procedure and Evidence and to the Regulations of the Court would clarify the process set out in article

65.
These amendments would:
1) Clarify the powers of the Court with respect to the guarantee of the accused.
2) Highlight abbreviated nature of negotiated justice.
3) Enforce the rights of the accused to know about the length of the proceedings under article 65.
This proposal should be made with the addition of six interconnected amendments:
A) An insertion of a paragraph 2 bis into article 65, namely: *"In order to establish all the essential facts that are required to prove the crime to which the admission of guilt relates, as set out in paragraph 2, the Court may hold a hearing, as long as these are limited to a reasonable time, considering abbreviated nature of the proceedings regarding an admission of guilt*."
B) An additional paragraph 11bis to article 61, namely: "*Once the charges have been confirmed in accordance with this article, and in case the accused has decided together with the Prosecutor to proceed with article 65, the Presidency – after having constituted a Trial Chamber in accordance to paragraph 11 – shall decide the number of hearings in accordance with the reasonable time requirements as set out in paragraph 2 bis of article 65 of this Statute."*
C) An additional paragraph 2 to Rule 139 of the Rules of Procedure and Evidence: "*The Trial Chamber shall respect the number of hearings decided by the Presidency under paragraph 11bis of article 61 of the Statute*."
D) An amendment of Regulation 54 to the Regulations of the Court, with an additional paragraph 2: "*the decision on the number of the hearings in case of proceedings on an admission of guilt under article 65 of the Statute shall not be discussed in the Status conferences before the Trial Chamber*."
E) An additional paragraph 4 bis to article 65: "*When the Trial Chamber, at the conclusion of the hearings under paragraph 11 bis of article 61, is not satisfied that the matters referred to in paragraph 1 of this article are established, it shall order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and shall remit the case to another Trial Chamber*".
F) Finally, an amendment to a rticle 67, inserting a subparagraph (l) in paragraph 1: "*If the accused has pleaded guilty and decided to proceed under article 65 of this Statute, he has the right to be informed about the numbers of the hearings, according to paragraph 11 bis of article 61 and with respect to the principle of reasonable time*".
These amendments will dispel the doubts of accused who want to make an admission of guilt. The accused are now informed that – even though the guilt is being admitted and the sentence is being agreed with the Prosecutor – a trial chamber may decide to hold hearing but within a reasonable time.

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