



Original: **French**

No.: **ICC-01/12-01/15**
Date: **20 October 2017**

THE APPEALS CHAMBER

Before: Judge Silvia Fernández de Gurmendi
Judge Sanji Mmasenono Monageng
Judge Christine Van den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
THE PROSECUTOR *v.* AHMAD AL FAQI AL MAHDI**

**Public redacted version of the corrected NOTICE OF APPEAL
“*In part and limited*”
against the Reparations Order of 17 August 2017 (paragraphs 81, 83 and 146)
pursuant to Appeals Chamber Order ICC-01/12-01/15-240-Conf, paragraphs,
with Redacted Annexes 1-5, of 6 October 2017, ICC-01/12-01/15-242-Conf-Exp-Corr**

Source: Legal Representative of Victims, Mr Mayombo Kassongo

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

Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims
Mr Mayombo Kassongo

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**Office of Public Counsel for the
Defence**

Amicus Curiae

REGISTRY

I. **1. PROCEDURAL HISTORY**

- II. The Legal Representative submitted to the Appeals Chamber a notice of appeal “in part and limited” against the Order for Reparations of 17 August 2017. He filed a corrigendum to his notice of appeal (ICC-01/12-01/15-238-Conf-Corr-tENG) on 21 September 2017.
- III. The Appeals Chamber, seized of the matter since 18 September 2017 (ICC-01/12-01/15-236), ordered the Legal Representative to file an amended notice of appeal “in part and limited” by 6 October 2017 at 16.00.
- IV. On 17 August 2017, Trial Chamber VIII (“Chamber”) had ordered reparations for the harm alleged by the 139 victims in their reparations applications.
- V. Well before the Order of 17 August 2017, the Chamber had received from the Legal Representative all of the applications for reparations in his possession, accounting for a total of one hundred and thirty-nine (139) victims applying for reparations (“Applicants”).
- VI. In the light of the deadline set for the parties and participants,¹ the Legal Representative had to file all of the victims’ applications in his possession within that time, before any deliberations on the merits of reparations. These were the same applications submitted to the Victims and Witnesses Unit for redaction.²
- VII. The Legal Representative met with the Trust Fund for Victims (“Trust Fund”) to set a calendar for collaboration. Discussions during this working meeting addressed the question of criteria for the administrative screening of reparations applications for consequential economic loss, and, in particular, the definition of the link between the Protected Buildings

¹ Reparations Calendar, ICC-01/12-01/15-172.

² Minutes from meeting with the Victims and Witnesses Unit.

and the consequential economic losses for which individual reparations are claimed.³

VIII. After the Appeals Chamber ordered him to file an amended notice of appeal in compliance with regulation 57 of the Regulations of the Court, [REDACTED].

IX. The expert's input will be produced in an annex to the appeal brief, purely in the interests of supplementing the information from the victims of consequential economic loss.

X. **2. NOTICE OF APPEAL**

XI. The Legal Representative hereby files his Notice of Appeal, limited to paragraphs 81, 83 and 146, and in particular paragraph 81, which awards "*individual reparations for consequential economic loss only to those whose livelihoods exclusively depended upon the Protected Buildings*".

XII. Likewise, in paragraph 83, the Chamber emphasized the criterion of an "exclusive" link required between the consequential economic loss and the Protected Buildings, when it considered that "*the economic harm caused by Mr Al Mahdi necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings [...]*". The Legal Representative will show, by the submissions and grounds in his forthcoming appeal brief, that this criterion of exclusivity will be problematic for the Trust Fund in assessing whether that exclusive link exists between the consequential losses and the Protected Buildings.

XIII. In his appeal brief, the Legal Representative will also show that letting the Trust Fund determine the application of this exclusive link as a screening criterion jeopardizes the victims' right to individual reparations. In paragraph 146 of the Order for Reparations, the Chamber grants power

³ Minutes from meeting with the Trust Fund.

to the Trust Fund to apply a legal criterion, without giving it a definition, even though the Trust Fund cannot make judicial determinations. The Legal Representative will contest this “power of adjudication” vested in the Trust Fund to interpret the principle of administrative screening applied to applicants seeking individual reparations for consequential economic losses in connection with the Protected Buildings.

XIV. In his initial notice of appeal,⁴ the Legal Representative reminded the Chamber that the 30-day deadline had not passed. For this appeal “in part and limited”, the Legal Representative relies on article 82(4) of the Rome Statute and rule 150 – together with regulation 57 of the Regulations of the Court – under which it is possible to appeal against an order for reparations issued under article 75 of the Rome Statute.

XV. **3. APPEAL “IN PART AND LIMITED” WITHOUT SUSPENSIVE EFFECT**

XVI. The Legal Representative respectfully requests the Chamber not to grant suspensive effect to its appeal “in part and limited”, so that the reparations envisaged together with the Trust Fund can take their normal course.

XVII. It is not the Legal Representative’s intention to request that the appeal have suspensive effect, or to have such a request granted under article 82(3) of the Statute, as that could risk jeopardizing all of the measures set forth by Trial Chamber VIII in the Reparations Order.

XVIII. Granting suspensive effect to the present appeal would halt the proceedings under way and would risk frustrating all of the victims, whose interest it is to obtain reparations.

⁴ ICC-01/12-01/15-238-Conf-Corr-tENG.

XIX. The Legal Representative of Victims respectfully submits to the Appeals Chamber, not all of the principles and solutions adopted by Trial Chamber VIII, but only the principle of administrative screening or the screening criterion for victims applying for individual reparations for consequential economic harm, i.e. paragraphs 81, 83 and 146 of the Order. The Legal Representative intends to argue this appeal both on the facts – by presenting in his appeal brief the factual case for a “non-exclusive” link between the economic losses and the Protected Buildings, based on an independent expert assessment of the reality of the losses⁵ – and in law, by showing that the Trust Fund is at serious risk of violating the principle enshrined in article 75 of the Rome Statute, which is entitled “*Reparations to victims*”, and which specifies in paragraph 6 that “[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

XX. **FOUNDATION AND BASIS IN LAW**

XXI. On the basis of article 75(6) of the Statute, the application of paragraph 81 of the Order for Reparations and the sense to be given to the word “exclusive”, as regards the fund for reparations, run the risk of ultimately working against the interest of reparations. The Legal Representative rightly fears that the Trust Fund, to which the Chamber has entrusted the screening process, is ill-equipped for the difficult task of teasing out the consequential economic losses exclusively linked to the Protected Buildings from the rest of the economic losses other than those concerned. The point of article 75, however, is to enable participating victims to receive individual reparations.

⁵ [REDACTED].

XXII. Under regulation 57(e) of the amended Regulations of the Court,⁶ a notice of appeal must state “[t]he grounds of appeal, cumulatively or in the alternative, specifying the alleged errors and how they affect the appealed decision”. The Legal Representative therefore points to the error of law affecting the cited paragraphs (81, 83 and 146) in that their wording puts them at cross purposes with article 75 of the Statute, which is entitled “Reparations to victims”; in other words, the Order must not be worded or construed in a way that prejudices the victims’ rights.

XXIII. **GROUND OF APPEAL**

1. **“Exclusivity” is an inappropriate screening criterion**

XXIV. Taken at face value, the word “exclusively” admits of various interpretations, at the risk of running counter to the victims’ interests.⁷

XXV. In his forthcoming brief, the Legal Representative will provide details on the impugned portions of the Reparations Order, namely paragraphs 81, 83 and 146, concerning the criteria for the administrative screening of applicants seeking individual reparations for consequential economic loss.

XXVI. Article 75(6) of the Rome Statute, addressing reparations, provides that “[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law”.

XXVII. Paragraph 81 of the Order for Reparations contains the following wording: “The Chamber therefore considers that the economic harm caused by Mr Al Mahdi necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings”. The Chamber aims at a category that is to come, and one that already exists. It is the Saints’ descendants or great grandchildren who were financially dependent on

⁶ Regulations of the Court, as amended on 12 July 2017, officially in force since 20 July 2017.

⁷ See appeal brief.

the mausoleums, crafts, and trade indirectly related to the mausoleums who will be excluded and victimized anew.

- XXVIII. On the basis of article 75 of the Statute, according to which *reparations are to the benefit of victims*, the word “**exclusively**” must be defined to enable the Trust Fund to apply the criterion of an **exclusive link** between the economic and financial losses and the Protected Buildings. Otherwise, the screening process will prejudice any victims seeking individual reparations for consequential economic or financial losses. The provision in article 75(6) that “[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law” gives the victims’ interests pride of place in reparations.
- XXIX. The Legal Representative will submit a brief in support of this Appeal, and respectfully requests the Appeals Chamber to grant him the opportunity to argue the views and concerns of those victims due to undergo administrative screening by the Trust Fund in pursuance of the Order.
- XXX. An early-stage screening of financial losses in direct relation or closely linked to the mausoleums or Protected Buildings runs the risk of ultimately excluding families whose work relates to the buildings, descendants of the Saints and those who work informally for the proper functioning of the mausoleums.
- XXXI. [REDACTED].⁸ According to the record [REDACTED].

⁸ [REDACTED] (Annex 3).

2. Articles 59 and 60 of the Regulations of the Trust Fund for Victims (“RTFV”) regarding confidentiality under regulation 23 bis were clearly misapplied

- XXXII. The Legal Representative respectfully requests of the Chamber: that the desire for anonymity expressed in certain applications for reparations be upheld at the early stages of the process, with any redactions lifted later; and that it be possible to request consent from any victims having objected to the disclosure of their confidential information in the light of continuing insecurity in northern Mali.
- XXXIII. The justification for maintaining confidentiality is [REDACTED] measure of temporary confidentiality, except where victims consent to the disclosure of confidential information for reparations purposes.⁹
- XXXIV. [REDACTED] may take the form of return assistance, consent should be sought after the event for the disclosure of confidential information when the victims’ applications are communicated to the Trust Fund and potentially to the other participants.
- XXXV. Moreover, as the Legal Representative will show in his appeal brief, articles 59 and 60 of the RTFV do not create an obligation to reveal victims’ identities to the Defence.
- XXXVI. The Legal Representative will, however, produce a redacted version, given the high level of insecurity faced by the persons cited in the annexes who are not parties to the proceedings.
- XXXVII. **RELIEF SOUGHT WITH REGARD TO PARAGRAPH 81**
- XXXVIII. The “relief sought” by the Legal Representative under regulation 57(f) is the rewording of the sentence to remove the word “exclusively” or to

⁹ Report of the Secretary-General on the situation in Mali, 28 September 2017.

provide a clear definition of the link between the consequential economic losses and the Protected Buildings, taking into account the informal nature of the local economy.

XXXIX. **FOR THESE REASONS**, without prejudice,

XL. The Legal Representative of Victims respectfully requests the Chamber:

- (a) to reword the paragraphs at issue, namely paragraphs 81 and 83 of the Order for Reparations of 17 August 2017; or
- (b) to define or give guidance on the word "exclusively", enabling the Trust Fund to remain within its mandate and not to derive from paragraph 146 any power of adjudication; and
- (c) to grant initial measures of confidentiality pursuant to regulation 23 *bis* of the Regulations of the Court, which may later be lifted with the victims' consent for disclosure purposes.

Respectfully submitted,

[signed]

Legal Representative of Victims,
Mr Mayombo Kassongo

Dated this 20 October 2017

At The Hague, Netherlands