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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 Document

Response of the Legal Representative of Victims to the “Observations on the Appeal Brief of the Legal Representative for Victims” filed by the Trust Fund for Victims on 29 November 2017 (ICC-01/12-01/15-250)

Source: Legal Representative of Victims, Mr Mayombo Kassongo

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Trust Fund for Victims

I. PROCEDURAL HISTORY

1. Mr Ahmad Al Faqi Al Mahdi (“Mr Al Mahdi”) was found guilty by Trial Chamber VIII (“Chamber”) of the International Criminal Court (“Court”) of the war crime of attacking protected property, as stated under article 8(2)(e)(iv) of the Rome Statute (“Statute”).¹ Mr Al Mahdi pleaded guilty to the charge against him.²
2. On 27 September 2016, the Chamber found Mr Al Mahdi guilty of the alleged war crime as a co-perpetrator and sentenced him to nine years’ imprisonment.³ Neither Mr Al Mahdi nor the Office of the Prosecutor (“Prosecution”) appealed the judgment.
3. On 17 August 2017, having regard to article 75 of the Statute, the Chamber issued a Reparations Order⁴ in which it recognized – for the purpose of reparations – the victim status of 139 applicants and ordered individual, collective and symbolic reparations. It assessed Mr Al Mahdi’s liability for these reparations at EUR 2.7 million.
4. The Chamber encouraged the Trust Fund for Victims (“Trust Fund”) to complement the reparations award and provide broader assistance to victims.
5. The Chamber also instructed the Trust Fund to submit a draft implementation plan to be filed by 16 February 2018. The Chamber directed parties to file any observations on the plan within 30 days of its notification.

¹ This single charge was brought by the Office of the Prosecutor in the document laying out the charges (ICC-01/12-01/15-62) and was confirmed by the Pre-Trial Chamber following the confirmation of charges hearing (ICC-01/12-01/15-84-Red).

² ICC-01/12-01/15-T-4-Red-ENG.

³ ICC-01/12-01/15-171.

⁴ ICC-01/12-01/15-236, Reparations Order of 17 August 2017 (“Reparations Order”), issued having regard to article 75 of the Rome Statute.

6. On 18 September 2017, the Legal Representative submitted a notice of appeal in part against the Reparations Order of 17 August 2017, of which a corrected version was filed on 21 September 2017 (ICC-01/12-01/15-238-Conf-Corr-tENG).
7. In its order of 26 September 2017 (ICC-01/12-01/15-240-Conf), the Appeals Chamber instructed the Legal Representative to amend his initial Notice of Appeal of 18 September 2017 to comply with regulation 57 of the Regulations of the Court in its updated version.
8. On 6 October 2017, the Legal Representative submitted his Notice of Appeal “in part and limited” (ICC-01/12-01/15-242-Conf-Exp-Corr) 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.
9. On 29 November 2017, the Trust Fund filed its Observations on the Appeal Brief of the Legal Representative of Victims.⁵
10. Reiterating the arguments expounded in his Brief in Support of Appeal, the Legal Representative, wishes to supplement his arguments of law and of fact in the light of the Trust Fund’s observations presented in response to the Brief in Support of Appeal “in part and limited”.

⁵ ICC-01/12-01/15-250.

II. PRELIMINARY REMARKS

1. *Supplementary matters of fact*

11. In addition to the facts referred to in his Brief in Support of Appeal “in part and limited”, the Legal Representative wishes to inform the Appeals Chamber of his joint field mission with the Trust Fund to meet the victims.

2. *Input of other new facts*

12. The Legal Representative wishes to inform the Chamber that the victims the Trust Fund met are those who had been in contact with the Chamber during the Reparations Order phase. During the joint mission, the victims expressed their expectations regarding reparations, i.e. their right to reparations.

3. *Input of an independent expert*

13. During his trip to Mali, the Legal Representative solicited the expertise of a religious leader in charge of a Wahhabi mosque.⁶

14. From this meeting it emerged that the ideas of belonging, ties of filiation and proof according to Timbuktu tradition are not based on standard customary norms.

15. The Legal Representative requests the Appeals Chamber to consider this independent expertise on the question of economic loss in connection with the Protected Buildings and to rule out any exclusivity, as required under paragraphs 81, 83 and 146 of the Reparations Order; this remains the material competence of the reparations judge, who alone is in a position to confirm the right to reparations.

⁶ Three-hour interview held in Mali in December 2017.

III. AUTHORITY OF THE TRUST FUND FOR VICTIMS

(1) Role of the Trust Fund

16. The Legal Representative first notes that the Trust Fund has confirmed that it has no jurisdictional authority:

The Trust Fund recalls that its role in judicial proceedings is not to comment on issues that are for the parties. The Trust Fund further recalls that its role in judicial proceedings is to comment on issues pertaining to an interpretation of the Regulations of the Trust Fund for Victims (“RTFV”), or that have an impact on the implementation stage of reparations. Therefore, the Trust Fund will only make a brief submission on the grounds of appeal, given that it is an administrative organ of the Rome Statute through which the chamber may order the implementation of orders for reparation.⁷

17. The Trust Fund recognizes here that the only regulations it can interpret are its own and under no circumstances can it be considered to be a court of law.

18. A court of law may be defined as an organ that resolves a dispute with a binding decision (i.e. with the force of *res judicata*) by applying the law. In other words, a court is characterized by three elements (dispute, application of the law and binding nature).

19. The Trust Fund, however, does not have any of these characteristics: it merely submits to the Chamber a draft implementation plan for reparations. It does not apply any law and its plan is not binding, so long as it has not been approved by the Chamber.

20. The clue to the primary mission of the Trust Fund lies in the very fact it is called a fund.

21. The French dictionary *Le Robert* indicates that, by metonymy, the term “*fonds*” [French for “fund”] can refer to an “[TRANSLATION] organ in charge of making payments and managing funds allocated for specific expenditure”.

⁷ ICC-01/12-01/15-250, para. 6.

22. This is confirmed by the notion of the Trust Fund's reparations mandate, as laid out in the Rules of Procedure and Evidence (rule 98, paragraphs 1-4). The mandate consists primarily of implementing the reparations orders handed down by the Court. Accordingly, the Trust Fund's role is limited to collecting resources, fines and forfeitures from sentenced persons, to be used in accordance with a reparations order.
23. The Trust Fund's mandate, therefore, cannot be transformed into the power to judge, which, under the Rome Statute, is a task only judges are authorized to carry out, their job being to interpret legal decisions.
24. Furthermore, reparations proceedings before an international criminal court lie at the heart of the international legal order, which continues to be the privilege of the judge of the competent court called upon to decide on the effectiveness of a victim's right to reparations for harm suffered when such a claim is made during the reparations phase. That is contrary to the present case.⁸

(2) Interpretation of the law requested of the Trust Fund

25. The Legal Representative considers that, by delegating to the Trust Fund the task of examining the reparations applications of victims eligible for individual reparations, the Trial Chamber has (a) erred in its interpretation of the statutory provisions; and (b) entrusted the Trust Fund with jurisdictional authority that it does not possess.
26. In *Lubanga*, the Appeals Chamber ruled that the Court should decide certain matters itself so as to allow the parties to appeal the decisions⁹ and to give the Trust Fund further guidance to fulfil its mission.

⁸ A. T. Lemasson, *La victime devant la justice pénale internationale* (Pulim, 2015), especially pp. 644-650.

⁹ ICC-01/04-01/06-3129, para. 34.

27. In the same case before the Court, in the absence of statutory provisions, the Trial Chamber decided not to examine the 85 applications for reparations received in time for the ruling on the guilt of the accused person, and instead to transmit them to the Trust Fund for it to decide whether the victims who had applied for reparations could be included in any reparations programmes to be implemented by the Fund.¹⁰
28. Delegating the examination of the reparations applications to the Trust Fund should be seen as an erroneous interpretation of the texts. According to regulation 118(2) of the Regulations of the Registry, where an order is issued by the Court for an award of reparations through the Trust Fund, the Registrar shall, having regard to confidentiality requirements, provide the Secretariat of the Trust Fund for Victims with any information included in the reparations applications that is necessary for the implementation of the order. According to our interpretation, this regulation does not authorize the Trust Fund to decide on reparations applications. At this stage, the Chamber is assumed to have assessed the merits of the applications, and the Registry transmits to the Trust Fund only the non-confidential information included in the applications to assist the Trust Fund in developing its draft implementation plan with a view to implementing reparations.
29. In response to the parties and participants who contested the Trial Chamber's decision not to examine these applications itself,¹¹ the Appeals Chamber ruled that when the Court awards only collective reparations – as in *Lubanga* – the

¹⁰ ICC-01/04-01/06-2904, paras. 284, 289(b).

¹¹ ICC-01/04-01/06-2970-tENG, paras. 25-27; ICC-01/04-01/06-2972-tENG, paras. 32-41; ICC-01/04-01/06-2973-tENG, paras. 14-15. The Legal Representatives of the V01 group of victims relied, in particular, on rule 95(2)(a) of the Rules of Procedure and Evidence, under which it is incumbent upon the Trial Chamber to rule on all reparations applications submitted to it by the victims.

Trial Chamber is not required to rule on the merits of the individual requests for reparations.¹²

30. In the instant case, however, the Chamber ordered that individual reparations be awarded to victims as follows:

-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;¹³

-The Chamber therefore orders that the moral harm caused by Mr Al Mahdi necessitates: (i) individual reparations for the mental pain and anguish of those whose ancestors' burial sites were damaged in the attack.¹⁴

31. Therefore, the Legal Representative argues that, in accordance with statutory provisions and the Court's case law, the Trial Chamber should have analysed the reparations applications eligible for individual reparations.

32. This task should not have been delegated to the Trust Fund as it was not its responsibility. To decide whether a victim is eligible, the Trust Fund would have to interpret legal concepts concerning, for example, descendants of the deceased, burial sites, livelihood, source of income, exclusive dependence, etc. It does not have the authority to do so and is not part of the Trust Fund's mission.

33. The Legal Representative emphasizes that, in its draft implementation plan, the Trust Fund – which, in *Lubanga*, admitted on 3 November 2015 that it could not identify all the victims eligible for reparations – confirms that it cannot determine the extent of the condemned individual's financial liability.¹⁵

34. In its draft implementation plan, the Trust Fund acknowledges that:

¹² ICC-01/04-01/06-3129, paras. 7 and 152.

¹³ ICC-01/12-01/15-236, para. 83.

¹⁴ ICC-01/12-01/15-236, para. 90.

¹⁵ ICC-01/04-01/06-3177-Red, paras. 214 *et seq.*

-The Trust Fund regrets that, at this time, despite best efforts it is not in a position to assist the Court with a definite number of potentially eligible (direct and indirect) victims.¹⁶

-[T]hese accounts indicate that up to 6,000 child soldiers were engaged in the FLPC/UPC at the relevant time, however, based on a different definition of the term child soldier than that contained in the Rome Statute. In fact, the task of identifying the number of eligible victims in the present proceedings is further complicated by the fact that the term “child soldier” as used in these reports is based on an understanding that this includes all children under the age of 18 rather than 15.¹⁷

35. Therefore, as the Trust Fund itself admits, it is impossible to say which victims are eligible for individual reparations without legal analysis of the reparations applications and without an interpretation of legal concepts – and that lies beyond the Trust Fund’s remit.

36. The Legal Representative is of the opinion that the Chamber should analyse each reparations application and indicate which victims are eligible for individual reparations.

37. Furthermore, when the Legal Representative solicited additional expertise regarding proof and filiation during his mission to Mali, it was to support the most plausible theory before a court during the selection of reparations applications, not before an organ with no jurisdictional authority to make an assessment – specific or abstract – in the case at bar.

38. The victims selected or excluded would have no possible recourse were they to have to depend entirely on selection by the Trust Fund.

39. Similarly, regarding the selection criterion, noting paragraphs 15 and 16 of its brief, the Trust Fund makes no mention of how a selection of the applications transmitted should be carried out.

40. The Legal Representative questions the notion of the criterion of exclusive selection and wonders whether it concerns the applications already

¹⁶ ICC-01/04-01/06-3177-Red, para. 241.

¹⁷ ICC-01/04-01/06-3177-Red, para. 246.

transmitted and known or any future reparations applications that may be presented during the implementation of the Order. Such is the problem before the Trust Fund at this stage of the proceedings.

41. The Legal Representative accordingly requests the Appeals Chamber to order the rewriting of paragraphs 81, 83 and 146 of the above-mentioned Order in its original and corrected versions.

IV. NECESSARY CONFIDENTIALITY

42. The Legal Representative wishes to recall the requisite level of confidentiality that must prevail for the sake of the victims' safety.

43. It is vital to prioritize the safety of victims and witnesses throughout the proceedings before international criminal courts, as they must not be subjected to a second victimization.

44. The Legal Representative therefore believes that it is crucial to maintain a high degree of confidentiality, even during the reparations phase, to ensure the safety of the victims. The victims should not be forced to choose between reparations and safety.

45. This "necessity" must mean that certain restrictions are placed on the information conveyed to the Defence. The victims have a compelling need for their safety to be ensured against a background of considerable insecurity. The transmission of redacted information would not deprive the Defence of any of its rights as the criminal sentence, nor the amount of harm for which it is liable, would not be modified.

46. The principles of proportionality and necessity ought to justify the transmission of redacted reparations applications to the Defence.

47. This is how the International Criminal Tribunal for the Former Yugoslavia (ICTY) ruled in *Tadić*:¹⁸ the Chamber decided that confidentiality was justified when there are special considerations regarding, in particular, ongoing armed conflict.
48. In discussions on the need for confidentiality in the case known as *Čelibići*, the ICTY referred to another decision in *Tadić*:
49. In balancing the interests of the accused, the public and witness R, this Trial Chamber considers that the public's right to information and the accused's right to a public hearing must yield in the present circumstances to confidentiality in the light of the affirmative obligation under the Statute and the Rules to afford protection to victims and witnesses. This Trial Chamber must take into account witness R's fear of the serious consequences to members of his family if information about his identity is made known to the public or media.¹⁹
50. In view of the exceptional circumstances, the Legal Representative argues that a high level of confidentiality must be maintained.

¹⁸ ICTY, *Tadić*, IT-94-1-T, 10 August 1995, para. 53.

¹⁹ ICTY, *Blaškić*, IT-95-14.

For these reasons, *without prejudice*

The Legal Representative of Victims respectfully requests the Chamber to take into account these submissions of the victims on the observations filed by the Trust Fund for Victims.

Respectfully submitted,

Without prejudice

[signed]

Legal Representative of Victims,
Mr Mayombo Kassongo

Dated this 11 December 2017

At The Hague, Netherlands