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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
With one Confidential Annex**

**Public redacted version of “Registry Observations on the Trust Fund for Victims’
Draft Implementation Plan for Reparations”, 18 May 2018, ICC-01/12-01/15-267-
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Trust Fund for Victims

I. Introduction

1. Pursuant to the instruction of Trial Chamber VIII (“Chamber”), the Registry submits its observations on the Trust Fund for Victims’ (“TFV”) Draft Implementation Plan for Reparations (“DIP”) in the case *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (“Case”).

II. Procedural History

2. On 17 August 2017, the Chamber issued its Reparations Order in the Case (“Reparations Order”), instructing the TFV to submit a draft implementation plan for reparations by 16 February 2018.¹
3. On 8 March 2018, the Appeals Chamber rendered its judgement on the Legal Representative of Victims’ (“LRV”) appeal of the Reparations Order.²
4. On 20 April 2018,³ the TFV submitted the confidential version of the DIP.⁴
5. On 4 May 2018, the Chamber instructed the Victims Participation and Reparations Section (“VPRS”) of the Registry to provide observations on two particular aspects of the DIP, namely (1) the screening process proposed by TFV in the DIP, and (2) the organisation of legal representation of victims in the screening process.⁵

III. Applicable Law

¹ Trial Chamber VIII, “Reparations Order”, 17 August 2017, ICC-01/12-01/15-236.

² Appeals Chamber, “Public redacted Judgment on the appeal of the victims against the “Reparations Order”, 8 March 2018, ICC-01/12-01/15-259-Red2.

³ On 12 February 2018 and 5 April 2018, respectively, the Chamber granted extensions of time to the TFV for the latter to submit its DIP. *See* Trial Chamber VIII, “Decision on Trust Fund for Victims’ Request for Extension of Time”, 12 February 2018, ICC-01/12-01/15-257-Red and “Public redacted version of ‘Decision on Second Trust Fund for Victims’ Request for Extension of Time’”, 5 April 2018, ICC-01/12-01/15-261-Red.

⁴ On 30 April 2018, the TFV submitted a corrected version of the DIP. *See* TFV, “Corrected version of Draft Implementation Plan for Reparations, With confidential Annex I, 20 April 2018, ICC-01/12-01/15-265-Conf”, 30 April 2018, ICC-01/12-01/15-265-Conf-Corr (in the following: “DIP”).

⁵ Email from the Chamber to the VPRS on 4 May 2018 at 13:51.

6. The Registry submits its observations pursuant to article 75 of the Rome Statute, rules 16(1), 90 and 98 of the Rules of Procedure and Evidence, regulations 79, 80 and 81 of the Regulations of the Court (“RoC”) and regulations 112, 113 and 118(2) of the Regulations of the Registry.

IV. Classification

7. Pursuant to regulation 23 *bis*(2) of the RoC, this document and its annex are classified as confidential because they refer to the TFV submission with the same classification. The Registry stands ready to file public redacted versions of these documents if so ordered by the Chamber.

V. Submissions

a. Observations relating to the screening process proposed by the TFV in the DIP

8. The Registry stands ready to support the TFV in the implementation of its DIP, within the limits of its available resources, in the identification of potential new applicants and in the screening of applications for individual awards to be undertaken in the Case.⁶ Following the Chamber’s instruction, the Registry submits observations on the issues outlined below in order to manage expectations of all relevant stakeholders.

1. Beneficiaries

9. Starting in paragraph 92 of the DIP, the TFV sets out its interpretation of the Chamber’s eligibility criteria and categories of beneficiaries contemplated for reparations related to economic loss and moral harms. The Registry joins the TFV in its request for confirmation of its interpretation and/or clarification of the

⁶ [Redacted]

list of categories of potential beneficiaries, as clarity on this topic will have a direct impact on the VPRS' ability to organise an efficient screening process of all potential beneficiaries' applications for reparations in the Case.

2. Timing

10. The timing envisaged by the TFV for the screening process seems to suggest three different intake phases, as well as an overall implementation phase.⁷ It would be useful to clarify how the different timelines specified at paragraphs 160, 161 and 176 of the DIP work together
11. In this regard, the Registry recommends following the TFV's suggested general approach mentioned in paragraph 161 of the DIP (i.e. that victims should be able to apply throughout the entire three-year period of the reparations programme). In terms of workflow, the VPRS agrees with initially focusing on completing and assessing the applications received prior to the issuance of the Reparations Order, followed by applications received thereafter. The VPRS would provide the results of its preliminary screening of applications for reparations in batches on a regular basis (for example, once per month). The Registry would register applications in its database and process them in the same order they are received at the VPRS HQ, but would group them per Protected Building,⁸ as suggested by the TFV, for the purpose of its periodically submitted tables summarising the results of the screening process. Each periodic table would thus contain

⁷ DIP, paras. 159-161.

⁸ See Reparations Order, para. 1: "Ten protected objects were attacked in Timbuktu, Mali, between around 30 June 2012 and 11 July 2012 [...] : (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door; and the two mausoleums adjoining the Djingareyber Mosque, namely the (ix) Ahmed Fulane Mausoleum and (x) Bahaber Babadié Mausoleum" ("Protected Buildings").

information relating to applications pertaining to various Protected Buildings.⁹ The Registry would prepare a final consolidated table grouping information for all applications screened per Protected Building at the end of the three-year implementation period.

12. Moreover, the Registry notes that at paragraph 177 of the DIP, the TFV considers that “undue delay” may be caused by the processing of incomplete, contested or otherwise more complicated applications and that this may trigger a different screening process by which “straightforward claims [...] be extracted and verified separately from incomplete, contested, or otherwise more complicated applications [...]”.¹⁰ The Registry considers important to highlight that as per its standard procedure, the finding whether an application is either complete or incomplete and after thorough analysis of its content, is always issued after a process of full data registration and preliminary legal analysis (the latter involving three steps: initial preliminary analysis, cross-check and quality check) by the VPRS HQ. This process applies to all applications; only after this screening will it be discernible which claim is “straightforward” and which applications require further follow-up. The Registry considers that this may impact on the workability of the TFV suggestion of a prioritization of “straightforward claims”. Again, periodic VPRS reporting to the TFV on a rolling basis of whichever applications have been submitted, analysed and considered complete in the relevant time interval would appear a simple, workable solution (this solution will be further elaborated *infra*; see also the annex for a graphic display of a potential screening procedure). This would also obviate the need to define what the TFV and VPRS would commonly understand as “undue delay” – a term that remains presently undefined in the

⁹ The Registry notes that it may need to be clarified how the presently suggested approach corresponds to what is suggested by the TFV in footnote 94 of the DIP.

¹⁰ DIP, para. 177, fn. 100.

DIP.¹¹ In addition, it would prevent the need to explore alternative transmission schedules as referred to in paragraph 177 of the DIP, which the TFV and the VPRS would have to elaborate in partnership, and in light of potential competing assignments of the VPRS.

13. Another factor that may have an impact on the timing of implementation of the DIP and, importantly, on the number of potential beneficiaries of individual reparations awards is the number of saints buried in each protected building as outlined in the Reparations Order (“Protected Building”). In this regard, the Registry draws attention to the fact that while the DIP seems to rely at paragraph 132 on the assumption that there is only one single saint buried in each Protected Building, information on record received from one expert suggests that there may be a plurality of saints buried in at least some of the Protected Buildings.¹² This may, in turn, multiply the number of potential beneficiaries of individual reparation awards.¹³

3. Role of VPRS HQ

14. The Registry notes that the TFV mentions at paragraph 173 of its DIP that it will rely on VPRS HQ for data input, processing and the preliminary analysis of applications and relevant supporting documents for all applications already received, as well as for future applications to be received. The Registry can confirm that these tasks fall within the expertise of the VPRS and relevant services can thus be rendered to the TFV.

¹¹ DIP, para. 177.

¹² See ICC-01/12-01/15-214-AnxIII-Red2, for example at pp. 16-17, where the expert mentions that there are 167 more saints buried alongside the main saint in the Cheikh Sidi Mahmoud Ben Omar Mohamed Aquit Mausoleum, and there are 50 more saints buried along the main saint in the Cheikh Abdoul Kassim Attawaty Mausoleum. The Registry respectfully suggests that the TFV may want to consult with the experts appointed in the Case on its DIP to ensure that factual discrepancies with the experts’ reports filed in the Case can be addressed.

¹³ See Reparations Order, paras. 89, 90, also referred to in para. 130 of the DIP.

15. The Registry further notes that at paragraph 192 of the DIP, the TFV proposes that the VPRS will provide the TFV with an assessment of the authenticity of supporting documents, and make such documents accessible to the TFV.
16. The VPRS, however, has unfortunately no capacity, both in terms of resources and tools, to assess the authenticity of supporting documents. Such assessment does not form part of its usual array of tasks as required by the relevant Chambers and the VPRS is thus not equipped to provide more than a *prima facie* assessment of the supporting documents, which the VPRS stands ready to provide. The VPRS will also be able to check whether the documents provided by victims are included in a list of possible supporting documents agreed by the Chamber. The Registry thus deems useful to ask the TFV to confirm that its actual expectation on this issue does not go further than the VPRS can presently provide.

4. Disclosure to the Defence

17. The disclosure process to the Defence as proposed by the TFV¹⁴ may also require some clarification. In particular, it would be useful to clarify how the different circumstances specified at paragraphs 180 – i.e. where there is a need for a fully contextualised disclosure - and 181 – i.e. “*any* issues within any application” - of the DIP work together.¹⁵
18. The VPRS also recommends that the extent of disclosure merits some clarification. The VPRS understands that the content of disclosure in cases of applications raising no issue entails that VPRS would have to disclose the tables providing the results of its preliminary legal assessment of applications (which the DIP refers to as “summaries”) in a redacted version to the Defence. However,

¹⁴ DIP, paras. 178-182.

¹⁵ In particular, it may require clarification which sort of issues would merit mere ‘summaries’ as opposed to those requiring a ‘fully contextualized disclosure’, a distinction that para. 181 of the DIP seems to suggest.

in the case of applications raising issues, the VPRS recommends to clarify if the intended disclosure is limited to the redacted version of the latest application received from the victim or, in cases where victims submitted more than one application, all applications received in relation to the Case from the same victim. The same type of clarification should be provided in relation to supporting documents to be disclosed: should the VPRS disclose only the documents attached to an application that support the claim (according to the VPRS preliminary legal assessment) or should the VPRS disclose all documents attached to the application, even if it assesses that some of them are not supporting the victim's claim? The approach taken will have a direct impact on the resources and time needed by the VPRS HQ as the redaction process may become rather heavy, depending on the volume of documents concerned.

5. VPRS eligibility recommendation process

19. The Registry notes the three possible types of VPRS eligibility recommendations envisaged by the TFV in paragraphs 183 to 190 of the DIP: positive eligibility recommendation, preliminary negative eligibility recommendation and final negative eligibility recommendation.
20. Mindful of the potential negative impact of the wording used in its communications with the victims concerned, and also to follow its standard operating procedures, the VPRS recommends to replace the wording "preliminary negative eligibility recommendation" by the wording "unclear eligibility recommendation". As per its standard practice, when VPRS is faced with an issue that it does not assess as minor, it will consider the application as "unclear" pending receipt of supplementary information to be requested from the LRV. Only after this additional information has been received, the VPRS will be in a position to resume its preliminary legal assessment and assess whether the application deserves a positive or negative recommendation. The VPRS

highlights that the suggested wording would have no impact on the actual handling of applications.

6. Victims' right to reply and VPRS consolidated reports

21. The Registry understands that the LRV will be allowed to reply to a VPRS “preliminary negative eligibility recommendation” including any Defence observations.¹⁶ In all those situations, the LRV would be able to provide additional information and/or supporting material.
22. The Registry also understands that where there is a “preliminary negative eligibility recommendation”, the VPRS will have to prepare consolidated reports to be provided to the LRV,¹⁷ including any Defence observations, on the eligibility recommendations of the VPRS before a final assessment is conducted by the VPRS on the application, based on any potential additional information received.¹⁸ The VPRS would recommend that such consolidated reports include two annexes: 1) the table prepared by the VPRS showing the results of its preliminary screening; and 2) the Defence observations provided to the VPRS.
23. Moreover, the Registry would favour a more simplified approach when the eligibility of an applicant is initially assessed as unclear by the VPRS. In such a case, the victim/LRV would be first given an opportunity to clarify the issue(s) at stake with the VPRS bilaterally before the issue is considered as one that would require disclosure to the Defence, Defence observations, and drafting of a consolidated report by the VPRS. Such approach would seem more efficient and less resource intensive for the Registry. Only those issues that could not be clarified and solved following a consultation with the victim/LRV would be raised with the Defence including the above disclosure process as well as the preparation of a consolidated report. The Registry would respectfully suggest to

¹⁶ DIP, paras. 184-189.

¹⁷ DIP, para. 188.

¹⁸ DIP, para. 189.

inquire with the TFV whether the latter simplified approach would be agreeable, provided the Chamber likewise accepts this approach.

24. The annex to this filing clarifies the VPRS proposal regarding a slightly modified screening process that may be implemented. The Registry stands ready to engage with the TFV with a view to providing the Chamber with a common consolidated scheme regarding all aspects of the screening process addressed in the DIP and the present submission if the Chamber were so minded.

b. Observations on the legal representation of victims

25. At paragraphs 156 to 158 of the DIP, the TFV requests the Chamber to provide guidance on, *inter alia*, “the process by which a victim would select (or have appointed) a legal representative and at which point of the process”,¹⁹ also raising the need to address potential future conflict(s) of interest in the legal representation of future applicants.²⁰

26. The Registry notes the Chamber’s appointment of Mr. Kassongo to represent all victims admitted to participate at the trial stage of the *Al Mahdi* proceedings.²¹ Moreover, in its reasoning the Chamber took the decision not to appoint more than one legal representative to represent victims “[i]n light of the nature of the charges confirmed”.²²

27. Mr Kassongo has been able to have regular access to his clients and has gathered their documentation to apply for reparations despite the various challenges posed by the ongoing security situation in Mali.

28. The Registry considers that in the specific circumstances of this case and given the homogeneous group of victims also due to the nature of the crimes subject to Mr. Al Mahdi’s conviction, their representation through a single legal

¹⁹ DIP, para. 157.

²⁰ *Ibid.*, paras. 157, 158.

²¹ Trial Chamber VIII, “Public redacted version of ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’, 8 June 2016, ICC-01/12-01/15-97-Red.

²² *Ibid.*, para. 38.

representative is reasonable. This assessment is respectful of victims' views and interests as per regulation 79(2) of the RoC while also mindful of the need for an efficient and cost-effective regime of legal representation.²³

29. Unless there is strong coordination between the legal representatives' teams, to introduce another counsel to represent newly-identified applicants at this point of the procedure may include the following drawbacks: (1) having multiple legal teams putting forward different legal arguments and/or submitting different types of documents to support otherwise similar claims, which may result in different treatment (in the amount of reparations awarded) of victims; (2) adding to potential complexity in the preparation, organization and transmission of victims' information and supporting documents for the purpose of review by the TFV; and (3) having separate groups of victims based only on the timing of the submission of applications for reparations may give rise to confusion within the victim population, with victims from the same family or social circle potentially ending up with different legal representation.
30. Absent any conflict of interest or any other future – and presently unforeseeable – reason that would merit separate legal representation of certain victims/victim groups, the Registry recommends to the Chamber to continue the mandate of Mr. Kassongo to represent all applicants for reparations.²⁴
31. The Registry notes the TFV's observation regarding a "potential for a conflict of interest [...] between the interests of the LRV's current clients and a future applicant [...]"²⁵ The Registry takes no position on the probability of such future occurrence.

²³ The Registry will continue to monitor the situation and would revert to the Chamber should there be any reason to revisit this evaluation of the situation.

²⁴ Any new applicant for reparations will be informed that he or she will be represented by Mr. Kassongo throughout the process of applying for reparations. The applicants will be informed that they can raise to the Registry any concern they have regarding this legal representation, so that the Registry may identify any potential issue that would mandate that the applicant is represented by another counsel. Moreover the LRV is bound by the Code of Professional Conduct of Counsel and, notably article 16 regarding potential conflicts of interest.

²⁵ DIP, para. 158.

32. The Registry recommends pre-emptively organising alternative legal representation, as it will accelerate the assignment process if the need indeed arises. The Chamber may consider two different options to address the issue:

- 1) Appointing a second common legal representative from the List of Counsel, to be paid by legal aid. The Registry remains available to assist the Chamber with the appointment of this second common legal representative if so decided;²⁶ or alternatively,
- 2) Pursuant to regulations 80 and 81 of the RoC, appointing the Office of Public Counsel for Victims. The advantage of appointing an in-house counsel, as other Chambers have done in other cases before this Court,²⁷ is (beyond the financial savings that it would entail) to be able to rely on its knowledge of the Court's proceedings and general experience and preparedness to represent victims, including at the stage of reparations.



p.p. Marc Dubuisson, Director of the Division of Judicial Services

On behalf of

Peter Lewis, Registrar

Dated this 27 July 2018

At The Hague, The Netherlands

²⁶ Counsel would be preferably from Mali, and would have knowledge of the local situation as well as relevant access to the victims of the Case. Any counsel chosen by the Registry would be selected only following a full vetting process as per the applicable regulatory framework.

²⁷ See for example, Trial Chamber I, "Decision on the OPCV's request to participate in the reparations proceedings", ICC-01/04-01/06-2858, 5 April 2012.