

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **15 May 2020**

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*

Confidential

Confidential redacted version of “Trust Fund for Victims’ response to the Legal Representative of Victims’ request for review of administrative decisions on victims’ eligibility” submitted on 15 May 2020

Source:

The Trust Fund for Victims

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

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I. OVERVIEW AND PROCEDURAL HISTORY

1. The Trust Fund for Victims (“Trust Fund”) hereby submits its observations concerning the Legal Representative of Victims’ (“LRV”) request for review of the assessments conducted by the Trust Fund (“Request”).¹ For the reasons set out herein, the Trust Fund maintains that its assessments are well founded and that the LRV fails to demonstrate that these assessments should be overturned.

2. While a detailed background is set out further below, the immediate procedural context for the Request is as follows. On 2 March 2020, VPRS transmitted 79 negative preliminary assessments, corresponding to the totality of applications from the second batch. The LRV did not make use of his procedural opportunity to submit observations at this stage. On 2 April 2020, VPRS transmitted 79 negative final recommendations to the Trust Fund in relation to the second batch of applications. On 16 April 2020, the Trust Fund likewise issued 79 negative administrative decisions and notified them to Trial Chamber VIII (“Trial Chamber”) on 22 April 2020.²

3. On 29 April 2020, the LRV submitted the Request.

4. As set out in the detailed observations below, the Trust Fund submits in short that: (i) the *attestations de filiation* required to prove direct descendancy were not signed by an approved certifying authority; (ii) amending the “direct descendancy” criterion to the much broader interpretation supported by the LRV, which consists in having a spiritual connection with a Protected Building, would contravene the Reparations Order;³ and (iii) debating whether a presumption of direct descendancy should be established is both untimely and in breach of the “system of attestations” that the Trial Chamber approved to establish the balance of probabilities in this case.

5. For these reasons, the Trial Chamber should uphold the Trust Fund’s administrative decisions on eligibility, contested by the LRV.

¹ *Demande de réexamen par la Chambre de la Décision du Fonds relative à l'éligibilité des victimes aux mesures de réparations, Avec une annexe A confidentielle et deux annexes B et C confidentielles ex parte réservées à la Chambre*, 29 April 2020, [ICC-01/12-01/15-360-Conf](#).

² Annex 3 to the Fourteen update report on the updated implementation plan and response to LRV Request ICC-01/12/01/15-356-Conf-Red, 22 April 2020, [ICC-01/12-01/15-358-Conf-Exp-Anx3](#) (“Annex 3 to the Fourteenth update report”).

³ Reparations Order, 17 August 2017, [ICC-01/12-01/15-236](#).

II. CLASSIFICATION OF THE PRESENT SUBMISSION

6. Pursuant to regulation 23 *bis* (1) of the Regulations of the Court, the Trust Fund has classified this filing as confidential *ex parte* as it contains identifying information related to the potential beneficiaries as well as details concerning the Trust Fund's and the LRV's [REDACTED]. A confidential version, redacting those details, is filed simultaneously.

III. BACKGROUND

7. The administrative decisions rendered by the Trust Fund pertain to application forms collected between 2016 and 2018, submitted to the Trust Fund for the first time in March 2020 and purported to allege that moral harm within the meaning of the Reparations Order rendered by the Trial Chamber was suffered. None of the applications at stake allege economic harm. As a result of these particularities, namely the years that have elapsed since the collection of the applications and their transmission to the Trust Fund for their consideration, the Trust Fund deems that contextual information is in order to capture the relevant events that preceded the implementation of reparations (A) and to inform the Trial Chamber of the factual circumstances surrounding the screening process as a whole (B).

A. CONTEXT

8. On 17 August 2017, the Trial Chamber rendered its Reparations Order.⁴ In relevant part, it ruled that the crime committed by Mr Al Mahdi had caused moral harm necessitating

“(i) individual reparations for the mental pain and anguish of those whose ancestors’ burial sites were damaged in the attack and (ii) collective reparations for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole”, in the form of rehabilitation programmes “to address the emotional distress suffered as a result of the attack on the Protected Buildings. These collective reparations c[ould] also include *symbolic measures* – such as a memorial, commemoration or forgiveness ceremony – to give public recognition of the moral harm suffered by the Timbuktu community and those within it” (emphasis added).⁵

⁴ [Reparations Order](#).

⁵ [Reparations Order](#), para. 90.

In the Reparations Order, the Trial Chamber directed the Trust Fund to develop an eligibility screening mechanism⁶ and gave guidelines as to its design.⁷

9. On 8 March 2018, the Appeals Chamber issued its judgment on the appeal submitted by the LRV against the Reparations Order,⁸ ruling *inter alia* that victim applicants, who the Trust Fund would not find eligible, are entitled to request that the Trial Chamber review the assessment made.⁹

10. On 12 July 2018, the Trial Chamber issued a decision on the draft implementation plan (“Decision on the DIP”),¹⁰ wherein it devised a screening process requiring three levels of review to reach a final administrative decision by the Trust Fund. The devised screening also includes opportunities for the parties to make representations when appropriate.¹¹ In relation to the 79 administrative decisions contested in the Request, all levels of review have resulted in negative outcomes and the LRV decided not to make observations during the administrative process.

11. In its Decision on the DIP, the Trial Chamber set forth that applicants whose applications were already in the case record were not required to fill in a new application form to not cause unnecessary delays.¹² At that time, the LRV had collected 409 applications (“Group of 409”).¹³ All 79 applications at stake in the Request were already collected at that time and form part of the Group of 409.

⁶ [Reparations Order](#), para. 144 (*see also* paras 141-143, justifying the need to develop such a mechanism).

⁷ [Reparations Order](#), paras 145-146.

⁸ 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](#) (“*Al Mahdi AJ*”).

⁹ [Al Mahdi AJ](#), para. 72.

¹⁰ Public redacted version of “Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations”, 12 July 2018, [ICC-01/12-01/15-273-Red](#).

¹¹ [Decision on the DIP](#), paras 35-49.

¹² [Decision on the DIP](#), para. 31.

¹³ According to the numbers consistently communicated by the LRV since then, 409 or 410 applications were already collected at that time. *See also* in respect of the fact that 409 or 410 applications were already collected at the time: First Registry Report on Applications for Individual Reparations, With Confidential Annex I and Confidential *EX PARTE* Annex II, only available to the Legal Representative of Victims, 10 August 2018, [ICC-01/12-01/15-275](#); Corrigendum of “Second Registry Report on Applications for Individual Reparations”, ICC-01/12-01/15-282, 10 September 2018, With Confidential Annex I and Confidential *EX PARTE* Annex II, only available to the Legal Representative of Victims, 10 September 2018, [ICC-01/12-01-15-282-Corr](#); Third Registry Report on Applications for Individual Reparations, With Confidential Annex I and Confidential *EX PARTE* Annex II, only available to the Legal Representative of Victims, 10 October 2018, [ICC-01/12-01/15-287](#); Fourth Registry Report on Applications for Individual Reparations, With Confidential Annex I and Confidential *EX PARTE* Annex II, only available to the Legal Representative of Victims, 13 November 2018, [ICC-01/12-01/15-298](#); Fifth Registry Report on Applications for Individual Reparations, With Confidential Annex I and Confidential *EX PARTE* Annex II,

12. The Trial Chamber further ordered the VPRS to start with its review forthwith: positive, negative or unclear preliminary assessments were to be communicated on a rolling basis every 30 days. Parties have a right to make observations within 15 days, after which a final assessment must be communicated to the Trust Fund. By 20 December 2018, VPRS indicated having completed the review of all applications of the Groupe of 409 and that it would start with the transmissions “as soon as it would receive the missing information and/or clarifications of unclear information requested of the LRV in its review exercise of existing applications, or new forms for reparations”.¹⁴

13. On 4 March 2019, the Trial Chamber issued a decision approving the Trust Fund’s updated implementation plan wherein it indicated that all applications for individual reparations had to be collected by 4 March 2020.¹⁵

14. Subsequently, prompted by a raising concern for not having received any application for consideration, be it new applications or applications belonging to the Group of 409, the Trust Fund developed a two-track approach to enable the process, which was otherwise stalled. On the one hand, the Trust Fund proceeded to identify and collect, jointly with the LRV, application forms for individual reparations. This has led to the collection of around 600 new application forms to date and the Trust Fund is about to complete the collection of all applications as a result of the adequacy of the measures put in place to mitigate the COVID-19 outbreak.¹⁶ They are currently pending with the LRV for consolidation and submission to VPRS. On the other hand, mindful of the Trial Chamber’s instruction to propose “alternative individuals when necessary”¹⁷ for the attestations, the Trust Fund began to identify and vet figures of authority from Timbuktu. The purpose of this was providing the LRV with a safeguarded list of certifying authorities he could use to sign the *attestations* apposite for the applications for reparations of his clients.

only available to the Legal Representative of Victims, 20 December 2018, [ICC-01/12-01/15-308](#) (“Fifth Registry Report”).

¹⁴ [Fifth Registry Report](#), para. 15.

¹⁵ Decision on the Updated Implementation Plan from the Trust Fund for Victims, 4 March 2019, ICC-01/12-01/15-324-Conf, para. 36.

¹⁶ No application collected since January 2020 has yet reached the Trust Fund for final review and decision.

¹⁷ Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations, 12 July 2018, ICC-01/12-01/15-273-Conf, para. 61.

15. On 31 January 2020, the first batch of applications – containing 12 dossiers – was transmitted to the Trust Fund. Following a positive preliminary assessment and final recommendation on the side of VPRS, the Trust Fund likewise issued 12 positive decisions for victims of both moral and economic harm. Seven applications had been collected by the LRV alone and belonged to the Group of 409. The other five applications – including one by a woman – had been jointly collected by the LRV and the Trust Fund. To consolidate applications in this batch, the LRV had resorted to the safeguard list of certifying authorities.

16. On 2 March 2020 and 1 April 2020, VPRS issued, respectively, 79 negative preliminary assessments and 79 negative recommendations on the grounds that the documents submitted “are not originating from the TFV approved certifying authorities”.¹⁸ The LRV did not raise observations at this stage despite having the procedural opportunity to do so. Unlike the first batch where the claims of applicants varied, all of the 79 applications at hand are submitted on the basis of moral harm. On 16 April 2020, the Trust Fund issued 79 negative final administrative decisions and notified them to the Trial Chamber on 22 April 2020.¹⁹ On 29 April 2020, the LRV submitted his Request seeking to reverse the whole of the 79 final administrative decisions at hand.²⁰

B. FACTUAL INFORMATION REGARDING THE COLLECTION AND CONSOLIDATION OF APPLICATIONS

17. The Trust Fund deems it useful to inform the Trial Chamber of the factual circumstances surrounding a reparations application from the identification of a potential beneficiary to the issuance of the administrative decision. When an individual potentially meeting the requirements set by the Trial Chamber is identified or presents himself or herself spontaneously, he or she is met, the Reparations Order is explained to him or her as well as the right the individual has to demand individual reparations.

18. Upon collection of the application form (either by the LRV, or by the Trust Fund, or jointly), it is submitted to the LRV whose task is to “consolidate” the form, that is gathering the necessary supporting documentation, in this case collecting the required

¹⁸ Annex 4 to the Fourteen update report on the updated implementation plan and response to LRV Request ICC-01/12/01/15-356-Conf-Red, 22 April 2020, [ICC-01/12-01/15-358-Conf-Exp-Anx4](#).

¹⁹ [Annex 3 to the Fourteenth update report](#).

²⁰ [Request](#).

attestation from a designated person of authority.²¹ Thus, when a person describes a type of harm seemingly of moral nature, it is expected that an attestation establishing their filiation is established. Similarly, when an applicant describes a type of harm seemingly of economic nature, it is expected that an attestation establishing their exclusive link with the mausoleum be produced.

19. In this case, figures of authorities designated by the Trust Fund are easily reachable, [REDACTED], in general, the immense majority of Timbuktiens met so far is responsive on the phone (notably via WhatsApp). During [REDACTED], the Trust Fund observed that they were amenable to assist the screening process and they met several time with the LRV to consolidate collected applications.

20. In respect of the Group of 409, to which the 79 applications at stake in the Request belong, the collection already took place years ago: the second element, that is the consolidation, is the crux of the Request.

IV. OBSERVATIONS ON THE REQUEST

21. When preparing its 79 administrative decisions, the Trust Fund identified three groups of applications, which resulted in three types of administrative decisions:

- (i) Category A applications were rejected on two grounds: the asymmetry between the claim and the supporting documents on the one hand, and the absence of valid supporting documents on the other hand;
- (ii) Category B applications were rejected on one ground only, namely the absence of valid supporting documents;
- (iii) Lastly, a group of nine applications did not fall into any category (“Category Individuals”).

Within each category, the Trust Fund identified further sub-categories, respectively three A sub-categories and six B-subcategories.²²

²¹ See Eleventh Update report on the updated implementation plan, Confidential *ex parte* available to the Legal Representative of Victims and the Registry, 25 October 2019, ICC-01/12-01/15-336-Conf-Exp (“Eleventh Update Report”), paras 14. The LRV deemed the consolidation as strictly falling within his mandate and is therefore the sole responsible for it in relation to newly collected forms and *a fortiori* to previously collected forms.

²² The sub-categories depended on the date of signature of the attestations and the identity of the individuals who signed attestations. While these differences did not turn out to be material to the decisions, for completeness of the Trial Chamber information these sub-categories are also referred to in Annex 1.

22. In its Decision on the DIP, the Trial Chamber indicated that the request for review “shall set out the reasons why the TFV erred” and “[i]n cases where several applicants are rejected for the same reason, the LRV is encouraged, when possible, to file a consolidated request”.²³

23. A close analysis of the Request and its annexes shows that the LRV makes a varying combination of the same four main arguments. Some of them appear to be interrelated and have been grouped as follows:

- (i) the Trust Fund made an error in refusing to consider the attestation of direct descendancy produced (“Argument 1-A”)²⁴ and in any event the information provided in the application form is sufficient to presume the direct descendancy: the negative decisions issued are the result of the application of an incorrect standard of proof or of an incorrect application of the standard of proof of balance of probabilities (“Argument 1-B”);²⁵
- (ii) when the applicant filled out the form, the requirement of direct descendancy did not exist: it appeared only later in the procedure, “[TRANSLATION] by the sole will of the Trust Fund” (“Argument 2-A”)²⁶, in any event, the Trust Fund made an error when stating that some applicants did not claim (direct) descendancy (“Argument 2-B”).²⁷

24. For ease of reference, having reviewed each and every request for review submitted by the LRV (Annex A to the Request), the Trust Fund has generated Annex 1,

²³ [Decision on the DIP](#), para. 47.

²⁴ This argument is made in relation to all 79 requests for review. The LRV makes several connected arguments: the Trust Fund’s lack of transparency in relation to the issue of authorities attesting ([Request](#), paras 39-41), the fact that the Trust Fund requests that an authority certified by itself be attesting ([Request](#), paras 45-52), the fact that the training of authorities delivered lacked quality, and the fact that the Trust Fund unduly rejects attestations submitted by the figures of authorities he submitted ([Request](#), paras 63-73 and subsequent paragraphs numbered 37-40) demonstrate that the decisions are not sufficiently motivated ([Request](#), paras 53-62). This lack of motivations is further demonstrated by the fact that the Trust Fund does not explain to which extent the knowledge of the protected buildings by the figure of authorities or their origin would have a concrete impact on his ability to attest to the filiation of a person ([Request](#), paras 25-28, 29, 31). Further, within this line of argument, the LRV argues in relation to certain requests for review that the Trust Fund’s decision in relation to authorities is sexist and reinforces the exclusion of women. Lastly, the LRV argues in relation to a number of requests for review, the Trust Fund made an error in alleging a discrepancy between the dates in the attestations and the *fiche de suivi* ([Request](#), paras 74-77). See also Annex B to the Request.

²⁵ [Request](#), paras 83-89. In the Request, this argument appears to be made in relation to all 79 applications. However, Annex A shows that it only appears in relation to certain decisions only.

²⁶ See Annex 1. While this argument appeared in all 79 challenges in Annex A, it does not seem to appear in the Request itself.

²⁷ [Request](#), paras 78-82 and Annex A. In Annex A, in some instances the LRV refers to *direct* descendancy and in some other instances to descendancy *lato sensu*.

that is a chart containing the application number, the category they belonged to (A, B or Individuals), the exact references of the administrative decision as notified in Annex 3 to the Fourteenth Update Report and the exact references of the request for review, as submitted in Annex A to the Request, with hyperlinks.

25. Unlike what is argued by the LRV,²⁸ each and every application was properly reviewed and analysed: this batch of 79 applications resulted in 13 different types of decisions (24 Category A decisions, 46 category B decisions and 9 Category Individuals). Further, each and every administrative decision contains **relevant** details such as a description of their composition, the date of the collection, the identity of the applicant or the identity of the person who signed an attestation.

26. In the Request, the LRV made several unsubstantiated comments on a number of aspects that were immaterial to the Trust Fund's administrative decisions. As a result and in the interest of efficiency, the Trust Fund has refrained to make observations. This should not be understood as acceptance.

A. The standard of proof has been approved in July 2018 and [REDACTED] is not approved as a certifying authority in the *Al Mahdi* case

27. The LRV argues in relation to all 79 requests for review that the Trust Fund made an error in refusing to consider the attestations of direct descendancy produced (Argument

²⁸ [Request](#), paras 25-33 and throughout the Request. In particular, the LRV mentions (without any reference) that the Trust Fund declined to take cognisance of the dossiers despite multiple invitations. This is not correct. Besides, the Trust Fund recalls that, by way of the procedure set out by the Trial Chamber, the reparations applications were to be transmitted to the Trust Fund on a rolling basis every 30 days. The 79 files at stake in the Request were transmitted to the Trust Fund on 1 March 2020 for the first time. Discussions on the opportunity for the Trust Fund to “take a look” at the dossiers outside of the procedure did not take place. Quite the contrary, despite the Trust Fund's efforts to ensure that the LRV does submit his dossiers, the latter took approximately a year and a half to do so. For instance, when on 27 September 2019, the Trust Fund set a one-month deadline to the LRV to transmit all 409 dossiers, so that administrative decisions could finally be issued (Email from the Trust Fund to the LRV on 27 September 2019 at 16.00), the former first questioned whether the Trust Fund had the authority to do so and, upon obtaining clarification on this issue, sought and obtained from the Trust Fund an extension of time until 13 December 2019. In seeking an extension of time, the LRV indicated that he deemed necessary to give his authorisation to VPRS before they transmit any dossiers to the Trust Fund (*See also* on the fact that the Trust Fund has attempted to set dates of transmission to finally be able to access the reparations applications: Eleventh Update Report, paras 15-16. It is noted that the Trust Fund shared this part of the report with the LRV to ensure that the common agreement was properly reflected, and that the LRV not only agreed but also made comments on the language, which were implemented). The extension of time was further extended until 10 February 2020 (*See Thirteenth Update Report*”, paras 39-49).

1-A)²⁹ and that, in any event, the information provided in the application form is sufficient to presume the direct descendancy: the negative decisions issued are the result of the application of an incorrect standard of proof or of an incorrect application of the standard of proof of balance of probabilities (Argument 1-B).³⁰

1) Relevant procedural history

28. Further to the issuance of the Reparations Order, the LRV and the Trust Fund liaised to discuss the design of the screening process. In this context, the LRV indicated that official documentation does not appear to exist with regard to establishing either the exclusive link or direct descendancy requirements. As a result, and as the result of its own similar observation, in its draft implementation plan (“DIP”) submitted in April 2018, the Trust Fund indicated that attestations would be an acceptable form of supporting documentation.³¹ In his observations on the DIP, the LRV indicated that he “proposes a number of statements [*attestations* in the French version] be admitted as evidence”.³² He further noted that “[i]t is the Legal Representative’s understanding that the Trust Fund seems to have taken account of these considerations by accepting an evidentiary threshold based on statements. This position is consistent with that of the Legal Representative”.³³

29. As a logical result, in its Decision on the DIP, the Trial Chamber ratified this agreement, ruled that the applicable standard of proof was that of a balance of probabilities and that “[w]ith regard to the TFV’s and LRV’s concerns in relation to the supporting documents, the Chamber is mindful of the reality of the situation in Timbuktu and is satisfied with the system of attestations proposed”.³⁴

30. Subsequently, following the issuance of the Decision on the DIP, starting on 13 August 2018, the Trust Fund liaised multiple times,³⁵ by email, orally and by way of

²⁹ [Request](#), paras 63-73 and subsequent paragraphs numbered 37-40.

³⁰ [Request](#), paras 83-89.

³¹ 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, para. 168.

³² Observations of the Legal Representative of Victims on the Draft Reparations Plan submitted by the Trust Fund for Victims in compliance with the Reparations Order pursuant to Article 75 of the Statute (ICC-01/12-01/15-236), With 13 Confidential Annexes *EX PARTE* Trust Fund for Victims, 30 May 2018, ICC-01/12-01/15-271-Conf-tENG (“LRV Observations on the DIP”), para. 170.

³³ LRV Observations on the DIP, para. 171.

³⁴ [Decision on the DIP](#), para. 61. The Trial Chamber went on to state: “In respect of the specific individuals suggested by the TFV, the Chamber takes no position but directs the TFV to consult with the LRV and to propose alternative individuals when necessary”.

³⁵ *See for instance* Email from the Trust Fund to the LRV on 13 August 2018; Trust Fund for Victims’ submission of draft application form, With four Confidential Annexes, 26 October 2018, ICC-01/12-01/15-

filings, with the LRV to confirm that attestations signed by authorities were accepted, that this was the case regardless of the official or traditional nature of the authority and that considering that already 409 reparations applications had been collected, to ease the process, the Trust Fund would not require that a copy of ID and information related to the background of the attesting authority be provided in relation to every application collected. Rather, the Trust Fund proposed that for each person having already attested the copy of the ID and the background information be provided only once by email.³⁶

31. By 6 May 2019, other than the information communicated by way of a filing of 20 November 2018 that the LRV was finally resorting to a single individual from Timbuktu to attest to all his files,³⁷ the Trust Fund had not yet received information on the sole authority proposed by the LRV. In order to enable the screening process which, by then, was stalled, the Trust Fund started to put in place a safeguard mechanism of authorities who would be in a position to produce attestations in support of victims. For that purpose, the Trust Fund resorted to individuals closely connected to the social fabric surrounding the mausoleums, and with first hand knowledge of the mausoleums, such as for instance [REDACTED]. The Trust Fund found that, with the exception of one authority [REDACTED], none of the other authorities from Timbuktu deemed themselves capable of attesting to the reality of *all* Protected Buildings at once, [REDACTED]. They declared that their knowledge extended to three Protected Buildings at most. As such, it is remarkable that [REDACTED] – has signed attestations in relation to seven Protected Buildings, covering all applications pertaining to administrative decisions at stake in the Request.

32. Between May and September 2019, the Trust Fund, jointly with the LRV, who participated to all training sessions, trained Timbuktu's figures of authority to make sure that they understood the remit of the Reparations Order and the categories of beneficiaries

289-Conf, paras 46-50 ("26 October Submission"); Fourth Monthly Report, para. 21, Eighth Monthly Report, paras 25-28.

³⁶ Email from the Trust Fund to the LRV on 13 August 2018; Trust Fund for Victims' submission of draft application form, With four Confidential Annexes, 26 October 2018, ICC-01/12-01/15-289-Conf, paras 46-50; Fourth monthly update report on the updated implementation plan with four confidential annexes, 14 November 2018, ICC-01/12-01/15-299-Conf, para. 21; Eighth update report on the updated implementation plan, 6 May 2019, ICC-01/12-01/15-331-Conf, paras 25-28.

³⁷ *Observations du Représentant légal sur le quatrième rapport mensuel d'activité du Fonds au profit des victimes*, 20 November 2018, ICC-01/12-01/15-300-Conf, para. 24.

entitled to individual compensation. [REDACTED], the sole authority proposed by the LRV, met with the Trust Fund and took part in the training of September 2019.

33. On 1 October 2019, by way of emails,³⁸ the Trust Fund transmitted a first list to the LRV and indicated that the Trust Fund invited VPRS to conduct its review of the reparations applications submitted by the LRV. In the event that certain applications would not contain any attestations yet, the LRV was free to resort to the figures of authorities identified and trained jointly by himself and by the Trust Fund. The names and contact details of the certifying authorities were shared with the LRV. Upon jointly training even more individuals, a final list was notified by way of the Eleventh Update Report. There are sufficient authorities to cover all of the Protected Buildings. Further, the list contains at least two persons per Protected Building in order to offer victims ample opportunity to seek confirmation of their claims. Lastly, bearing in mind that over a year had elapsed without any applications being transmitted, the Trust Fund set a generous deadline³⁹ to provide the LRV an ample opportunity to obtain proper *attestation de filiation* in support of his clients.⁴⁰

34. From October to December 2019, the LRV resorted to these figures of authorities to consolidate the Group of 409 applications but, according to the LRV himself “[TRANSLATION] out of the 409 dossiers presented [...] only 8 were retained”,⁴¹ that is that figures of authorities recognised only eight of the LRV’s clients.

35. At this juncture, the LRV requested a meeting with the Trust Fund. The meeting took place on 17 January 2020 and on the same day, the LRV sent an email to the Trust Fund reiterating his concern in relation to the remaining 402 unconsolidated files and proposing “*donc, pour l’ensemble de ces 402 dossiers, une appréciation in concreto qui permettrait que de potentiels bénéficiaires de réparations individuelles ne soient pas*

³⁸ Email from the Trust Fund to the LRV on 27 September 2019 at 16.00 and on 1 October 2019 at 16.11.

³⁹ The deadline expired on 10 February 2020 (See Thirteenth update report on the updated implementation plan, confidential, *ex parte*, available to the Legal Representative of Victims and the Registry, 20 February 2020, ICC-01/12-01/15-346-Conf-Exp (“Thirteenth Update Report”), paras 39-49). However, the Group of 409 are transmitted in batches of approximately 80 applications. As a result, the third batch (decisions to be issued on 19 May 2020, (the fourth (decisions to be issued mid-June) and the fifth batch (decisions to be issued mid-July) are expected to be constituted by applications belonging to the Group of 409. As a matter of fact, the totality of the third batch is (decisions to be issued on 19 May 2020).

⁴⁰ The Trust Fund notes that field work has demonstrated that most certifying authorities are keen to contribute to the reparations process.

⁴¹ Email from the LRV to the Trust Fund on 17 January 2020 at 18.46.

rejetés.”⁴² The Trust Fund refused on the grounds that, *inter alia*, this would violate the principle of equal treatment among victims.⁴³

2) Trust Fund's observation

36. **Argument 1-A** – The LRV argues that the Trust Fund made an error in refusing to consider the attestation of direct descendancy produced. The Trust Fund has rejected all of the 79 applications on the grounds that they are signed by an authority, [REDACTED], who is not fit to attest for purposes of the *Al Mahdi* case. This is because, after meeting with him and having him participate in a training, the Trust Fund could observe that he lacked knowledge about and appropriate association with the Protected Buildings. Additionally, he is not the mayor of Timbuktu. Moreover, other participants to the training (traditional and governmental authorities from Timbuktu, [REDACTED]) pointed out to the fact that he has no knowledge of the mausoleums. All of these factors rendered his testimony insufficient to meet the legal standard of the balance of probabilities in the present case.

37. The determination that [REDACTED] was unable to serve as a certifying authority was notified to the LRV by email and subsequently via the Eleventh Update Report on 25 October 2019,⁴⁴ a decision that he did not contest before the Trial Chamber at the time.

38. **Argument 1-B** – Concerning the balance of probabilities standard, the LRV submits that the Trust Fund erred and that a presumption of direct descendancy should be applied instead.⁴⁵

39. While the Trust Fund deems it inappropriate to seek a change in legal standards and their interpretation mid-way of the screening process, it wishes to recall that the fact

⁴² Email from the LRV to the Trust Fund on 17 January 2020 at 18.46; *see also* Thirteenth Update Report, paras 43-46. In this email, it was reported that 402 applications could not be consolidated, as opposed to 401 previously.

⁴³ Email from trust Fund to LRV on 20 January 2020 at 16:58; *See also*, Thirteenth Update Report, paras 44-46; *See also* in this regard, *Al Mahdi AJ*, para. 56, in which the Appeals Chamber stated that it “understands that the Trial Chamber considered that all applications should be screened at the same time and by the same entity, which would ensure that the screening would be done in a consistent and equal manner”. Even more so, while this request may have been entertained at a certain point, the fact that the LRV made this suggestion only after 401 of his clients were rejected by figures of authorities he jointly trained and resorted to appeared untimely, in particular bearing in mind that over the past year and a half, the LRV was conducting missions for the very purpose of consolidating his reparations applications.

⁴⁴ Eleventh Update Report, footnote 20.

⁴⁵ [Request](#), paras 83-89.

that the specific test of the balance of probabilities in the *Al Mahdi* case relies on a system of attestation stems from the LRV's proposal and was defined on 12 July 2018.⁴⁶ By contrast, requests for "presumptions of victimhood" were never put forward nor entertained by the Trial Chamber. Further, the first time that the LRV proposed an alteration of the standard of proof was on 17 January 2020, that is, *after* he had sought attestations from certified authorities and obtained only eight attestations for the 409 clients he is representing.⁴⁷

B. The requirement to receive individual reparations is that of "direct descendancy", as defined by the Trial Chamber in its Reparations Order of 17 August 2017

40. The LRV seems to be seeking an altogether alteration of the legal tests and legal criteria which the Trial Chamber had established for the *Al Mahdi* screening process. This transpires from the LRV's arguments that the requirement of direct descendancy appeared only late in the procedure, by the sole will of the Trust Fund⁴⁸ (Argument 2-A) and that the Trust Fund made an error when stating that some applicants did not claim direct descendancy⁴⁹(Argument 2-B).

1) Relevant procedural history

41. While the Trust Fund maintains that questioning legal criteria and legal tests is inappropriate at this stage of the reparations phase, the Trust Fund wishes to briefly recall that in its Reparations Order, the Trial Chamber, relying on the expert reports as well as on the reparations applications before it decided to order: "(i) individual reparations for the mental pain and anguish of those whose ancestors' burial sites were damaged in the attack".⁵⁰ While the LRV appealed the Trial Chamber's determination of the category of beneficiaries of reparations as a result of the economic harm suffered, he did not appeal the Trial Chamber's finding in relation to beneficiaries of reparations as a result of the moral harm suffered.

⁴⁶ See paras 28-29 above and [Decision on the DIP](#), para. 61.

⁴⁷ See Email from the LRV to the Trust Fund on 17 January 2020 at 18:46; Thirteenth Monthly Report, paras 43-46.

⁴⁸ See Annex A to the Request. This argument is used in support of all requests for review.

⁴⁹ See Annex A to the Request. This argument is used in support of all requests for review.

⁵⁰ [Reparations Order](#), para. 90.

42. In its DIP, the Trust Fund submitted that beneficiaries of reparations for moral harm should include descendants of the saints in direct kinship (including women and children) among the families descending directly from persons buried at the Protected Building.⁵¹ In his observations on the DIP, the LRV submitted that the Trust Fund's interpretation that reparations should be awarded only to those in direct kinship of the saints was too restrictive.⁵²

43. In its Decision on the DIP, the Trial Chamber confirmed the Trust Fund's interpretation:

“the Chamber confirms the TFV's interpretation that descendants in direct kinship (including women and children) with saints buried in the Protected Buildings are eligible for individual moral reparations”⁵³

2) Trust Fund's observations

44. **Argument 2-A** is incorrect and a mere reference to the case record is sufficient to so conclude: the criterion of direct descendancy did not appear late and at the sole will of the Trust Fund. It was defined by the Trial Chamber in the Reparations Order, back in August 2017, and clarified further in its Decision of 12 July 2018. The Trust Fund has limited itself to apply it so as to ensure that individual reparations are awarded to direct descendants as opposed to any Timbuktian.

45. It is however true that the criterion of direct descendancy was established *after* the collection of the 409 application forms by the LRV – a collection which appear to have taken place very early in the proceedings. The only logical consequence of the definition of the criterion should have been that the LRV establishes whether his clients fall within the criterion or not and in the event they do not, mitigate their expectations as to the chances of success of the submission of their application.⁵⁴ Instead, the LRV elected to submit the 79 applications nonetheless.

⁵¹ DIP, paras 134-138.

⁵² LRV Observations on the DIP, paras 93-98.

⁵³ [Decision on the DIP](#), para. 67.

⁵⁴ On the contrary, on 18 October 2018, seemingly ignoring all of the above, the LRV reiterated to the Trust Fund that the concept of direct descendancy should be interpreted broadly as a spiritual link (Email from the LRV to the Trust Fund on 18 October 2018 at 15.26. As a result, on 26 October 2018, the Trust Fund reiterated that those eligible for individual reparations as a result of the moral harm suffered were those descendants in direct kinship with the saint (26 October Submission, paras 32-42. It is noted that in its Second Monthly Report, the Trust Fund had indicated that only those descending from the main saint would be eligible (ICC-01/12-01/15-283-Anx), thereby endorsing the approach proposed by VPRS (ICC-

46. Further, the Trust Fund would like to point out that interpreting the direct descendancy as demanded by the LRV, that is based on the spiritual connection,⁵⁵ would result in a *de facto* amendment of the Reparations Order: most Timbuktuans may claim a spiritual connection to one of the mausoleums which would result in individual reparations being awarded to a very high number of people (over 650 000 beneficiaries, taking into account the calculation of the LRV, according to which one mausoleum would result in 65 000 descendants of the saint)⁵⁶, thereby changing the essence of the Reparations Order and making it entirely inapposite to the current reparations proceedings.

47. **Argument 2-B** is equally incorrect and a mere reference to the reparation applications submitted is sufficient to so conclude: the Trust Fund rejected applications on this ground in 28 occasions⁵⁷ only and only when their content could not be reasonably comprehended as them having alleged to be a descendant in any way. Yet, the LRV argues that in relation to all administrative decisions.

48. The Trust Fund recalls that Category A applications are those which were rejected on the basis of an additional ground, namely, that the applicants did not claim to bear any kind of ancestral connection whatsoever with the Saint of any Protected Building. By contrast, all Category B applications contained a reference, even if sometimes indirectly, to the fact that the applicant claims to be a direct descendant.

49. Bearing in mind that most of the application forms (68 out of 79) were collected prior to the issuance of the Reparations Order, that is prior to the definition of the criterion, the Trust Fund deemed it appropriate to adopt a flexible approach in the reading

01/1201/15-275-Anx). This issue is not at stake here, which is probably a consequence of the fact that a deeper understanding of the factual context has been gained in the meantime: there is indeed only one saint buried in the mausoleums. Mausoleums are however built in cemeteries where other individuals are buried).

⁵⁵ See email from the LRV to the Trust Fund 18 October 2018 at 15.26; see also [Request](#), para. 58: as demonstrated by the LRV himself, to render the Reparations Order applicable and meaningful, the Trust Fund decided to determine direct descendancy on the basis of the current social perceptions: that is certain families are associated to the mausoleums and are deemed by all Timbuktuans to be the descendants. Anybody demonstrating their appurtenance to this family can claim to be a direct descendant.

⁵⁶ As a matter of fact, in the [Request](#) (para. 58), the LRV produces a calculation according to which a single saint deceased 400 years ago, taking into account only two descendant per generation would produce approximately 65.000 descendants, that is the totality of the population of Timbuktu when taking the largest estimates. Seeing that some of the saints were deceased way earlier (such as Sidi Yehia), than it is not one but 10 Saints that are at stake here, the conception of the LRV would render the Reparations Order entirely inapposite to the reality of Timbuktu.

⁵⁷ That is all Group A applications plus four individuals: a/35082/16, a/35048/16, a/40040/17 and a/45003/18.

of the application forms. Considering that when the application forms were filled out, the applicants could not have been aware of the criterion, and may have omitted in good faith to signal that they are a direct descendant of a Saint, the Trust Fund deemed it to be in the interest of victims to understand the narrative contained therein broadly. Thus, when an applicant made reference to *a connection of any form* to one of the Saints, even if faintly, the Trust Fund considered that they claimed direct descendancy. By way of example, applicant a/35049/16 was considered to claim direct descendancy even if her application form only contains references to a much broader type of link to one of the mausoleums: “[TRANSLATION] the Saint Amadou Foulane is my ancestry”.⁵⁸

50. It is only when an applicant did not claim anything close to a form of descendancy that the Trust Fund noted that the form did not contain any reference to the direct descendancy. In such instances, the Trust Fund had no choice but to note the fact that the victim does not claim to be a direct descendant. As a result, in the relevant part of the decisions of Category A applications, the Trust Fund recalled that the purpose of the *attestation de filiation* was to “corroborate” the account of the applicant, rather than creating a novel claim for him/her:

“[T]he fact that only the *attestation de filiation* states that the applicant is a direct descendant, and that this is not included in the documents signed by the applicant, misconstrues the purposes of the *attestation*. The role of the *attestation de filiation* is to support the account of the applicant. However, in this case, there is an asymmetry between the information contained in the *attestation* and that directly provided by the applicant.”⁵⁹

The Trust Fund fails to understand where the LRV alleges that the Trust Fund committed an error in its reasoning. What is more, the LRV alleges this error in relation to all administrative decisions, including belonging to Category B, that is, decisions in which it is explicitly acknowledged that the applicant made a claim based on ancestry.

V. CONCLUDING REMARKS

51. As stated by the Appeals Chamber, in the *Lubanga* case, “[t]he reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of

⁵⁸ [Annex 3 to the Fourteenth update report](#), p. 320

⁵⁹ [Annex 3 to the Fourteenth update report](#).

reparations.”⁶⁰ The thoroughness, adequacy and promptness of procedures to identify victims and verify their eligibility for reparation awards, in particular in relation to individual reparation awards, are key factors determining the success of of the Rome Statute’s reparations system. In this regard, it must be understood that eligibility for reparations is not just a procedural outcome. Eligibility is also a potent social currency within communities affected by the convicted crimes.

52. In the present case, extensive consultations conducted by the Trust Fund show that the community of Timbuktu appreciates the primarily collective nature of the reparations ordered by the Trial Chamber and deems adequate the criterion set out by the Trial Chamber in respect of the award of individual reparations for moral harm suffered. The families associated with the mausoleums are well-known and respected in Timbuktu. Consultations with their representatives have permitted the Trust Fund to determine that they are satisfied with the system put in place. More striking is also the fact that meetings with other traditional and official authorities who are not eligible for individual reparations, have shown that the Trial Chamber’s decision to determine the group of direct descendants as eligible for individual reparations as a result of an increased harm suffered, is also well accepted.

53. Many of individuals encountered – potentially eligible or not – did however express a concern that if reparations would be effectively awarded to the wrong individuals, that is individuals who are not direct descendants, this would result in destabilising the community. The Trust Fund’s own observation is that due to the modest size of the community of Timbuktu and to its culture of sharing information, Timbuktuans are generally aware of who is and who is not a direct descendant. Individual awards reaching individuals outside these families will ultimately become known, result in social tensions, further destabilising the fragile social fabric of Timbuktu and it may ultimately lead to alienation of the community from the reparations process.

54. The eligibility verification mechanism approved by the Trial Chamber (that is the standard of proof of balance of probabilities with the mere requirement of the production of an attestation) strikes the appropriate balance between accessibility and preventing undesirable eligibility outcomes. The Trust Fund wishes to assure the Chamber that it

⁶⁰ [Lubanga Reparations Principles](#), para. 3..

considers it to be its duty of care to ensure that this balance is properly preserved. The Trust Fund understand its duty of care to extend to facilitating and supporting the activities of other stakeholders, such as the LRV, so they may assume their own responsibilities to the fullest possible extent.

VI. RELIEF SOUGHT

55. The Trust Fund respectfully requests the Trial Chamber to take note of the present observations and uphold its administrative decisions.



Pieter W.I. de Baan
Executive Director of the Trust Fund for Victims,
on behalf of the Board of Directors of the Trust Fund for Victims

Dated this 15 May 2020
At The Hague, The Netherlands