

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 PROSECUTION v. AHMAD AL FAQI AL MAHDI***

Public Document

General Defence observations on reparations

Source: The Defence for Mr Ahmad Al Faqi Al Mahdi

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

Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Gilles Dutertre

Counsel for the Defence

Mr Mohamed Aouini

Legal Representative of Victims

Mr Mayombo Kassongo

Office of Public Counsel for Victims

Ms Paolina Massidda

States' Representatives

Competent authorities
of the Republic of Mali

REGISTRY

Registrar

Mr Herman von Hebel

Victims Participation

and Reparations Section

Ms Isabelle Guibal

Others

- Trust Fund for Victims
- Queen's University Belfast Human Rights Centre
- Redress Trust
- *Fédération internationale des ligues des droits de l'Homme*
- *Association Malienne des Droits de l'Homme*

I – PROCEDURAL BACKGROUND

1. Considering articles 64(3)(a), (6)(f), 65 and 75 of the Statute;
2. Considering regulations 24 *bis*, 28, 34 and 44 of the Regulations of the Court;
3. Considering rules 94, 97(2) and 103 of the Rules of Procedure and Evidence;
4. Considering the final Judgment of 27 September 2016;¹
5. Considering the Decision establishing a reparations phase calendar, dated 29 September 2016, in particular its paragraph (2)(iii);²
6. Considering the Decision of 27 October 2016³ in response to four institutions wishing to intervene in the proceedings;⁴
7. Considering the Decision of 31 October 2016⁵ in response to UNESCO's request to also take part in the proceedings.⁶

II – OBSERVATIONS OF THE DEFENCE

8. The Defence for Mr Ahmad Al Faqi Al Mahdi (“the Defence”) respectfully complies with the Chamber’s instructions and hereby submits its general observations on the reparations proceedings.
9. The Defence wishes to present to the Chamber the principles drawn from the case-law of the International Criminal Court regarding reparations, as well as the

¹ ICC-01/12-01/15-171.

² ICC-01/12-01/15-172.

³ ICC-01/12-01/15-178.

⁴ ICC-01/12-01/15-175 and ICC-01/12-01/15-176.

⁵ ICC-01/12-01/15-180.

⁶ ICC-01/12-01/15-179.

international principles it deems applicable in this case, and then indicate what it considers as constituting law, equity, justice and expeditiousness in this particular case.

10. The Defence notes that, for questions relating to reparations, this Chamber has proactively ordered the Registry to submit to it a list of experts who could be appointed to carry out an evaluation on several matters, including harm and any reparations that may apply accordingly.⁷ The related discussion will take place at a later time in accordance with the schedule set by the Chamber.

Principles and case-law of the ICC concerning reparations

11. Reparations proceedings are provided for in articles 75 and 79 of the Statute, rules 85 and 98 of the Rules of Procedure and Evidence and paragraphs 42 to 50 of the Regulations of the Trust Fund for Victims.⁸

12. Article 75(1) of the Statute constitutes the legal basis for the reparation of harm suffered by victims as a result of the conduct of the person convicted by the Court. This text, however, is broad and leaves the Chamber to determine the fundamental principles:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

13. The Court first clarified the principles and proceedings for reparations in the case of *Thomas Lubanga Dyilo*, the first person convicted by the ICC. It rendered a

⁷ ICC-01/12-01/15-177.

⁸ Resolution ICC-ASP/4/Res. 3.

decision establishing the principles and procedures to be applied to reparations on 7 August 2012 (appended with the order for reparations against Thomas Lubanga). An appeal was lodged against this decision by the Defence, as well as by the Legal Representatives of Victims. The final decision in this matter was the Judgment of 3 March 2015 rendered by the Appeals Chamber.⁹ This decision on appeal and the amended Order for Reparations (“the Order for Reparations”) constitute the general principles applicable to reparations.

Reparations proceedings before the ICC

14. To date, the Court has not yet completed reparations proceedings in any of the cases it has tried. Besides the *Al Mahdi* case, reparations proceedings are still pending before the ICC in *Lubanga*, *Katanga* and *Bemba*.
15. In *Katanga* and *Bemba*, the principles laid down in the aforementioned Order for Reparations in *Lubanga* were used as a starting point for the reparations proceedings. In *Al Mahdi*, the Chamber has not yet taken a decision on the precedent set in *Lubanga*. In fact, each of the Chambers that has tried the four cases in the reparations phase conducts the proceedings as it sees fit.
16. In *Katanga*, the Chamber issued an order on 1 April 2015 instructing the parties and participants to file observations for the reparations proceedings.¹⁰ In this order, the Chamber invites the parties to submit their observations on the “applicability of the principles established by the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo* to the facts of the present case and on any

⁹ ICC-01/04-01/06-3129. *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’” of 7 August 2012 with “AMENDED Order for Reparations” (Annex A), 3 March 2015.

¹⁰ ICC-01/04-01/07-3532-tENG, “Order instructing the parties and participants to file observations in respect of the reparations proceedings”. 1 April 2015, para. 14.

modifications or additions which might be required in the light of the particular circumstances of this case.”¹¹

Furthermore, the Chamber “considers the Appeal Chamber’s order of 3 March 2015 an appropriate starting point” and refers to the structure of the order for reparations against Thomas Lubanga.¹² The Defence for Germain Katanga and the Legal Representatives of Victims acknowledged the applicability of these principles.¹³

On 15 July 2016, Trial Chamber II issued an order instructing the parties and the Trust Fund for Victims to file observations on the monetary value of the alleged harm.¹⁴

17. In *Bemba*, the Court issued an order on 22 July 2016 also requesting the parties and interested organisations to submit their observations on, *inter alia*, the applicability of the principles established by the Appeals Chamber in the *Lubanga* case and whether they needed to be amended or supplemented in the light of the particular circumstances of the case.¹⁵ The deadline was extended to 17 October 2016 by an Order of 25 August 2016.¹⁶

An initial order for reparations was issued (3 March 2015), and the parties are still currently submitting their observations on the application of these principles

¹¹ *Idem*, para. 12.

¹² *Idem*, para. 14.

¹³ For the Defence, ICC-01/04-01/07-3549, para. 2. For the Trust Fund for Victims, ICC-01/04-01/07-3548.

¹⁴ ICC-01/04-01/07-3702-tENG. These submissions were filed by the Defence (ICC-01/04-01/07-3711) as well as by the Legal Representative for Victims (ICC-01/04-01/07-3713) on 30 September 2016.

¹⁵ ICC-01/05-01/08-3410, para. 7.

¹⁶ ICC-01/05-01/08-3429.

in the draft implementation plan of the Trust Fund for Victims, in accordance with the adversarial principle.

18. Yet, conversely, in *Katanga* and *Al Mahdi*,¹⁷ the parties' submissions on the reparations proceedings (and the applicability of the principles of the *Lubanga* case principles) are required as a first step, followed by submissions on the reports and information presented; on the submissions of other participants; and on any other representations. Accordingly, the Chamber will issue an order for reparations in the case only upon completion of the exchange of submissions, pursuant to article 75(3): "Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States."

19. This difference clearly shows the specificity of *Lubanga* and its groundbreaking role; being the first case, it was the Court's opportunity to establish general principles applicable to reparations proceedings, principles that can be adapted and complemented as different cases arise.

20. As a consequence, the Defence for Mr Al Mahdi considers that it is important to clarify the principles applicable to reparations, as established by the Appeals Chamber. Emphasis will then be placed on the possibility of implementing them while avoiding the pitfalls encountered by the parties in the other cases currently in the reparations phase before the Court.

¹⁷ ICC-01/12-01/15-172, Reparations Phase Calendar.

Principles applicable to reparations

21. These principles were established in the Judgment of 3 March 2015 on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012¹⁸ and its Annex A: “Amended Order for Reparations”.¹⁹

22. The Order for Reparations (Annex A to the Decision of 3 March 2015) is divided into two parts:

(i) Principles on reparation (§1-§52): “Principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon or added to by future Trial Chambers”;²⁰

(ii) Order for Reparations against Thomas Lubanga (§53-§81).

23. The principles established in the order elaborate on the five essential criteria for an order for reparations, which must:

(a) be directed against the convicted person;

(b) establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order;

(c) specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97(1) and 98 of the Rules of Procedure and Evidence;

¹⁸ ICC-01/04-01/06-3129.

¹⁹ ICC-01/04-01/06-3129-AnxA.

²⁰ *Idem*, para. 5.

(d) define the harm caused to direct and indirect victims as a result of the crimes of which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and

(e) identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes of which the person was convicted.²¹

24. The Chambers have explicitly stressed that they expected submissions from the parties on these five aforementioned points in particular.²² The Defence for Mr Al Mahdi considers that this is valid in this specific case.

❖ **The status of “victim”**

25. Under rule 85(a) of the Rules of Procedure and Evidence, “victims” means “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.

26. The Order for Reparations issued by the Appeals Chamber provides as follows:

Pursuant to rule 85 of the Rules of Procedure and Evidence, reparations may be granted to:

- a. direct victims, and
- b. indirect victims, including

²¹ ICC-01/04-01/06-3129, para. 32.

²² For *Bemba*: ICC-01/05-01/08-3410, para. 7(b)(d). For *Katanga*: ICC-01/04-01/07-3532-tENG, para. 13.

- i. the family members of direct victims,
- ii. anyone who attempted to prevent the commission of one or more of the crimes under consideration,
- iii. individuals who suffered harm when helping or intervening on behalf of direct victims, and
- iv. other persons who suffered personal harm as a result of these offences.²³

27. Moreover, in its Decision of 3 March 2015, the Appeals Chamber specifies that only victims within the meaning of article 85(a) of the Rules of Procedure and Evidence who suffered harm as the result of a crime of which the accused was found guilty, are eligible for reparations.²⁴ The convicted person may be held liable only for reparations to direct or indirect victims of the crimes of which he or she was found guilty.²⁵

28. The Defence for Mr Al Mahdi considers that this is a universal principle establishing a causal link between the convicted person's liability and the harm suffered by the victims. This critical principle is fundamental in determining victim status. It must also be applied in the *Al Mahdi* case.

❖ Admittance of legal entities as victims

29. Rule 85(b) of the Rules of Procedure and Evidence provides that:

Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or

²³ ICC-01/04-01/06-3129 mentioned above, para. 5.

²⁴ ICC-01/04-01/06-3129, para. 211.

²⁵ ICC-01/04-01/06-3129, para. 54.

charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

30. Trial benches have confirmed that legal entities may be granted reparations and the Appeals Chamber has clarified and complemented rule 85(b):

Reparations can be granted to legal entities, pursuant to Rule 85(b) of the Rules. These may include, *inter alia*, non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges)[...] institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships.²⁶

31. The Defence for Mr Al Mahdi submits to this Chamber that the status of legal entity is a well-defined legal concept and that non-individual applicants in this case should provide evidence of their status.

❖ **Establishment of harm**

32. The concept of “harm” is not defined in the Statute or the Rules of Procedure and Evidence, but it denotes hurt, injury and damage. The harm does not necessarily need to have been direct, but it must have been personal to the victim. Harm may be material, physical and psychological.²⁷ The Defence for Mr Al Mahdi considers that in this case, the harm must be proven and not merely alleged.

❖ **Causal link between the crime and the harm**

33. The principle is that reparations are to be awarded on the basis of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. The causal link between the crime and the harm is to be determined in the

²⁶ *Idem*, para. 8.

²⁷ *Idem*, para. 10.

light of the specificities of a case.²⁸ The Defence for Mr Al Mahdi again submits that the proven existence of harm must not suffice to oblige its client to provide reparation; a causal link must still be established between the alleged harm and Mr Al Mahdi's conviction by the Court.

❖ **Standard of causation in *Lubanga*: “but/for” criteria + direct cause**

34. In its Order for Reparations, the Appeals Chamber states that the standard of causation is a “but/for” relationship in common law between the crime and the harm – that is to say, had the crimes not been committed, the harm would not have been done – and, moreover, it is required that the crimes of which the accused was convicted were the “proximate cause” of the harm for which reparations are sought.²⁹

❖ **Scope of the convicted person's liability**

35. The principle as regards reparations is that “the convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case”.³⁰

36. With regard to the scope of the convicted person's liability for reparations, he or she is liable for reparations in relation to the harm caused to the victims of the crimes for which he or she was convicted.³¹ The Trust Fund for Victims, upon being seized of the present order for reparations, may decide whether to advance

²⁸ *Idem*, para. 11.

²⁹ *Idem*, para. 59.

³⁰ *Idem*, para. 21.

³¹ *Idem*, para. 60.

its resources in order to enable the implementation of the order and to claim the advanced resources from the convicted person.³² Nonetheless, it is clear that the order for reparations is directed against the convicted person.

37. The present order for reparations covers direct as well as indirect victims who have suffered harm as a result of the established crimes. In order to determine whether an “indirect victim” is to be included in the reparations scheme, a determination should be made as to whether there was a close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents.³³

38. In the present *Al Mahdi* case, it is therefore necessary to establish the extent of any connection between the victims and the harm, given that, at the time of the commission of the acts, the attacked mausoleums neither had their own legal personality, nor were they the property of determined natural persons, as far as can be judged by the Defence, which, to date, has received only a significantly redacted version of the application for participation and reparations by victims authorised to participate in the trial phase.

39. The Defence for Mr Al Mahdi asks that its client be given the opportunity to review the Fund’s proposed victim screening process at the implementation stage, subject to any protective measures, such as granted by the Bench in *Lubanga*.³⁴

³² *Idem*, para. 62.

³³ *Idem*, para. 63.

³⁴ *Idem*, para. 66.

❖ **Indigence is not an obstacle to the convicted person's liability**

40. According to this principle, the convicted person remains liable for reparations, even if he or she is considered to be indigent. The liability of the convicted person is personal; the order for reparations is directed against him or her, even if the amounts are paid through the Trust Fund for Victims.³⁵

41. While Mr Al Mahdi's Defence acknowledges, as did Mr Katanga's Defence, the principle that indigence is not an obstacle to its client's liability, it nevertheless requests that:

(a) in the order for reparations, a set amount to pay be defined, on account of Mr Al Mahdi's indigence and the extremely unlikely premise that he could return to better fortune;

(b) a financial burden not be placed on someone who does not have the means to bear such costs, as this would be unfair and biased. Consequently, the amount of reparations for which he would be liable should be a set and reasonable amount that reflects his financial abilities;³⁶

(c) emphasis be placed on the following advantages: the Court would be acting practically and realistically, rather than theoretically and in a manner far removed from the reality of the situation. This would also mean that the

³⁵ The Appeals Chamber reached this conclusion in the Judgment of 3 March 2015 in the light of article 75(4) of the Statute: "In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1."

³⁶ *Idem*, para. 73.

convicted person would not be subject to an order that he or she could never hope to execute, and this would facilitate the convicted person's reintegration once the sentence was served.³⁷ It should also be noted that the domestic criminal justice systems do not order compensation when there is no possibility that this compensation will be paid;³⁸ and

(d) should the situation change, the TFV be authorised to claim reimbursement, exceptionally and with the Chamber's leave, only within a limited time period.³⁹

❖ **Evidentiary threshold and burden of proof: standard of proof for assessing reparations**

42. The principle: in the reparations proceedings, the applicant must provide sufficient proof of the causal link between the crime and the harm suffered, on the basis of the specific circumstances of the case. Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the Prosecution must establish the relevant facts to the standard of "beyond reasonable doubt", should apply.

43. The standard of proof in *Lubanga* is that of the "balance of probabilities".⁴⁰ The expression "balance of probabilities" is synonymous with "preponderance of the evidence". *Black's Law Dictionary* defines it as:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior

³⁷ *Idem*, para. 73.

³⁸ *Idem*, paras. 73 and 74.

³⁹ *Idem*, para. 74.

⁴⁰ ICC-01/04-01/06-3129, para 65.

evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.⁴¹

❖ **Modalities of reparation**

44. *Collective and/or individual reparations.* Rule 97(1) of the Rules of Procedure and Evidence provides that “taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”. Individual and collective reparations are not mutually exclusive, and they may be awarded concurrently.

45. *Adequate and appropriate reparations proportional to the harm suffered.* Victims should receive appropriate, adequate and prompt reparations.⁴² They should be proportionate to the harm, injury, loss and damage, as established by the Court.⁴³

❖ **Different types of reparation**

46. Reparations are not limited to restitution, compensation and rehabilitation, as listed in article 75 of the Statute. Other types of reparations, for instance those with a symbolic, preventive or transformative value, may also be appropriate.⁴⁴

47. *Restitution.* Restitution is intended, to the extent possible, to “restore the victim to his or her circumstances before the crime was committed”.⁴⁵ It may also be apposite for legal bodies such as schools or institutions.⁴⁶

⁴¹ *Black’s Law Dictionary*, Eighth Edition, Garner (ed.), 2004, p. 1220.

⁴² *Idem*, para. 44.

⁴³ *Idem*, para. 45.

⁴⁴ *Idem*, para. 34.

⁴⁵ *Idem*, paras. 35 and 67.

⁴⁶ *Idem*, para. 36.

48. **Compensation.** The Order for Reparations elaborates on eligibility for compensation:

Compensation should be considered when i) the economic harm is sufficiently quantifiable; ii) an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and iii) in view of the availability of funds, this result is feasible.⁴⁷

Although some forms of damage are essentially unquantifiable in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted. Examples include:

- (a) Physical harm, including causing an individual to lose the capacity to bear children;
- (b) Moral and non-material damage resulting in physical, mental and emotional suffering;⁴⁸
- (c) Material damage, including lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings;
- (d) Lost opportunities, including those relating to employment, education and social benefits; loss of status; and interference with an individual's legal rights (although the Court must ensure it does not perpetuate traditional or existing discriminatory practices, for instance on the basis of gender, in attempting to address these issues); and

⁴⁷ UN Basic Principles on Reparation for Victims, principle 20.

⁴⁸ See the jurisprudence of the IACtHR (e.g., *Garrido and Baigorria v. Argentina*, para. 49; *Plan de Sánchez Massacre v. Guatemala*, paras. 80-89, 117; *The Juvenile Reeducation Institute v. Paraguay*, para. 295) and the ECHR (*Selmouni v. France*, paras. 92, 98 and 105; *Aksoy v. Turkey*, para. 113); Pre-Trial Decision on Applications for Participation, p.11.

(e) Costs of legal or other relevant experts, medical services, psychological and social assistance.

49. **Rehabilitation.**⁴⁹ Rehabilitation shall include the provision of medical services and healthcare, psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services.⁵⁰

50. **Other types of reparations** that have a *symbolic, preventive or transformative value*, may also be granted: the Appeals Chambers specifies that: “[t]he conviction and the sentence are likely to have significance for the victims, their families and communities [...]. [T]he wide publication of the Conviction Decision may also serve to raise awareness...”.⁵¹

Consequently, apologies or requests for forgiveness: furthermore, the Judges state that the convicted person can contribute to this process by way of a voluntary apology to individual victims or to groups of victims, publicly or confidentially.⁵² Mr Al Mahdi has expressed his sincere remorse several times and has offered his apologies to all those who have suffered any harm of any kind.

Likewise, a Defence proposal concerning Mr Lubanga’s implication suggested that he make a personal contribution to the reparations phase, in particular, by participating in a public *reconciliation ceremony respectful of the customs of Congolese culture*, at which he would meet the victims of the crimes for which he

⁴⁹ ICC-01/04-01/06-3129, para 42.

⁵⁰ UN Basic Principles on Reparation for Victims, principle 21.

⁵¹ ICC-01/04-01/06-3129, para. 43.

⁵² *Lubanga*. ICC-01/04-01/06-3129, para. 67.

was convicted in order to express his personal and sincere feelings and apologies to them.⁵³

Without going to such extremes – not in keeping with Malian traditions and not without risk with armed groups still holding sway in Mali – Mr Al Mahdi is fully prepared to reiterate his apologies in accordance with any process that the Chamber may see fit to establish.

51. Overall, the Defence for Mr Al Mahdi does not object either to the principle of reparation, or to any of its forms, but lays down all the aforementioned conditions, in addition to the respect of his rights.

❖ **Respect of the rights of the Defence and of other principles**

52. The principles that are to govern the reparations must not prejudice or be inconsistent with the rights of the convicted person and the requirement of a fair and impartial trial.⁵⁴ Mr Al Mahdi must therefore retain the usual rights of the Defence:

- (a) A fair and impartial trial;
- (b) The right to appeal the order for reparations;⁵⁵ and
- (c) The right to examine any applications for reparation and the right to submit any observations, as enshrined in the provisions of article 75(3), read with rule 94(2), and in the case-law of the Court.⁵⁶

⁵³ *Idem*, para. 97.

⁵⁴ *Idem*, para. 49.

⁵⁵ ICC-01/04-01/06-3129, para. 29.

⁵⁶ ICC-01/04-01/06-3129, paras. 66 and 80.

- **The Trust Fund for Victims has competence for the implementation of the reparations proceedings**

53. The Order for Reparations, rendered on 3 March 2015 pursuant to article 75(2) of the Statute,⁵⁷ instructs the Trust Fund for Victims (TFV) to present the Chamber with a draft plan for implementing collective reparations.⁵⁸ According to this Order, the Chamber is responsible for monitoring and overseeing the implementation of the plan once it has approved it.⁵⁹

54. The Chamber must also ensure this procedure is carried out properly, and it is responsible for determining the monetary amount of the convicted person's liability in order to complete the Order for Reparations⁶⁰ and by availing itself of all the means to do so, in particular by requiring:

- (i) a list of potentially eligible victims;
- (ii) the proposal and form of the modalities of reparations; and
- (iii) the evaluation of the extent of the harm caused to the victims, the anticipated amount and the monetary amount which the Fund could potentially advance.⁶¹

55. This process is under way in *Lubanga*. The Defence for Mr Al Mahdi assumes that the process will be the same in the present case, in particular with regard both to limiting the reparations and to the implementation of symbolic reparations.⁶²

⁵⁷ Article 75(2): "The Court may make an order against a convicted person specifying appropriate reparations to, or in respect of, victims. The form of such reparations includes restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."

⁵⁸ ICC-01/04-01/06-3129, para. 75.

⁵⁹ ICC-01/04-01/06-3129, para. 76.

⁶⁰ ICC-01/04-01/06-3129, para. 81.

⁶¹ "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", 9 February 2016, ICC-01/04-01/06-3198-tENG.

56. The Defence requests this Chamber to apply to Mr Al Mahdi the precedents set by the Court with regard to the following:

- (a) The identification of eligible victims as the only means of evaluating the harm suffered, and determining the number of victim beneficiaries and their locations.⁶³
- (b) The right of the Defence to receive information on the victims at the reparations stage in order to “test the credibility of victims and assess the extent of the alleged harm”, and order the disclosure of any applications for reparation from victims, as well as any relevant supporting documents;⁶⁴ and
- (c) The right of Mr Al Mahdi to receive the same procedural safeguards as those granted to Mr Katanga or to Mr Lubanga, for example,⁶⁵ as all accused persons are equal before the Court.

57. Furthermore, the Defence expects the Chamber to limit the harm subject to reparations to only the harm caused by the attack on the sites covered by the judgment handed down against Mr Al Mahdi. Any unsupported harm, or harm derived solely from the political and religious situation in northern Mali at the time of the events, should be disregarded.

- **Anticipated amount necessary to implement the reparations**

⁶² *Idem*, para. 17.

⁶³ “*Observations de la Défense de M. Thomas Lubanga relatives au ‘Filing on Reparations and Draft Implementation Plan’, daté du 3 novembre 2015*”, filed on 1 February 2016 (ICC-01/04-01/06-3196-Conf), paras. 24-25.

⁶⁴ ICC-01/04-01/07-3583-tENG, para. 24. See also paras. 17, 19, 25, 26.

⁶⁵ ICC-01/04-01/06-3198-tENG, “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, para. 17.

58. The amount anticipated for reparations is a crucial piece of information for the Defence, since it will determine the extent of the convicted person's liability.⁶⁶ The importance of this was underscored by the Appeals Chamber, which referred this issue back to the Trial Chamber to avoid depriving the convicted person of his or her right to appeal on this matter.⁶⁷

- **Identification of victims**

59. The Defence agrees to the same victim identification procedure as that set out in *Lubanga*⁶⁸ and has no particular comments to make.⁶⁹

- **Regarding the consequences of Mr Al Mahdi's indigent status on the Order for Reparations to be issued**

60. The Defence concurs with the observation that the Appeals Chamber in *Lubanga* based itself on several decisions of international tribunals concerning individual requests against a State, but that this cannot be applied to cases before the ICC. Accordingly, the Defence requests the Chamber to consider this difference when it makes a decision on the extent of the reparations owed to victims. After all, Mr Al Mahdi's liability and capacity cannot be measured against those of a State.⁷⁰

⁶⁶ "Observations de la Défense de M. Thomas Lubanga relatives au 'Filing on Reparations and Draft Implementation Plan', daté du 3 novembre 2015", filed on 1 February 2016 (ICC-01/04-01/06-3196-Conf), para. 100.

⁶⁷ ICC-01/04-01/06-3129, paras. 239-242.

⁶⁸ ICC-01/04-01/06-3129, para. 57.

⁶⁹ *Idem*, paras. 22-23.

⁷⁰ *Idem*, para. 76.

FOR THESE REASONS

The Defence for Mr Ahmad Al Faqi Al Mahdi respectfully requests the Court to take account of its observations set out above and to decide that:

- The principles laid down by the Appeals Chamber in *Lubanga* – in particular the five criteria it established – shall apply in the present *Al Mahdi* case;
- Mr Al Mahdi will receive the same procedural safeguards as Mr Lubanga and Mr Katanga, in all respects;
- The reparations in this case shall be collective, as no bodily harm was suffered by any person;
- Financial losses shall be proven and limited to the period during which the destroyed monuments had not yet been rebuilt by UNESCO;
- Any reimbursement to the Trust Fund for Victims by Mr Al Mahdi – if his financial situation were to change – shall be limited in time, to a reasonable period;
- The psychological harm shall be proved, in particular by the direct kinship existing between the people claiming the psychological harm and the deceased whose mausoleums were attacked; and
- The status of the victims that are legal entities shall have been established before the acts causing the harm.

WITHOUT PREJUDICE

AND JUSTICE SHALL BE DONE.

Dated the 2 December 2016

At The Hague

[signed]

Mohamed Aouini

Lead Counsel