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No.: **ICC-01/12-01/15**  
Date: **17 October 2017**

**THE APPEALS CHAMBER**

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

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public Document**

**Brief in support of the Appeal (in part and limited)  
ICC-01/12-01/15-242-Conf-Exp-Corr filed against the Reparations Order of  
17 August 2017 (ICC-01/12-01/15-236) issued by Trial Chamber VIII**

**Source:** Legal Representative of Victims, Mr Mayombo Kassongo

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

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## I. PROCEDURAL HISTORY

1. Mr Ahmad Al Faqi Al Mahdi (“Mr Al Mahdi”) was convicted by Trial Chamber VIII (“Chamber”) of the International Criminal Court (“Court”) of the war crime of attacking protected objects under article 8(2)(e)(iv) of the Rome Statute (“Statute”).<sup>1</sup> Mr Al Mahdi had admitted guilt to the charge against him.<sup>2</sup>
2. On 27 September 2016, the Chamber convicted Mr Al Mahdi as a co-perpetrator of the war crime charged and sentenced him to nine years’ imprisonment.<sup>3</sup> Neither Mr Al Mahdi nor the Office of the Prosecutor (“Prosecution”) appealed against the Judgment.
3. On 17 August 2017, the Chamber entered its Reparations Order (“Order”) under article 75 of the Statute,<sup>4</sup> granting victim status for reparations purposes to 139 reparations applicants and awarding individual, symbolic and collective reparations accordingly. The Chamber assessed Mr Al Mahdi’s liability for those reparations at USD 2,700,000.
4. The Chamber encouraged the Trust Fund for Victims (“Trust Fund”) to complement the reparations award and provide broader assistance for victims.
5. It also instructed the Trust Fund to prepare and submit a draft implementation plan (“Plan”) by 16 February 2018. It directed the parties to file any observations in reply to the Plan within 30 days.
6. The Legal Representative of Victims is not seeking a stay of execution of the Reparations Order. As stated in the Notice of Appeal, this appeal is non-suspensive to enable the Order to continue to have effect.

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<sup>1</sup> This single charge was laid by the Office of the Prosecutor in the document containing the charges (ICC-01/12-01/15-62) and confirmed by the Pre-Trial Chamber after the confirmation hearing (ICC-01/12-01/15-84-Red).

<sup>2</sup> ICC-01/12-01/15-T-4-Red-FRA.

<sup>3</sup> ICC-01/12-01/15-171.

<sup>4</sup> ICC-01/12-01/15-236, Reparations Order of 17 August 2017 (“Reparations Order”).

7. The Legal Representative respectfully submits to the Chamber this Brief in support of his appeal (in part and limited) in accordance with regulation 58(1) of the Regulations of the Court.
8. On 18 September 2017, the Legal Representative filed a notice of appeal against part of the Reparations Order of 17 August 2017. That notice of appeal was corrected on 21 September 2017 (ICC-01/12-01/15-238-Conf-Corr).
9. By order dated 26 September 2017, (ICC-01/12-01/15-240-Conf), the Appeals Chamber instructed the Legal Representative to amend his initial Notice of Appeal of 18 September 2017 to comply with the latest version of regulation 57 of the Regulations of the Court.
10. On 6 October 2017, the Legal Representative filed a notice of appeal “in part and limited” (ICC-01/12-01/15-242-Conf-Exp-Corr) against the Reparations Order of 17 August 2017 (paragraphs 81, 83 and 146), pursuant to the order of the Appeals Chamber (ICC-01/12-01/15-240-Conf).
11. This Appeal Brief is provided to support the grounds stated in the Notice of Appeal (ICC-01/12-01/15-242-Conf-Exp-Corr) by setting out the legal and factual reasons required by regulation 58(2) of the Regulations of the Court.

## II. SUBJECT OF THE APPEAL

1. The Legal Representative will present below the reasons for his appeal *in part and limited* against the Order, regarding only its aspects in connection with: paragraph 81, concerning “*individual reparations for consequential economic loss only to those whose livelihoods exclusively depended upon the Protected Buildings*”; paragraph 83, to the extent that it requires an exclusive link for “*individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings [...]*”; and paragraph 146, insofar as it confirms “*the administrative role of the TFV in the screening*” of victims applying for individual reparations.

2. This Appeal Brief argues, with limitation, as *grounds for appeal*, that the current wording of paragraphs 81 and 83 of the Order issued by Trial Chamber VIII (“Chamber”) merits reproof insofar as it requires screening for an *exclusive link* between the consequential economic losses and the Protected Buildings. This requirement runs the risk of becoming a basis for excluding, rather than including, in the individual reparations process, the relevant victims under the terms of the Order.
3. The Order delegates the *role of assessing* the individual reparations applications for *consequential economic loss* presented to the *Trust Fund*, in paragraph 146:

This screening process itself must respect the rights of both the victims and the convicted person. The Chamber considers that the full details of this screening are to be determined by the TFV, but it can already set out the following general parameters: (i) [...] to identify individuals who may be eligible under the screening process, within a timeframe to be proposed by the TFV.

4. The Legal Representative would like to stress to the Appeals Chamber that the Trial Chamber has granted decision-making power by delegating the final say of adjudication – after submissions from the Defence – according to paragraph 146(iii) as currently worded:

Both the applicant, on his or her own or through a legal representative, and the Defence must be given an opportunity to make representations before the TFV assesses any applicant’s eligibility. In assessing eligibility, the TFV may base itself only on information made available and to which the Defence has had an opportunity to access and respond.

This wording of the Reparations Order creates an obligation on the Trust Fund within an adjudicative role. The Trust Fund is required to disclose the victims’ applications and reveal their identities to the Defence. This obligation cannot in any way be contested under articles 59 and 60 of the Regulations of the Trust Fund, but it is the decision-making power that arises as a consequence pursuant to paragraph 146(iii) of the Reparations Order.<sup>5</sup>

5. Furthermore, an early-stage screening of financial losses in direct relation or closely linked to the mausoleums or Protected Buildings runs the risk of

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<sup>5</sup> Reparations Order, para. 146(iii), p. 56.

ultimately excluding families whose work relates to the buildings, descendants of the Saints and those who work informally for the proper functioning of the mausoleums.

6. The Legal Representative therefore moves the Appeals Chamber to amend the Order solely on the points raised herein and to affirm its other provisions.

### III. APPLICABLE LAW

7. The purpose of article 75 of the Rome Statute has been violated, and an error of judgement made with regard to regulations 59 and 60 of the Regulations of the Trust Fund for Victims.<sup>6</sup>
8. Article 75(6) of the Rome Statute, concerning reparations, provides that *“[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law”*.
9. The purpose of that text – reparations to the benefit of victims – is thwarted by the current wording of paragraphs 81 and 83 and their counterparts, paragraphs 145 and 146. The word *“exclusif [exclusive]”*, according to the Larousse dictionary, is an adjective (derived through medieval Latin *exclusivivus* from classical Latin *excludere*, “to exclude”) meaning “which excludes another thing as incompatible; right exclusive of all other rights; which belongs to one alone, to the exclusion of others, by special privilege”.
12. In other words, the Trial Chamber has awarded individual reparations for economic losses only to those victims who made their living strictly from the operation of the mausoleums.

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<sup>6</sup> Article 75 concerns *“Reparations to victims”*, and manifestly sets out their purpose. As for regulations 59 and 60 of the Regulations of the Trust Fund for Victims, the power they confer is administrative and financial, not adjudicative. The assessment of any link belongs to the role of adjudicator, which is the Chamber’s alone.

13. The Trial Chamber's ruling effectively rejects the views and concerns of the victims. However, the harm done to the victims and their needs must be a matter of primary concern to the Chamber if its order is to be more than a merely symbolic measure and if it is to truly give the victims back their dignity and meet those needs.
14. The Appeals Chamber, upon taking cognizance of the content and quanta of the applications for reparations, should be able to satisfy itself that an award for individual reparations to the victims of economic loss from the attack is in no way impracticable.
15. **Clear error of judgement**
16. The Legal Representative submits that the Chamber's interpretation of the law and the facts was erroneous, providing ground for a limited appeal.
17. The standard of review is the same as that which applies to any other appeal.
18. The question before the Appeals Chamber is therefore whether the Trial Chamber misinterpreted the law and the facts of the instant case, and how to amend the Order accordingly.

#### **IV. FIRST GROUND OF APPEAL: ARTICLE 75 OF THE STATUTE**

19. The Legal Representative's appeal against part of the impugned Order rests on two grounds of law and fact:
  - (1) **The Chamber erred in law by awarding individual reparations for consequential economic losses only to victims who made their living exclusively from the mausoleums that Mr Al Mahdi destroyed (paragraphs 81 and 83)**

20. **Form of the appeal:** According to regulation 58(2) of the Regulations of the Court, an appeal brief must set out the legal and/or factual reasons in support of each ground of appeal.
21. **Substance of the appeal:** On the basis of article 75 of the Rome Statute, entitled “*Reparations to victims*”, the Legal Representative raises an error of law vitiating paragraphs 81 and 83 of the Reparations Order.
22. In paragraph 81 of the impugned Order,<sup>7</sup> the Trial Chamber awards “*individual reparations for consequential economic loss only to those whose livelihoods exclusively depended upon the Protected Buildings*”.
23. The Chamber gives the following reasons for its ruling in paragraph 81:
- An individualised response is more appropriate for them, as their loss relative to the rest of the community is more acute and exceptional. This is recognised by the LRV and the appointed experts, who single out persons in this group as having suffered harm in the present case. Such persons include those whose livelihood was to maintain and protect the Protected Buildings. Certain business owners may also qualify – such as a business whose only purpose is to sell sand perceived as holy from the sites of the Protected Buildings – but not owners of businesses with broader purposes who have been harmed by the loss of the Protected Buildings.
24. The same line of reasoning is called upon in paragraph 83 of Order:<sup>8</sup> “*The Chamber therefore considers that the economic harm caused by Mr Al Mahdi necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings*”.
10. In effect, exclusivity means excluding any applications for individual reparations that fail to show an exclusive link between the consequential economic loss and the Protected Buildings. The word “*exclusif* [exclusive]”, according to the Larousse dictionary, is an adjective (derived through medieval Latin *exclusivivus* from classical Latin *excludere*, “to exclude”) meaning “which excludes another thing as incompatible; right exclusive of all

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<sup>7</sup>Reparations Order, para. 81, p. 32.

<sup>8</sup> *Ibid.*, para. 83, p. 33.

other rights; which belongs to one alone, to the exclusion of others, by special privilege”.

11. In other words, the Trial Chamber has awarded individual reparations for economic losses only to those victims who made their living strictly from the operation of the mausoleums.
12. This reasoning excludes most victims and voids the Reparations Order of its substance:
  1. The economic losses suffered by the victims as a result of the destruction of the monuments cannot be reduced to a loss of livelihood. For example, the victims who had to flee Timbuktu in the wake of the attack<sup>9</sup> were forced to abandon their family and friends as well as their occupations, homes and personal property.
  2. The loss of their homes is not a loss of livelihood *per se*; therefore, if the Trust Fund for Victims were to comply with the Order as it stands, these victims would receive no individual reparations, as there is no loss of livelihood.
  3. Being physically distant and without the means to return, these victims would also receive no collective reparations – and therefore no reparations at all.
  4. Business owners who lost their businesses as a result of the disappearance of tourism after the attack are owed reparation. But a literal reading of the Order will deprive them of it.

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<sup>9</sup> ICC-01/12-01/15-214-AnxII-Red2, para. 58, p. 20. Expert findings confirmed the harm suffered by the victims who were forced to flee after the attack: “As indicated by UNESCO, this deprivation of cultural rights and access to cultural heritage may particularly affect ‘refugees and internally displaced people’ on a continuing basis. This form of impact affects those in Mali who fled due to the destruction of the mausoleums. Accordingly, ‘in the longer term, this might cause irreversible loss of cultural diversity’.”

5. In sum, no fewer than 90 per cent of victims will be deprived of reparations for their economic losses, in violation of international legal principles,<sup>10</sup> including that of full reparation for the harm caused.
  6. Individual reparations should not be restricted to the custodians of the mausoleums; other victims suffered losses of livelihood as a result of the destruction. The attack had repercussions on the earning potential of Timbuktu's inhabitants. The custodian families traditionally earned their living thanks to donations from pilgrims and tourists visiting the mausoleums. While it is true that the custodian families received those donations from pilgrims and tourists, the fact remains that part of the donations was then redistributed among the custodians. The category of eligible victims corresponding to this type of harm should therefore be understood broadly and not restricted to the custodian families alone.<sup>11</sup>
  7. Likewise, if the impugned Order is executed in its current form, any victim who used to earn a living only partially from the mausoleums would be refused individual reparations because his or her livelihood did not "exclusively" depend on the mausoleums. And yet, such victims suffered harm – financial losses – that should be repaired.
25. The Legal Representative notes that the Trial Chamber acknowledges the possibility of individual reparations, hinting cryptically that: "[t]his is not to say that individual businesses and families could not receive financial support in the implementation of these collective reparations".

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<sup>10</sup> ICC-01/12-01/15-190-Conf, para. 30, p. 11, "Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation", 2 December 2016: "A line of authority acknowledges the right of victims of violations of international law to reparation as a fundamental principle. In 1928, the Permanent Court of International Justice held that any breach of international law casts a duty of reparation [...] of the harm which ensues from human rights violations as a 'general concept of law'."

<sup>11</sup> Expert statement on the transfer of donations to every person in the family. ICC-01/12-01/15-242-Conf-Exp-Corr-Anx3.

26. The Legal Representative would also like to draw the Appeals Chamber's attention to the fact that requiring victims to prove an exclusive link for their economic loss is tantamount to denying them the right to reparations. The Chamber knows how hard it is for the victims to provide evidence. To demand that they produce payslips, accounting records, employment contracts and so forth, in a country where such documents simply do not exist or are not readily available, is to deny their right to reparations.
27. And yet the Trial Chamber adds a further layer of difficulty by requiring proof not only of the economic loss but also of its exclusivity, which effectively eliminates any chance of receiving reparations and thereby nullifies the goals of the Statute.
28. In the light of the foregoing, the Appeals Chamber should rule that any victim who can show an economic loss linked to the destruction of the mausoleums is eligible for individual reparations.
29. The Legal Representative submits that individual reparations should be available to any victim who can demonstrate economic loss – not only to those with an exclusive link or loss of livelihood connected to the mausoleums.
- (2) The Trial Chamber erred in law when it decided to delegate an effective “power of adjudication” for reparations purposes to a non-judicial entity (paragraphs 145 and 146)**
30. **Form of the appeal:** According to regulation 58(2) of the Regulations of the Court, an appeal brief must set out the legal and/or factual reasons in support of each ground of appeal.
31. **Substance of the appeal:** On the basis of regulations 59 and 60 of the Regulations of the Trust Fund, the Legal Representative raises an error of law vitiating paragraphs 145 and 146 of the Reparations Order (pages 55-59).

32. Regulation 59 provides that

[w]here the Court orders that an award for reparations against a convicted person be deposited with the Trust Fund in accordance with rule 98, sub-rule 2, of the Rules of Procedure and Evidence, the draft implementation plan shall set out the names and locations of victims to whom the award applies, where known (and subject to confidentiality), any procedures that the Trust Fund intends to employ to collect missing details, and methods of disbursement.

33. Regulation 60 provides that

[w]here the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors.

34. The Legal Representative hereby asks the Chamber to clarify and interpret the nature of the Trust Fund's power: does the order issued by Trial Chamber VIII grant the Trust Fund a broad, quasi-judicial power to assess?

35. In the meaning, that is, of "*apprécier* [to assess]": "to determine the monetary value of an object or good". It is a question not only of the Fund, but also of the rights involved. After all, it lies within the Chamber's remit [alone] to determine applicants' rights; whereas the Trust Fund has no judicial authority under articles 59 and 60 of the Regulations of the Trust Fund.

36. The Chamber's ruling establishes the standing of victims without referring that decision to any other body, least of all the Trust Fund. On a reading of both texts together, it is the Chamber's responsibility to determine the *criteria* for screening victims for reparations. By mandating the Trust Fund to perform the initial screening, the Chamber relinquishes its power of adjudication.

37. The Legal Representative would like the Chamber to consider paragraph 59 of the Trust Fund's submissions of 2 December 2016 to the Trial Chamber, noting that "*[w]ith respect to collective awards, [...] unlike the procedure set out for*

*individual awards, [the Trust Fund's] Regulations are silent in relation to how eligibility is to be determined".<sup>12</sup>*

38. Yet, in Mr Al Mahdi's case, the Trial Chamber has mandated the Trust Fund not only to determine who is a victim and who is not, but also to assess the consequential economic losses cited in connection with the running of the Protected Buildings – that is, to pronounce on a right to reparations, which is a judicial function because it involves deciding on an individual right *in rem*. But only a judge can decide on a right.<sup>13</sup> The mandate of the Trust Fund, conversely, should be administrative and financial rather than judicial. The Statute is not clear as to the Trust Fund's role, and a number of difficulties continue to impede the process, as the NGO Redress noted in its November 2016 report.<sup>14</sup>
39. In the instant case, at paragraph 145 of the Reparations Order,<sup>15</sup> the Trial Chamber states that individual reparations are to be awarded to “(i) those whose livelihoods exclusively depended upon the Protected Buildings and (ii) those whose ancestors' burial sites were damaged in the attack [...] [T]he Chamber considers that one screening for both categories is sufficient.” The word “exclusively” is problematic here because, as noted above in paragraph 10 of this Appeal Brief, the victims seeking individual reparations for consequential economic losses are discriminated against in favour of other applicants, which frustrates the purpose of the reparations principle. The Chamber should, therefore, reword

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<sup>12</sup> ICC-01/12-01/15-187, para. 59, p. 21; *ibid.*, para. 60: “[T]he Trust Fund submits that a verification process of each individual beneficiary by its Board of Directors [...] is not appropriate or operationally feasible for collective reparations awards.” See also para. 57, p. 20, where the Trust Fund “would request that the Trial Chamber consider whether and, if so, for which collective awards a screening process is required, including the legal criteria to be applied by the Trust Fund in that regard.”

<sup>13</sup> Articles 17, 21 and 35 of the Rome Statute; articles 59 and 60 of the Regulations of the Trust Fund.

<sup>14</sup> Redress, “Moving Reparation Forward at the ICC: Recommendations”, November 2016, p. 3: “Neither the existing legal framework nor the jurisprudence provides certainty on which decisions and actions ought to remain within the scope of the judicial process, and which ones could be delegated [...], for example to the Registry or the Trust Fund for Victims. If unaddressed, these challenges threaten to undermine the ICC's reparation system and may seriously impede the Court from delivering justice to victims.” – [http://www.redress.org/downloads/publications/1611REDRESS\\_ICCReparationPaper.pdf](http://www.redress.org/downloads/publications/1611REDRESS_ICCReparationPaper.pdf)

<sup>15</sup> Reparations Order, pp. 55-56.

that paragraph by deleting the word “exclusively” or clarifying what it means. If Trial Chamber VIII is asking the applicants to prove that their livelihoods “*exclusively depended*” on the Protected Buildings, that is a very high standard of proof inconsistent with the appropriate hurdle for establishing a causal link, which is the “*balance of probabilities*” standard.

40. Paragraph 146 of the Reparations Order is problematic in its entirety. As the Legal Representative has argued in this Appeal Brief, the Order confers a power of adjudication on the Trust Fund. According to paragraph 146, the Chamber considers that

the full details of this screening are to be determined by the TFV, but it can already set out the following general parameters:

- (i) Reasonable efforts must be made to identify individuals who may be eligible under the screening process, within a timeframe to be proposed by the TFV.
- (ii) Individuals who wish to be considered for the screening process are to provide a reparations application and any supporting documents. It is noted in this regard that this step has already been taken by the reparations applicants in the present case, and these persons should be considered first by the TFV if they also apply to be screened.
- (iii) Both the applicant, on his or her own or through a legal representative, and the Defence must be given an opportunity to make representations before the TFV assesses any applicant’s eligibility. In assessing eligibility, the TFV may base itself only on information made available and to which the Defence has had an opportunity to access and respond.

41. The Legal Representative recalls that applications for reparations are made before the Chamber and not before the Trust Fund. Applicants who apply to be screened file an application with the Court. However, without specifying which victims are to be considered initial applicants, applicants having made disclosures or victims already known to the Chamber, the Chamber asks the Trust Fund to determine the applicants’ standing and right to reparations.

42. Subparagraphs 146(iv) and (v) set out the rights of the Defence in this “administrative”<sup>16</sup> process established by Trial Chamber VIII.

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<sup>16</sup> Reparations Order, para. 146(v), p. 58.

43. In subparagraph (iv),<sup>17</sup> Trial Chamber VIII notes that

[i]t is true that the regulations governing the TFV verification procedure in this context do not expressly specify any role for the Defence, but these same regulations also make clear that the TFV verification procedure is subject to additional principles specified in the Court's order. The Chamber considers it appropriate that Mr Al Mahdi be afforded an opportunity to present informed views and concerns regarding the individuals claiming to be owed individual reparations from him. The Chamber does not identify beneficiaries in a full Chamber procedure – complete with the procedural rights associated with such a procedure – for a reason outside the Defence's control, namely the impracticability of conducting such an assessment. It is fair to afford the Defence an opportunity to present an informed submission to the TFV in these circumstances.

44. Subparagraph (v)<sup>18</sup> states that *“[o]n the other hand, the Defence always has the right to challenge the victim parameters, total liability conclusions and administrative screening process set forth in the present order before the Appeals Chamber”*. The Legal Representative submits that the Chamber provides a right of recourse for the Defence but not for the victims/applicants. *“The TFV is merely identifying eligible victims according to the parameters specified in the present order. [...] A denial of eligibility of any particular applicant during the screening process [...]”* Applicants cannot call for a judicial review if the Trust Fund turns down their applications for reparations. No recourse is available to them in this “administrative screening process”.

45. However, it is incumbent upon the Trial Chamber to fulfil its own responsibilities within a strictly judicial framework.

46. In accordance with rule 96 of the Rules of Procedure and Evidence, the Chamber has a duty to establish principles to be applied to forms of reparations; to determine the scope and extent of any damage, loss and injury to or in respect of victims; to ensure that the reparations proceedings are public; to appoint appropriate experts to assist it in determining the scope and extent of any damage, loss and injury to or in respect of victims, and to suggest various options concerning the appropriate types and modalities of

<sup>17</sup> Reparations Order, para. 146(iv), p. 57.

<sup>18</sup> *Ibid.*, para. 146(v), pp. 58 and 59.

reparations; and to invite, as appropriate, the persons affected to make observations on the reports of the experts.

47. Nowhere, on the other hand, is it provided that the Chamber may delegate its powers to another organ of the Court, let alone a non-judicial organ whose sole *raison d'être* is to support the Court – and not to take its place – in the provision of reparations to victims.<sup>19</sup>
48. This was the legal basis for the Appeals Chamber's landmark judgment of 3 March 2015 amending the order of the Trial Chamber in *Lubanga*.<sup>20</sup> The Trust Fund for Victims is an independent organ whose role is to execute the Chamber's orders. It has a general mandate to assist victims, as well as the goal of supporting and administering programmes designed to implement reparations for the harm caused to victims as a result of serious violations of international humanitarian law. In its judgment in *Katanga*, Trial Chamber II assessed the applications for reparations itself, directing the Legal Representative and Registry to compile individual files for each victim, detailing the harm suffered and any other information relevant to an assessment of the applications.
49. The Chamber in *Al Mahdi*, by contrast, has conferred upon the Trust Fund a veritable power of adjudication by stating that it is the Trust Fund's responsibility to screen victims for eligibility for individual reparations – which, in this case, it is not.

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<sup>19</sup> This was more or less the argument behind the Trust Fund's "Request for Leave to Appeal against the '*Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre*' (9 February 2016)", ICC-01/04-01/06-3200, para. 15.

<sup>20</sup> ICC-01/04-01/06-3129, "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) and public annexes 1 and 2".

50. **CONFIDENTIALITY**

51. The Legal Representative respectfully moves the Appeals Chamber to grant initial measures of confidentiality pursuant to regulation 23 *bis* of the Regulations of the Court, which may later be lifted with the victims' consent for disclosure purposes.

52. The Trust Fund should not be given discretion to lift confidentiality restrictions as soon as it is asked to do so (see the new documents in the annexes not previously provided since the start of the reparations phase).<sup>21</sup>

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53. Implementing the Reparations Order will be a challenge. However, rather than constituting an end in itself, the Order should mark the beginning of a process to ensure the ultimate effective exercise of rights and liberties. A mere declaratory order for reparations would transform the reparations proceedings into an exercise in futility and, by the same token, negate the ultimate aim of the Statute; the status of victims would be completely devoid of relevance.

54. The challenge of implementing reparations ought to spur debate regarding the operative status, effectiveness and even efficiency of reparations programmes.

55. Accordingly, the Chamber should amend the impugned Order for the reasons laid out above.

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<sup>21</sup> Notice of Appeal, ICC-01/12-01/15-242-Conf-Exp-Corr-tENG, Annexes 1-5.

**FOR THESE REASONS, *without prejudice*,**

The Legal Representative of Victims respectfully moves the Appeals Chamber to:

- **REVISE** or **DEFINE** the disputed words, if not to reword the paragraphs of the impugned Order, insofar as it concerns (i) individual reparations for persons whose livelihoods exclusively depended on the Protected Buildings, i.e. paragraph 81 (page 32), paragraph 83 (page 33), paragraph 145 (page 55) and paragraph 146 (pages 55-59); the same applies to the powers devolved to the Trust Fund for Victims regarding victim eligibility, concomitant with an obligation to disclose their identities to the Defence; and
- **ORDER** the Trial Chamber to rule anew on the partial wording of those paragraphs (81, 83 and 145) within the framework of individual reparations, pursuant to article 75 of the Rome Statute, in accordance with the decision of the Appeals Chamber and solely with regard to the two points raised above.

Respectfully submitted,

[signed]

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Legal Representative of Victims, Mr Mayombo Kassongo

Dated this 17 October 2017

At The Hague, Netherlands