



**Original: English**

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

**Date: 8 March 2018**

**THE APPEALS CHAMBER**

**Before:**

**Judge Howard Morrison, Presiding Judge**

**Judge Silvia Fernández de Gurmendi**

**Judge Sanji Mmasenono Monageng**

**Judge Christine Van den Wyngaert**

**Judge Piotr Hofmański**

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public redacted**

**Judgment**

**on the appeal of the victims against the “Reparations Order”**

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

**Legal Representatives of Victims**  
Mr Mayombo Kassongo

**Counsel for the Defence**  
Mr Mohamed Aouini

**Trust Fund for Victims**  
Mr Pieter de Baan

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel

**Other**  
Trial Chamber VIII

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Legal Representative of Victims against the order of Trial Chamber VIII entitled “Reparations Order” of 17 August 2017 (ICC-01/12-01/15-236),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

1. The “Reparations Order” is amended to the effect that:
  - (i) Victim applicants who wish to be considered for individual reparations but do not wish that their identities be disclosed to Mr Al Mahdi may nevertheless participate in the administrative screening process that the Trust Fund for Victims will carry out. In that case, their identities will be disclosed to the Trust Fund for Victims, but will not be disclosed to Mr Al Mahdi.
  - (ii) Victim applicants, who the Trust Fund for Victims finds, as a result of the administrative screening, ineligible for individual reparations, are entitled to request that the Trial Chamber review the assessment by the Trust Fund for Victims. The Trial Chamber may also review the assessment by the Trust Fund for Victims *proprio motu*.
2. The remainder of the “Reparations Order” is confirmed.

## REASONS

### I. KEY FINDINGS

1. It is within the discretion of a trial chamber to request, on a case-by-case basis, the assistance of, for example, the Trust Fund for Victims to undertake the administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the trial chamber.
2. The oversight of the Trial Chamber exercising judicial control over the screening process shall include that the Trial Chamber finally endorse the results of the screening, with the possibility of amending the conclusions of the Trust Fund for Victims on the eligibility of applicants for individual reparations, upon request of those applicants, or *proprio motu* by the Trial Chamber.

### II. PROCEDURAL HISTORY

#### A. Proceedings before the Trial Chamber

3. On 27 September 2016, Trial Chamber VIII (“Trial Chamber”) issued the “Judgment and Sentence” (“Conviction Decision”), in which Mr Ahmad Al Faqi Al Mahdi (“Mr Al Mahdi”) was convicted as a co-perpetrator under articles 8 (2) (e) (iv) and 25 (3) (a) of the Statute for intentionally attacking ten protected objects in Timbuktu, Mali (“the Protect Buildings”), between around 30 June 2012 and 11 July 2012.<sup>1</sup>
4. On 2 December 2016, the Trust Fund for Victims (“TFV”)<sup>2</sup>, the Legal Representative of Victims (“LRV”)<sup>3</sup>, Mr Al Mahdi,<sup>4</sup> the Prosecutor<sup>5</sup>, the Registrar<sup>6</sup>

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<sup>1</sup> [ICC-01/12-01/15-171](#). See also Trial Chamber, “Reparations Order”, 17 August 2017, [ICC-01/12-01/15-236](#), para. 1.

<sup>2</sup> “Submissions on the reparations proceedings”, [ICC-01/12-01/15-187](#).

<sup>3</sup> “Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation”, ICC-01/12-01/15-190-Conf-tENG; a public redacted version was registered on 3 January 2017, [ICC-01/12-01/15-190-Red-tENG](#) (“First LRV Submission”).

<sup>4</sup> “General Defence observations on reparations”, [ICC-01/12-01/15-191-tENG](#) (“First Defence Submissions”).

<sup>5</sup> “Prosecution’s Submissions on Reparations”, ICC-01/12-01/15-192-Conf; a public redacted version was registered on 7 December 2016 ([ICC-01/12-01/15-192-Red](#)).

and several organisations<sup>7</sup> who had been granted leave by the Trial Chamber,<sup>8</sup> filed general observations on the reparations proceedings.

5. On 16 December 2016, the Registrar filed the first victims' applications for reparations, together with its report on those applications.<sup>9</sup> On 24 March 2017, the LRV supplemented these applications with supporting materials.<sup>10</sup> On the same day, the Registrar filed additional applications.<sup>11</sup> In sum, 139 applications for reparations were filed with the Trial Chamber, including two by organisations.<sup>12</sup>

6. On 19 January 2017, the Trial Chamber appointed four experts to assist in the determination of reparations.<sup>13</sup> On 1 May 2017, the Registrar submitted the reports of the appointed experts<sup>14</sup> ("Experts' Reports").

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<sup>6</sup> "Registry's observations pursuant to Trial Chamber VIII's Decision ICC-01/12-01/15-172 of 29 September 2016", registered on 5 December 2016, ([ICC-01/12-01/15-193](#)), with confidential *ex parte* Annex I, available to the Registry only, public redacted Annex I and confidential Annex II ("Registrar Observations").

<sup>7</sup> Queen's University Belfast Human Rights Centre, Redress Trust, "Queen's University Belfast Human Rights Centre and the Redress Trust observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules", [ICC-01/12-01/15-188](#); Fédération internationale des ligues des droits de l'Homme ("FIDH"), Association Malienne des droits de l'Homme ("AMDH"), "Joint observations of FIDH and AMDH on the reparations proceedings", [ICC-01/12-01/15-189-tENG](#) ("FIDH/AMDH Submissions"); United Nations Educational, Scientific and Cultural Organization ("UNESCO"), "UNESCO Amicus Curiae Observations", registered on 5 December 2016, [ICC-01/12-01/15-194](#).

<sup>8</sup> "Decision on Application by the United Nations Educational, Scientific and Cultural Organization ('UNESCO') to Submit *Amicus Curiae* Observations", 31 October 2016, [ICC-01/12-01/15-180](#); "Decision on Application by Queen's University Belfast Human Rights Centre, the Redress Trust, the FIDH and AMDH to submit *amicus curiae* observations (ICC-01/12-01/15-175 and ICC-01/12-01/15-176)", 25 October 2016, [ICC-01/12-01/15-178](#).

<sup>9</sup> "First Transmission and Report on Applications for Reparations", [ICC-01/12-01/15-200](#), with 136 confidential *ex parte* annexes available to the Registry and the LRV only.

<sup>10</sup> "Dépôt de pièces additionnelles en appui aux demandes en réparation déposées par le Greffe en date du 16 décembre 2016 (ICC-01/12-01/15-200)", ICC-01/12-01/15-210-Conf, with 126 confidential *ex parte* annexes available to the Registry and the LRV only; a public redacted version, including the annexes, was registered on 28 April 2017 ([ICC-01/12-01/15-210-Red](#)).

<sup>11</sup> "Second Transmission and Report on Applications for Reparations", [ICC-01/12-01/15-211](#), with 5 confidential *ex parte* annexes available to the Registry and the LRV only.

<sup>12</sup> [Impugned Decision](#), para. 5.

<sup>13</sup> "Decision Appointing Reparations Experts and Partly Amending Reparations Calendar", ICC-01/12-01/15-203-Conf; a public redacted version was registered on the same day ([ICC-01/12-01/15-203-Red](#)).

<sup>14</sup> "Transmission of Experts' Reports pursuant to Trial Chamber Decision ICC-01/12-01/15-203-Red of 19 January 2017", [ICC-01/12-01/15-214](#) with 3 confidential *ex parte* annexes. The 3 annexed reports hereinafter will be referred to as "Annex I to the Transmission of the Public Version of one Expert's Report pursuant to the Trial Chamber's Order of 11 July 2017", a public redacted version was registered on 14 August 2017, [ICC-01/12-01/15-214-AnxI-Red3](#) ("First Expert Report"), "Annex II to the Transmission of One Public Version and Two Confidential Versions of Experts' Reports pursuant to the Trial Chamber's Order of 11 July 2017", a confidential redacted version was registered on a public redacted version was registered on 11 August 2017, [ICC-01/12-01/15-214-AnxII-Red2](#) ("Second Expert

7. On 16 June 2017, Mr Al Mahdi<sup>15</sup> and the TFV<sup>16</sup> filed final submissions on reparations. On 6 July 2017, the LRV filed final submissions on reparations.<sup>17</sup>

8. On 17 August 2017, the Trial Chamber issued the “Reparations Order”<sup>18</sup> (“Impugned Decision”).

## **B. Proceedings before the Appeals Chamber**

9. On 21 September 2017, the LRV filed a notice of appeal against the Impugned Decision.<sup>19</sup> On 26 September 2017, the Appeals Chamber issued the “Order in relation to the notice of appeal filed on 18 September 2017”<sup>20</sup> (“Order of 26 September 2017”), in which it ordered that the LRV file an amended notice of appeal, to comply with regulation 57 of the Regulations of the Court, by 6 October 2017.<sup>21</sup> It also ordered that, if the amended notice of appeal was not filed publicly, it should be accompanied by clear reasons as to why it could not be made public, in addition to a public redacted version, if possible.<sup>22</sup>

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Report”), and “Annex III to the Transmission of One Public Version and Two Confidential Versions of Experts’ Reports pursuant to the Trial Chamber’s Order of 11 July 2017”, a confidential redacted version was registered on 4 August 2017 and a public redacted version was registered on 4 August 2017, [ICC-01/12-01/15-214-AnxIII-Red2](#) (“Third Expert Report”).

<sup>15</sup> “Final Submissions of the Defence for Mr Al Mahdi in Anticipation of the Order for Reparations”, 16 June 2017, ICC-01/12-01/15-226-Conf-tENG (“Final Defence Submissions”); a public redacted version was registered on 24 August 2017 ([ICC-01/12-01/15-226-Red](#)).

<sup>16</sup> “Final Submissions on the reparations proceedings”, [ICC-01/12-01/15-225](#).

<sup>17</sup> “Final submissions of the Legal Representative on the implementation of a right to reparations for 139 victims under article 75 of the Rome Statute”, original version registered on 16 June 2017 and corrigendum registered on 6 July 2017, ICC-01/12-01/15-224-Conf-Corr-tENG; a public redacted version was registered on 14 July 2017 ([ICC-01/12-01/15-224-Corr-Red-tENG](#)) (“Final LRV Submissions”).

<sup>18</sup> [ICC-01/12-01/15-236](#).

<sup>19</sup> “NOTICE OF APPEAL ‘*In part and limited*’ Against the Reparations Order of 17 August 2017 (ICC-01/12-01/15-236) issued in accordance with article 75 of the Statute; *limited to paragraphs 81, 83 and 146 setting one of the criteria for screening victims eligible for reparations*”; original version registered on 18 September 2017 and corrigendum registered on 21 September 2017, [ICC-01/12-01/15-238-Corr-tENG](#). This document was originally filed confidentially but was reclassified as public pursuant to the “Order on reclassification of documents”, dated 7 November 2017 and registered 8 November 2017, [ICC-01/12-01/15-247](#).

<sup>20</sup> [ICC-01/12-01/15-240](#); this order was originally issued confidentially but was reclassified as public pursuant to the “Order on the filing of public versions of documents and on the reclassification of order ICC-01/12-01/15-240-Conf”, 17 October 2017, [ICC-01/12-01/15-243](#).

<sup>21</sup> [Order of 26 September 2017](#), para. 1 at p. 3.

<sup>22</sup> [Order of 26 September 2017](#), para. 2 at p. 3.

10. On 9 October 2017, the LRV filed a corrigendum to the notice of appeal<sup>23</sup> (“LRV’s Notice of Appeal”), attaching five annexes.
11. On 18 October 2017, the LRV filed the “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”<sup>24</sup> (“LRV’s Appeal Brief”).
12. On 7 November 2017, the Appeals Chamber issued the “Directions on the conduct of the appeal proceedings”<sup>25</sup> (“Directions of 7 November 2017”), in which it invited the TFV to submit observations on the LRV’s Appeal Brief by 24 November 2017.<sup>26</sup> It also invited Mr Al Mahdi and the LRV to submit responses to the observations filed by the TFV and Mr Al Mahdi to consider submitting his response to the LRV’s Appeal Brief by 8 December 2017.<sup>27</sup> It directed that any request for leave to submit observations under rule 103 of the Rules of Procedure and Evidence (“Rules”) should be filed by 10 November 2017, stipulating the specific issues to be addressed on the basis of the appeal.<sup>28</sup>
13. On 23 November 2017, the TFV submitted the “Request for extension of time”,<sup>29</sup> to be able to file its observations by 29 November 2017.<sup>30</sup> This request was granted by the Appeals Chamber on 24 November 2017.<sup>31</sup>
14. On 29 November 2017, the TFV submitted the “Observations on the Appeal Brief of the Legal Representative for Victims”<sup>32</sup> (“TFV’s Observations on the LRV’s

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<sup>23</sup> “Corrigendum - NOTICE OF APPEAL ‘*In part and limited*’ against the Reparations Order of 17 August 2017 (paragraphs 81, 83 and 146) pursuant to Appeals Chamber Order ICC-01/12-01/15-240-Conf, paragraphs”, ICC-01/12-01/15-242-Conf-Exp-Corr-tENG, with five confidential *ex parte* annexes available to the Appeals Chamber only; a public redacted version was registered on 20 October 2017 ([ICC-01/12-01/15-242-Corr-Red-tENG](#)).

<sup>24</sup> Dated 17 October 2017 and registered on 18 October 2017, [ICC-01/12-01/15-244-tENG](#).

<sup>25</sup> [ICC-01/12-01/15-246](#).

<sup>26</sup> [Directions of 7 November 2017](#), para. 1 at p. 3.

<sup>27</sup> [Directions of 7 November 2017](#), paras 2, 3 at p. 3.

<sup>28</sup> [Directions of 7 November 2017](#), para. 4 at p. 3.

<sup>29</sup> [ICC-01/12-01/15-248](#).

<sup>30</sup> [ICC-01/12-01/15-248](#), para. 16.

<sup>31</sup> “Decision on the Trust Fund for Victims’ request for time extension”, [ICC-01/12-01/15-249](#), para. 7.

<sup>32</sup> [ICC-01/12-01/15-250](#).



Appeal Brief”), to which, on 11 December 2017, Mr Al Mahdi<sup>33</sup> (“Mr Al Mahdi’s Response to the TFV’s Observations”) and the LRV<sup>34</sup> (“LRV’s Response to the TFV’s Observations”) responded. Mr Al Mahdi did not file a separate response to the LRV’s Appeal Brief, although general arguments related to the appeal were included in the latter response.<sup>35</sup>

### III. PRELIMINARY ISSUE

15. The Appeals Chamber notes that the LRV annexes five documents to his notice of appeal and raises new information before the Appeals Chamber. He also submits additional arguments in support of his appeal, in the LRV’s Response to the TFV’s Observations.

16. In the LRV’s Notice of Appeal, the LRV states that, after he was ordered by the Appeals Chamber to file an amended notice of appeal, he [REDACTED].<sup>36</sup> He states that this expert’s input would be annexed to his appeal brief “purely in the interests of supplementing the information from the victims of consequential economic loss”.<sup>37</sup> No such document is annexed to the LRV’s Appeal Brief which was subsequently filed.

17. Also in the LRV’s Notice of Appeal, the LRV states that he will present, in his appeal brief, arguments as to the fact that there is no exclusive link “between the economic losses and the Protected Buildings, based on an independent expert assessment of the reality of the losses”.<sup>38</sup> The LRV footnotes to what he states is

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<sup>33</sup> “Response of the Defence for Mr Al Mahdi to the Observations of the Trust Fund for Victims (ICC-01/12-01/15-250)”, [ICC-01/12-01/15-251-tENG](#).

<sup>34</sup> “Response of the Legal Representative of Victims to the ‘Observations on the Appeal Brief of the Legal Representative for Victims’ filed by the Trust Fund for Victims on 29 November 2017 (ICC-01/12-01/15-250)”, [ICC-01/12-01/15-252-tENG](#).

<sup>35</sup> Mr Al Mahdi’s response to the LRV’s Appeal Brief was due to be filed on 19 December 2017 (regulation 59 of the Regulations of the Court). In the Directions of 7 November 2017, the Appeals Chamber invited Mr Al Mahdi to submit a response to any observations to be filed by the TFV by 8 December 2017 and asked him to consider submitting his response to the LRV’s Appeal Brief by the same date. See [Directions of 7 November 2017](#), paras 3-4 at p. 3. Mr Al Mahdi filed, on 11 December 2017, [Mr Al Mahdi’s Response to the TFV’s Observations](#), including in that document, more general arguments in relation to the LRV’s appeal. The Appeals Chamber understands this document to also constitute his response to the LRV’s Appeal Brief.

<sup>36</sup> [LRV’s Notice of Appeal](#), para. 8.

<sup>37</sup> [LRV’s Notice of Appeal](#), para. 9.

<sup>38</sup> [LRV’s Notice of Appeal](#), para. 19.

[REDACTED].<sup>39</sup> Later in the LRV’s Notice of Appeal, the LRV refers to [REDACTED].<sup>40</sup> This annex is [REDACTED].<sup>41</sup> The LRV contends that, [REDACTED].<sup>42</sup> Also in the LRV’s Notice of Appeal, he refers to [REDACTED],<sup>43</sup> annexes three other documents<sup>44</sup> and, in support of the need for confidentiality because of [REDACTED], he refers in a footnote to a report by “the Secretary General” on the situation in Mali dated 28 September 2017, but without annexing this report.<sup>45</sup>

18. In the LRV’s Appeal Brief, the LRV submits that the category of victims eligible for individual reparations for economic loss should be understood broadly and not restricted to the custodians of the mausoleum only, as evidence shows that the income generated by the mausoleums was then re-distributed by the guardians to the members of their extended family and even more broadly.<sup>46</sup>

19. In the LRV’s Response to the TFV’s Observations, the LRV states that he “wishes to inform the Appeals Chamber of his joint field mission with the Trust Fund to meet the victims”,<sup>47</sup> that “the victims expressed their expectations regarding reparations, i.e. their right to reparations”,<sup>48</sup> and that he had sought the views of a religious leader in Mali.<sup>49</sup> From the latter meeting, he states that “it emerged that the ideas of belonging, ties of filiation and proof according to Timbuktu tradition are not based on standard customary norms”<sup>50</sup> and that the Appeals Chamber should “consider this independent expertise on the question of economic loss in connection

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<sup>39</sup> [LRV’s Notice of Appeal](#), para. 19, fn. 5.

<sup>40</sup> [LRV’s Notice of Appeal](#), para. 31.

<sup>41</sup> [LRV’s Notice of Appeal](#), para. 31.

<sup>42</sup> [LRV’s Notice of Appeal](#), para. 31.

<sup>43</sup> [LRV’s Notice of Appeal](#), para. 34.

<sup>44</sup> The LRV appended five confidential *ex parte* annexes, available to the Appeals Chamber only, to his Notice of Appeal. Annex 1 is a copy of [REDACTED]. Annex 2 is [REDACTED]. Annex 3 is a hand-written statement [REDACTED]. Annex 4 is [REDACTED]. Annex 5 is [REDACTED].

<sup>45</sup> [LRV’s Notice of Appeal](#), fn. 9.

<sup>46</sup> [LRV’s Appeal Brief](#), para. 12 (6) at p. 10 referring to Annex 3 to [LRV’s Notice of Appeal](#).

<sup>47</sup> [LRV’s Response to the TFV’s Observations](#), para. 11.

<sup>48</sup> [LRV’s Response to the TFV’s Observations](#), para. 12.

<sup>49</sup> [LRV’s Response to the TFV’s Observations](#), para. 13.

<sup>50</sup> [LRV’s Response to the TFV’s Observations](#), para. 14.

with the Protected Buildings and [...] rule out any exclusivity, as required” in the Impugned Decision.<sup>51</sup>

20. The Appeals Chamber notes that the LRV, in his notice of appeal, is providing both new information to the Appeals Chamber and five new documents, none of which was before the Trial Chamber at the time of issuance of the Impugned Decision. The LRV has not sought leave of the Appeals Chamber to submit this information or the additional documents, simply annexing the latter to his notice of appeal and making arguments based thereon in his three appellate documents. The Appeals Chamber observes that, as far as this information would be categorised as additional evidence, regulation 62 (1) of the Regulations of the Court regulates the procedure that should apply when seeking leave from the Appeals Chamber to file such evidence. In particular, it provides that:

1. A participant seeking to present additional evidence shall file an application setting out:
  - (a) The evidence to be presented;
  - (b) The ground of appeal to which the evidence relates and the reasons, if relevant, why the evidence was not adduced before the Trial Chamber.

21. The remainder of this provision then regulates the procedure that should apply for consideration of any application. The LRV did not make any submissions seeking the admission of this evidence as additional evidence and nor did he explain why this new information should be considered by the Appeals Chamber.<sup>52</sup> In such circumstances, the Appeals Chamber will disregard it. This is, however, without prejudice to the question as to whether the TFV may consider this information in its assessment of the category of victims who will satisfy the group defined by the Trial Chamber. In particular, whether such persons may be considered as direct (or indirect) victims.

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<sup>51</sup> [LRV's Response to the TFV's Observations](#), para. 15. *See also* paras 13-14 and fn. 6.

<sup>52</sup> In the case of *Thomas Lubanga Dyilo*, the Appeals Chamber found that additional evidence on appeal is admissible if: the Appeals Chamber is convinced of the reasons why such evidence was not presented at trial, including whether it could have been presented with the exercise of due diligence, and it is demonstrated that the additional evidence, if it had been presented before the Trial Chamber, could have led the Trial Chamber to enter a different verdict, in whole or in part. *See Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, [ICC-01/04-01/06-3121-Red](#) (A 5), paras 58-59.

22. In respect of the additional arguments in support of his appeal, which the LRV raises in the LRV's Response to the TFV's Observations, the Appeals Chamber finds that, to the extent that these arguments address issues raised in the TFV's Observations on the LRV's Appeal Brief, the Appeals Chamber will take them into account. However, to the extent that the LRV is submitting additional arguments supporting his appeal, not related to the content of the TFV's Observations on the LRV's Appeal Brief, the Appeals Chamber will disregard them.

#### IV. MERITS

23. The LRV raises two grounds of appeal. First, he argues that the Trial Chamber erred in limiting individual reparations for economic loss to those whose livelihoods exclusively depended upon the Protected Buildings.<sup>53</sup> And second, he argues that the Trial Chamber erred in delegating a "power of adjudication" for reparations to the TFV, a non-judicial entity.<sup>54</sup> Within the latter, he includes an argument challenging the Trial Chamber's findings on the confidentiality of the victims' identifying information.<sup>55</sup> The Appeals Chamber shall address these grounds in turn, after having set out the applicable standard of review.

##### A. Standard of review

24. The LRV's appeal alleges errors in the exercise of the Trial Chamber's discretion in deciding on reparations in this case. The Appeals Chamber set out the relevant standard of review for a decision involving the exercise of discretion in a judgment in the case of *the Prosecutor v. Uhuru Muigai Kenyatta*:<sup>56</sup>

22. The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an

<sup>53</sup> [LRV's Notice of Appeal](#), paras 11-13, 24-30, 40; [LRV's Appeal Brief](#), paras 1-2 at pp. 4-5, para. 5 at pp. 5-6, paras 7-14 at pp. 7-8, paras 22-29, 39 and p. 18.

<sup>54</sup> [LRV's Notice of Appeal](#), para. 29; [LRV's Appeal Brief](#), paras 30-49.

<sup>55</sup> [LRV's Notice of Appeal](#), paras 32-34, 40 (c); [LRV's Appeal Brief](#), paras 51-52.

<sup>56</sup> *Prosecutor v. Uhuru Muigai Kenyatta*, "Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute'", 19 August 2015, [ICC-01/09-02/11-1032](#) (OA 5) ("*Kenyatta* OA5 Judgment"), paras 22-25.

exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.

23. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.

24. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Chamber's findings. The Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts. Regarding the misappreciation of facts, the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.

25. In addition, the Appeals Chamber may interfere [where] a discretionary decision amounts to an abuse of discretion. Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question. [Footnotes omitted.]<sup>57</sup>

25. The above standard of review will guide the analysis of the Appeals Chamber.

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<sup>57</sup> [Kenya OA5 Judgment](#), paras 22-25. See also Appeals Chamber, *Prosecutor v. Dominic Ongwen*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'", 17 June 2015, [ICC-02/04-01/15-251](#) (OA3), para. 35; Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence pursuant to Article 76 of the Statute'", 1 December 2014, [ICC-01/04-01/06-3122 \(A 4 A 6\)](#), para. 41.

## **B. First ground of appeal: Limitation of individual reparations to those whose livelihoods *exclusively* depended on the Protected Buildings**

### *1. Relevant part of the Impugned Decision*

26. In the Impugned Decision, the Trial Chamber recalled its finding in the Conviction Decision that Mr Al Mahdi had caused economic harm<sup>58</sup> and noted that “[t]he victims [were] asking for compensation for the effect the attacks on the Protected Buildings had on their livelihood”.<sup>59</sup> The Trial Chamber noted that information contained in applications for reparations, as well as Experts’ Reports, attested to economic losses caused to “those whose livelihoods were exclusively dependent on the mausoleums”<sup>60</sup> as well as the “general consequential economic loss caused by the attack [which] reverberated across the entire community in Timbuktu”.<sup>61</sup> The Trial Chamber considered “that the harm caused by Mr Al Mahdi’s actions [was] primarily collective in character” and “much larger and of a different nature than the harm suffered by the 139 applicants grouped together”.<sup>62</sup>

27. Following an analysis as to whether individual reparations should be awarded only to those who had already applied for reparations, and noting the experts’ recommendation that reparations should, in the present case, be awarded on a collective basis as far as possible,<sup>63</sup> the Trial Chamber awarded individual reparations for economic loss “only to those whose livelihoods *exclusively* depended upon the Protected Building”.<sup>64</sup> The Trial Chamber explained:

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

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<sup>58</sup> [Impugned Decision](#), para. 72.

<sup>59</sup> [Impugned Decision](#), para. 73.

<sup>60</sup> [Impugned Decision](#), para. 74.

<sup>61</sup> [Impugned Decision](#), para. 76.

<sup>62</sup> [Impugned Decision](#), para. 76.

<sup>63</sup> [Impugned Decision](#), paras 77-80.

<sup>64</sup> [Impugned Decision](#), para. 81.

businesses with broader purposes who have been harmed by the loss of the Protected Buildings. [Footnotes omitted.]<sup>65</sup>

28. The Trial Chamber found that “the number of victims and the scope of the consequential economic loss [made] a collective award more appropriate for those beyond this identified group”.<sup>66</sup>

29. The Trial Chamber concluded that:

[T]he economic harm caused by Mr Al Mahdi necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings and (ii) collective reparations for the community of Timbuktu as a whole.<sup>67</sup>

## 2. *Submissions of the parties and participants*

30. In his first ground of appeal, the LRV challenges the Trial Chamber’s decision to limit individual reparations to those whose livelihoods depended exclusively on the Protected Buildings<sup>68</sup> which, in his submission, amounts to an error of law.<sup>69</sup> In support of this contention, the LRV makes two arguments.

31. First, he submits that the Trial Chamber’s approach excludes most victims because it incorrectly reduces economic loss to loss of livelihood and does not cover the loss of homes of those victims who had to flee Timbuktu, who would also not benefit from collective reparations because they had been left with no means to return, and losses incurred by business owners due to a drop in tourism resulting from the destruction of the Protected Buildings.<sup>70</sup> The LRV argues that, as a result, 90% of the victims will not receive reparations for economic loss, in violation of international principles.<sup>71</sup> The LRV argues that individual reparations should not be limited to the custodians of the mausoleums, who traditionally earned their living from visits to the mausoleums by pilgrims and tourists who made donations; he also notes that the

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<sup>65</sup> [Impugned Decision](#), para. 81.

<sup>66</sup> [Impugned Decision](#), para. 82.

<sup>67</sup> [Impugned Decision](#), para. 83.

<sup>68</sup> [LRV’s Appeal Brief](#), paras 21-29.

<sup>69</sup> [LRV’s Appeal Brief](#), para. 21.

<sup>70</sup> [LRV’s Appeal Brief](#), paras 12-1 to 12-4 at p. 9.

<sup>71</sup> [LRV’s Appeal Brief](#), para. 12-5 at p. 10.

Impugned Decision excludes anyone whose livelihood depends only in part on the mausoleums and yet they suffered harm.<sup>72</sup>

32. Second, the LRV submits that the requirement of exclusivity stipulated by the Impugned Decision is tantamount to denying any individual reparations because of the evidential difficulties faced by the victims, who now not only have to prove that they suffered economic loss, but also that their livelihood depended exclusively on the Protected Buildings, adding a “further layer of difficulty”.<sup>73</sup> The LRV requests that the Appeals Chamber rule that any victim who can show economic loss linked to the destruction of the mausoleums should be entitled to individual reparations.<sup>74</sup>

### 3. *Determination by the Appeals Chamber*

33. The Appeals Chamber recalls that the Trial Chamber found that, in this case, reparations should primarily be collective, and that individual reparations would concern only a “limited number” of victims.<sup>75</sup> The LRV disputes<sup>76</sup> the determination made by the Trial Chamber that only “those whose livelihoods exclusively depended upon the Protected Buildings” would be granted individual reparations for economic loss.<sup>77</sup> The question before the Appeals Chamber is therefore, whether, in reaching the decision it did, the Trial Chamber erred in the exercise of its discretion. For the following reasons, the Appeals Chamber finds that the Trial Chamber did not err.

34. The Appeals Chamber recalls that reparations proceedings at the Court are governed by article 75 of the Statute, which vests a trial chamber with the power to “determine the scope and extent of any damage, loss and injury to, or in respect of, victims” (paragraph 1), and to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” (paragraph 2). Rule 97 (1) of the Rules provides that, “[t]aking 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

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<sup>72</sup> [LRV’s Appeal Brief](#), paras 12-5 to 12-7 at p. 10.

<sup>73</sup> [LRV’s Appeal Brief](#), para. 27. *See also* para. 26.

<sup>74</sup> [LRV’s Appeal Brief](#), paras 28-29.

<sup>75</sup> [Impugned Decision](#), paras 67, 82, 140.

<sup>76</sup> [LRV’s Notice of Appeal](#), paras 11-13, 24-30, 40; [LRV’s Appeal Brief](#), paras 1-2 at pp. 4-5, para. 5 at pp. 5-6, paras 7-14 at pp. 7-8, paras 22-29, 39 and p. 18.

<sup>77</sup> [Impugned Decision](#), paras 81, 83, 104 (ii), 145.



appropriate, on a collective basis or both”. These provisions illustrate that a trial chamber, in making an award for reparations, has discretion, explicitly circumscribed only by the “scope and extent of any damage, loss and injury” (article 75 (1) of the Statute and rule 97 (1) of the Rules). In reaching its decision, a trial chamber shall take account of parties’ submissions, as per article 75 (3) of the Statute, and it “may appoint appropriate experts to assist it in determining the scope, 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 reparations” pursuant to rule 97 (2) of the Rules.

35. The Appeals Chamber notes that the Trial Chamber, in analysing “the different kinds of harm alleged in the information before it”, stated that it “freely considered all submissions, applications, supporting materials, expert reports and other relevant information” (footnote omitted).<sup>78</sup> The Trial Chamber found, based on the Experts’ Reports, that the harm caused by the attack on, and destruction of, the Protected Buildings was primarily collective and suffered by the entire community of Timbuktu.<sup>79</sup> For instance, it stated that “the Protected Buildings belonged to the entire community of Timbuktu and their loss was felt by the community as a whole”.<sup>80</sup> In these circumstances, it found that “collective reparations [were] the most appropriate way to address the damage caused”,<sup>81</sup> that in this case reparations should primarily be collective, and that individual reparations would concern only a “limited number” of victims.<sup>82</sup> In its determination of what category of victims should be awarded individual reparations, it considered that this determination should hinge on “the extent of the harm suffered or sacrifice made” by a victim, rather than on whether that victim made an application before the Court or not.<sup>83</sup> The Trial Chamber accordingly found that individual reparations should be granted to “those whose livelihoods exclusively depended upon the Protected Buildings”, because their “loss relative to the rest of the community is more acute and exceptional”.<sup>84</sup> It made a distinction

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<sup>78</sup> [Impugned Decision](#), para. 57.

<sup>79</sup> [Impugned Decision](#), para. 76 referring to [Third Expert Report](#), pp. 123-134, [Second Expert Report](#), paras 80-84. *See also* paras 52, 56, 59-60, 62, 67, 75.

<sup>80</sup> [Impugned Decision](#), para. 67.

<sup>81</sup> [Impugned Decision](#), para. 67.

<sup>82</sup> [Impugned Decision](#), paras 67, 82, 140.

<sup>83</sup> [Impugned Decision](#), paras 78, 80. *See also* para. 141.

<sup>84</sup> [Impugned Decision](#), para. 81.

between those who directly, and to a greater extent, suffered the harm, and those who suffered indirect economic loss.<sup>85</sup>

36. The Appeals Chamber notes that the Trial Chamber made its determination as to who should receive individual reparations for economic loss based on the content of individual applications for reparations<sup>86</sup> and the parties' submissions,<sup>87</sup> in addition to the Experts' Reports.<sup>88</sup> Although the Trial Chamber noted the LRV's request to grant individual reparations to the 137 applicants,<sup>89</sup> it also noted that the "[e]xperts reports and other submissions to the Chamber attest[ed] to direct economic losses caused by the attacks to those whose livelihoods were exclusively dependent on the mausoleums".<sup>90</sup> Indeed, the Appeals Chamber observes that, for example, the report submitted by the UN Special Rapporteur in the field of cultural rights reflected the voices of those who saw as problematic that "financial compensation [would be] made a central component of these reparations" in the particular political and economic context of Mali.<sup>91</sup> The Second Expert Report in particular stressed the fact that [REDACTED].<sup>92</sup> This report also stated that [REDACTED].<sup>93</sup> The FIDH and AMDH, in their submissions before the Trial Chamber, pointed to the particular category of victims the "guardian families" belong to, and the fact that "[a]n attack against a mausoleum is thus a direct attack against that mausoleum's guardian family".<sup>94</sup>

37. The Appeals Chamber also notes that the Trial Chamber stated that the loss of those whose livelihoods exclusively depended upon the Protected Buildings, "relative

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<sup>85</sup> [Impugned Decision](#), paras 73-74.

<sup>86</sup> [Impugned Decision](#), para. 73 referring to the applications of a/35020/16, a/35030/16, a/35022/16, a/35002/16. *See* para. 73 referring to ICC-01/12-01/15-210-Conf-Anx13-Red-tENG, p. 2, ICC-01/12-01/15-210-Conf-Anx23-Red-tENG, p. 3, ICC-01/12-01/15-210-Conf-Anx15-Red-tENG, p. 2, ICC-01/12-01/15-200-Conf-Anx6-Red-tENG, p. 2.

<sup>87</sup> [Impugned Decision](#), para. 73, fn. 115 referring to [First LRV's Submissions](#), para. 25(f); para. 74, fn. 120 referring to [First LRV's Submissions](#), paras 66-70; para. 77, fn. 123 referring to [Final LRV Submissions](#), p. 37.

<sup>88</sup> [Impugned Decision](#), para. 74 referring to [Third Expert Report](#), pp. 123-134, [Second Expert Report](#), paras 80-84; para. 76 referring to [Third Expert Report](#), pp. 123-134, [Second Expert Report](#), paras 80-84.

<sup>89</sup> [Impugned Decision](#), para. 77 referring to [Final LRV Submissions](#), p. 37. *See also* paras 9-10 referring to [First LRV Submissions](#), paras 110-124, 147.

<sup>90</sup> [Impugned Decision](#), para. 74.

<sup>91</sup> [First Expert Report](#), p. 47.

<sup>92</sup> [Second Expert Report](#), para. 66. *See also* para. 80.

<sup>93</sup> [Second Expert Report](#), para. 84.

<sup>94</sup> [FIDH/AMDH Submissions](#), para. 14.

to the rest of the community [was] more acute and exceptional”.<sup>95</sup> It found that this was “recognised by the LRV [...] who single[d] out persons in this group as having suffered harm in the present case”.<sup>96</sup> [REDACTED]<sup>97</sup> [REDACTED]<sup>98</sup> [REDACTED]<sup>99</sup> The Appeals Chamber also notes that Mr Al Mahdi requested the Trial Chamber to award predominantly collective reparations, partly because no bodily harm was suffered.<sup>100</sup> In light of the above, the LRV has not shown that the Trial Chamber abused its discretion in reaching the decision it did in this case, given the information it had before it.

38. An abuse of discretion is also not established by the LRV’s argument that the Trial Chamber’s decision would deprive of reparations and “exclude 90% of the victims” who actually suffered an economic loss. The Appeals Chamber understands this argument and the reference to the “rights of victims under national or international law” enshrined in article 75 (6) of the Statute in support of it, as aiming to show that a too restrictive definition of the category of beneficiaries who would receive individual reparations would, in fact, result in denying the right to reparations of many victims who suffered an economic loss and should, therefore, be entitled to reparations. In his submissions, those “excluded” victims include, among others, people who had to flee Timbuktu,<sup>101</sup> business owners who lost their business as a result of the disappearance of tourism,<sup>102</sup> those who used to earn a living only partially from the mausoleum,<sup>103</sup> those who work informally for the proper functioning of the mausoleums,<sup>104</sup> and those who benefitted from donations that the guardians had been given, including the members of their extended family.<sup>105</sup>

39. The Appeals Chamber notes first, that the number of victims who will be entitled to individual reparations has not yet been determined; the Trial Chamber has

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<sup>95</sup> [Impugned Decision](#), para. 81.

<sup>96</sup> [Impugned Decision](#), para. 81.

<sup>97</sup> See [Impugned Decision](#), para. 81 referring to [First LRV Submissions](#), para. 67. See also [First LRV Submissions](#), para. 68.

<sup>98</sup> [First LRV Submissions](#), para. 67.

<sup>99</sup> See [Final LRV Submissions](#), paras 38-39.

<sup>100</sup> [Impugned Decision](#), paras 11, 12 (iii) referring to [First Defence Submissions](#), p. 23, [Final Defence Submissions](#), pp. 26-28.

<sup>101</sup> [LRV’s Appeal Brief](#), paras 12 (1)-(3) at p. 9.

<sup>102</sup> [LRV’s Appeal Brief](#), para. 12 (4) at p. 9.

<sup>103</sup> [LRV’s Appeal Brief](#), para. 12 (7) at p. 10.

<sup>104</sup> [LRV’s Notice of Appeal](#), para. 30.

<sup>105</sup> [LRV’s Notice of Appeal](#), para. 31. [LRV’s Appeal Brief](#), para. 12 (6) at p. 10.

stated that the victims' livelihoods must depend exclusively on the Protected Buildings. Some of those referred to by the LRV may be able to show this. The fact that 90% of the victims will be deprived of reparations is therefore speculative. Second, the Appeals Chamber notes that in any event, even if only a small number of applicants is found eligible for individual reparations, the rest of the applicants will be considered, as stated by the Trial Chamber, for collective reparations, as "the decision not to award reparations on an individual basis does not prejudice the individuals who filed individual reparations requests with respect to their eligibility to participate in any collective reparations programme".<sup>106</sup> The Trial Chamber also stated that collective reparations may include "return/resettlement programmes", "'micro-credit system' that would assist the population to generate income", "cash assistance programmes to restore some of Timbuktu's lost economic activity".<sup>107</sup> The Appeals Chamber notes that the LRV's argument focuses on individual reparations, without making specific submissions as to why individual reparations only may repair the economic harm suffered. In this respect, the Appeals Chamber notes the Trial Chamber's statement that, "[t]his is not to say that individual businesses and families could not receive financial support in the implementation of these collective reparations, but rather that the Chamber considers that a collective response is needed to adequately address the harm suffered".<sup>108</sup> The Appeals Chamber is, therefore, not persuaded by the LRV's argument that the potential victims who suffered economic loss, but do not belong to the categories defined in the Impugned Decision, will be "excluded" from the reparations process as a whole.

40. The Appeals Chamber notes that the LRV also argues that requiring applicants to prove the exclusive link between their economic loss and the Protected Buildings amounts to denying their right to reparations due to the difficulties they may face in producing evidence like payslips, accounting records, employment contracts etc., in a country where such documents do not exist or are not readily available.<sup>109</sup> The Trial

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<sup>106</sup> [Impugned Decision](#), para. 82 referring to Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012", 3 March 2015, [ICC-01/04-01/06-3129](#) ("*Lubanga* Reparations Appeal Judgment"), para. 155.

<sup>107</sup> [Impugned Decision](#), para. 83.

<sup>108</sup> [Impugned Decision](#), para. 82.

<sup>109</sup> [LRV's Appeal Brief](#), paras 26-27.

Chamber stated that the “full details of [the] screening [were] to be determined by the TFV”, setting out only “general parameters”, among which was the requirement for individuals who wished to be considered in the screening to provide a reparations application and “any supporting documents”.<sup>110</sup> The Trial Chamber did not specify further how the exclusive link required by the Trial Chamber should be proven. The Appeals Chamber notes, therefore, that the LRV’s argument relates to how the TFV will carry out its assessment as to who is entitled to individual reparations.

41. Regulation 63 of the Regulations of the Trust Fund for Victims<sup>111</sup> (“Regulations of the TFV”) provides guidance on the standard of proof applicable when the TFV must verify whether persons are members of a beneficiary group in relation to rule 98 (2) of the Rules, providing that:

Subject to any stipulations set out in the order of the Court, the Board of Directors shall determine the standard of proof for the verification exercise, having regard to the prevailing circumstances of the beneficiary group and the available evidence.

42. The Appeals Chamber also recalls its jurisprudence that, “[i]n determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence”.<sup>112</sup> The Appeals Chamber observes that, in this case, elsewhere in the Impugned Decision, the Trial Chamber has already made such an assessment and considered that potential victims may face difficulties in both filing their applications and supporting them, in particular due to the “dire security situation in Timbuktu” and “customary practices in managing life in Timbuktu, which leads to the creation of relatively fewer official and business records” (footnote omitted).<sup>113</sup> Thus, not only was the Trial Chamber aware of these difficulties, it also took them into account “when evaluating what the victims of Mr Al Mahdi’s crimes can be reasonably

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<sup>110</sup> [Impugned Decision](#), para. 146.

<sup>111</sup> *Regulations of the Trust Fund for Victims*, last amended on 14 December 2007, [ICC-ASP/4/Res.3](#).

<sup>112</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Amended Order for Reparations” annexed to “Judgment on the appeals against the ‘Decision establishing the principles and procedures to be applied to reparations’ of 7 August 2012”, 3 March 2015, [ICC-01/04-01/06-3129-AnxA](#) (“*Lubanga Amended Order for Reparations*”), para. 22.

<sup>113</sup> [Impugned Decision](#), para. 58.

expected to provide in support of their claims”.<sup>114</sup> As a result, when assessing potential victims’ claims, the Appeals Chamber would expect the TFV to also be aware of the standard applied by the Trial Chamber resulting from its assessment of the various factors specific to the case, and for it to be aware in particular of the difficulties applicants may face in supporting their applications. The LRV’s submissions that the standard of proof that will be applied by the TFV will result in a denial of the right of individual reparations is, therefore, only speculative and does not, as such, demonstrate that the Trial Chamber abused its discretion by limiting individual reparations to those whose livelihoods depended exclusively on the Protected Buildings.

43. In sum, the Appeals Chamber finds that the LRV has not demonstrated an error in the Trial Chamber’s determination of the category of victims who should be entitled to individual reparations for economic loss in this case. The first ground of appeal is therefore rejected.

### **C. Second ground of appeal: Delegation of “power of adjudication” to the TFV and confidentiality of identifying information of victim applicants**

#### *1. Delegation of “power of adjudication” to the TFV*

##### **(a) Relevant part of the Impugned Decision**

44. As to the implementation of reparations, the Trial Chamber noted that the Impugned Decision was the first of three decisions that would be taken by that Chamber; the second would be the approval of the draft implementation plan to be presented by the TFV and the third would be the eventual approval of the selected projects to be proposed by the TFV.<sup>115</sup> The Trial Chamber stated that it was not its responsibility, at the time of the issuance of the Impugned Decision, to give detailed information about the implementation component of the reparations phase, but that it would, nevertheless, stipulate a set of “preliminary considerations to guide the implementation of its order”.<sup>116</sup> As part of this, the Trial Chamber emphasised that the limited number of individual reparations ordered should be prioritised when

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<sup>114</sup> [Impugned Decision](#), para. 58.

<sup>115</sup> [Impugned Decision](#), para. 136.

<sup>116</sup> [Impugned Decision](#), para. 137.

implementing the award, based on the particular extent to which those victims were harmed by Mr Al Mahdi's conduct.<sup>117</sup> The Trial Chamber also noted that only 139 applications for reparations had been received so far, despite the actual number of victims presumably being much higher, and the difficulties of travelling to Timbuktu and contacting victims.<sup>118</sup> The Trial Chamber considered that "the names of all the victims meeting its parameters for individual reparations are simply not known and considers that it would be impracticable for the Chamber to attempt to identify and assess them all itself".<sup>119</sup> The Trial Chamber stated:

142. The Appeals Chamber in *Lubanga* expressly took no position on 'whether a Trial Chamber would be required to rule on each individual reparations request received if it decides to award reparations on an individual basis pursuant to rule 98 (2) of the Rules of Procedure and Evidence or to award reparations on both an individual and collective basis'.<sup>120</sup> The Chamber considers that it is not required to make such an assessment when awarding individual reparations, making administrative screening through the TFV an approach that is compatible with the statutory framework.

143. As also recognised by the Appeals Chamber,<sup>121</sup> the Regulations of the TFV explicitly contemplate individual reparations for unidentified beneficiaries.<sup>122</sup> This is in juxtaposition to the TFV Regulations governing individual reparations in cases where the Court identifies each beneficiary.<sup>123</sup> When the Court does not identify the beneficiaries, it falls to the TFV to establish a verification procedure to determine that any persons who identify themselves to the TFV are in fact members of the beneficiary group.<sup>124</sup> The Chamber considers that proceeding in this manner is an alternative to an application-based process, whereby the Chamber assesses the reparation requests of identifiable beneficiaries filed pursuant to Rule 94 of the Rules.

144. For the reasons above, the Chamber considers that the impracticability of identifying all those meeting its individual reparations parameters justifies an eligibility screening during the implementation phase. The Chamber therefore considers it best that individual reparations be awarded on the basis of an administrative screening by the TFV.<sup>125</sup>

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<sup>117</sup> [Impugned Decision](#), para. 140.

<sup>118</sup> [Impugned Decision](#), para. 141.

<sup>119</sup> [Impugned Decision](#), para. 141.

<sup>120</sup> [Impugned Decision](#) referring to [Lubanga Reparations Appeal Judgment](#), para. 152.

<sup>121</sup> [Impugned Decision](#) referring to [Lubanga Reparations Appeal Judgment](#), paras 142, 167.

<sup>122</sup> [Impugned Decision](#) referring to regulations 60-65 of the Regulations of the TFV.

<sup>123</sup> [Impugned Decision](#) referring to regulation 59 of the Regulations of the TFV.

<sup>124</sup> [Impugned Decision](#) referring to regulations 62-65 of the Regulations of the TFV.

<sup>125</sup> [Impugned Decision](#) referring to [First LRV Submissions](#), paras 56-63, and stating that: "The TFV has made submissions confirming its capacity to conduct administrative screenings."

45. The Trial Chamber clarified that the screening process would only relate to individual reparations and that anyone not participating therein could still participate in any collective reparations programmes.<sup>126</sup> The Trial Chamber considered that the procedure of the screening process, the “full details” of which “are to be determined by the TFV”, must comply with the rights both of the victims and Mr Al Mahdi, and it stipulated a set of “general parameters”.<sup>127</sup> This included that those who wished to be considered in the screening process should submit an application for reparations and any supporting documents;<sup>128</sup> that both the applicants and Mr Al Mahdi “must be given an opportunity to make representations before the TFV assesses any applicant’s eligibility”,<sup>129</sup> and that the identities of all those requesting individual reparations must be disclosed to the TFV and Mr Al Mahdi.<sup>130</sup> The Trial Chamber also stated that “[n]o administrative review mechanism is available to the Defence for victims screened as eligible”.<sup>131</sup> In this respect, it stated:

This absence of a review mechanism for those screened as eligible is appropriate in view of the administrative nature of the screening exercise. The TFV is merely identifying eligible victims according to the parameters specified in the present order. [...] To permit the Defence to effectively appeal any affirmative screening would be to invite a full-fledged, non-administrative judicial procedure. The Chamber has already considered such a procedure to be impracticable, which is why it ordered an administrative screening in the first place. On 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.<sup>132</sup>

46. The Trial Chamber did not address whether victims who were found ineligible by the TFV for individual reparations could have that decision reviewed.

### (b) Submissions of the parties and participants

47. As his second ground of appeal, the LRV submits that the Trial Chamber erred in law by delegating judicial authority to the TFV, a non-judicial entity.<sup>133</sup> Noting regulations 59 and 60 of the Regulations of the TFV, the LRV asks whether the

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<sup>126</sup> [Impugned Decision](#), para. 145.

<sup>127</sup> [Impugned Decision](#), para. 146.

<sup>128</sup> [Impugned Decision](#), para. 146 (ii).

<sup>129</sup> [Impugned Decision](#), para. 146 (iii).

<sup>130</sup> [Impugned Decision](#), para. 146 (iv).

<sup>131</sup> [Impugned Decision](#), para. 146 (v).

<sup>132</sup> [Impugned Decision](#), para. 146 (v) referring to article 82 (4) of the Statute.

<sup>133</sup> [LRV’s Appeal Brief](#), paras 31-52.



Impugned Decision grants the TFV “a broad, quasi-judicial power”.<sup>134</sup> He submits that the assessment of claims involves a question of the rights involved and therefore a question that is exclusively in the Trial Chamber’s remit.<sup>135</sup> Thus, in his submission, it is the Trial Chamber’s “responsibility to determine the *criteria* for screening victims for reparations”, which the Trial Chamber relinquished.<sup>136</sup>

48. Referring also to the TFV’s submissions before the Trial Chamber, the LRV argues that the Trial Chamber not only asked the TFV to determine who is a victim, but also the consequential economic loss, thereby allowing the TFV to make a determination of the right to reparations, which is something only a judge may decide.<sup>137</sup> The role of the TFV, in contrast, should, in his view, be limited to administrative and financial functions.<sup>138</sup> The LRV submits that, as a result, the paragraph of the Impugned Decision setting out the screening process is “problematic in its entirety” and recalls that applications for reparations are submitted to the Trial Chamber and not to the TFV.<sup>139</sup> Noting the various duties stipulated in rule 96 of the Rules, the LRV submits that there is no legal basis for the Trial Chamber delegating its judicial powers to the TFV.<sup>140</sup> In his submissions, the role of the TFV is to execute a Chamber’s order, but not to take its place, as was recognised in the *Lubanga* Reparations Appeal Judgment.<sup>141</sup> He also notes that in the *Katanga* case, Trial Chamber II assessed all applications for reparations, while in the *Al Mahdi* case, the Trial Chamber conferred upon the TFV “a veritable power of adjudication”.<sup>142</sup>

49. The LRV avers further that, while the Impugned Decision points to a right to recourse for Mr Al Mahdi, no such recourse is available for applicants whose requests for individual reparations are turned down by the TFV.<sup>143</sup>

50. The TFV observes that the “present situation is one of ‘mixed’ categories of victims”.<sup>144</sup> As regards the first category of victims, those “still [...] to be identified”,

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<sup>134</sup> [LRV’s Appeal Brief](#), para. 34.

<sup>135</sup> [LRV’s Appeal Brief](#), para. 35.

<sup>136</sup> [LRV’s Appeal Brief](#), para. 36.

<sup>137</sup> [LRV’s Appeal Brief](#), paras 37-38.

<sup>138</sup> [LRV’s Appeal Brief](#), para. 38.

<sup>139</sup> [LRV’s Appeal Brief](#), paras 40-41.

<sup>140</sup> [LRV’s Appeal Brief](#), paras 46-47. *See also* [LRV’s Response to the TFV’s Observations](#), para. 25.

<sup>141</sup> [LRV’s Appeal Brief](#), paras 47-48.

<sup>142</sup> [LRV’s Appeal Brief](#), paras 48-49.

<sup>143</sup> [LRV’s Appeal Brief](#), para. 44; [LRV’s Response to the TFV’s Observations](#), para. 38.

it submits that the Regulations of the TFV are clear that the TFV can determine the eligibility of reparations beneficiaries when not identified by the Trial Chamber.<sup>145</sup> As regards the second category of victims, “those [139] individuals who filed reparation applications” and who are “potential beneficiaries arguably [...] known to the Court, given they filed applications”, the TFV understands the LRV’s appeal as challenging the notion that they can be brought within the Regulations of the TFV, and as arguing that the Trial Chamber should rather have decided on the merits of those 139 applications.<sup>146</sup> The TFV states that, “[w]hether the 139 applicants can be treated as unidentified, as opposed to as decided upon by the Trial Chamber in its order for reparations, is an open legal question”, on which it is not appropriate for it to have a position since it extends beyond the purview of the Regulations of the TFV.<sup>147</sup> It states that this question “has ramifications beyond this case and is a matter of fundamental importance in terms of providing clarity for victims and their legal representatives regarding the legal framework for reparations, as well as for the Trial Chamber regarding how to best conduct pre-order proceedings.”<sup>148</sup> The TFV also refers to regulation 81 of the Regulations of the Court and states that it may be appropriate for the Appeals Chamber to seek the views of the Office of Public Council for Victims (“OPCV”) on this legal question.<sup>149</sup>

51. Mr Al Mahdi replies that he concurs with the TFV’s position that, pursuant to the Regulations of the TFV, it is within the remit of the TFV to assess the applications and decide on the eligibility for reparations for economic harm, of any victim other than the 139 applicants who have participated in the proceedings to date.<sup>150</sup> He adds that it “might well be necessary for the Bench to provide clarification on [the] matter

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<sup>144</sup> [TFV’s Observations on the LRV’s Appeal Brief](#), para. 14.

<sup>145</sup> [TFV’s Observations on the LRV’s Appeal Brief](#), paras 9, 14.

<sup>146</sup> [TFV’s Observations on the LRV’s Appeal Brief](#), paras 10-11, 14.

<sup>147</sup> [TFV’s Observations on the LRV’s Appeal Brief](#), paras 14-15.

<sup>148</sup> [TFV’s Observations on the LRV’s Appeal Brief](#), para. 17.

<sup>149</sup> [TFV’s Observations on the LRV’s Appeal Brief](#), paras 18-19. The Appeals Chamber notes that Mr Al Mahdi considers that the opinion of the OPCV is not required in the instant case. See [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 23. The Appeals Chamber also notes that the OPCV is not acting as a party in this case. A legal representative of victims raised the matter at issue before the Appeals Chamber and submissions were also sought from the TFV on the specific issue on which it believes the OPCV should file submissions. See [Directions of 7 November 2017](#), para. 1 at p. 3. The Appeals Chamber did not find it necessary at the time to seek other submissions pursuant to rule 103 of the Rules. It is not clear how the OPCV would assist any further and the Appeals Chamber finds it unnecessary to seek its views.

<sup>150</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 18.

concerning the categories of applicants the Trust Fund is authorized to screen in the instant case”.<sup>151</sup> It is not clear from his submissions whether Mr Al Mahdi argues that the Trial Chamber or the Appeals Chamber should rule on the eligibility for individual reparations for the 139 applicants.<sup>152</sup> Mr Al Mahdi requests that the Appeals Chamber, as for indirect victims, order “the meticulous verification of their link in this case with the direct victims”.<sup>153</sup> He also reiterates his request for significantly less redacted versions of the applications already transmitted to him.<sup>154</sup>

52. The LRV, in its response to the TFV, adds that a court of law is an organ that resolves a dispute with a binding decision by applying the law.<sup>155</sup> He submits that the TFV has none of the three characteristics of a court of law: dispute, application of the law, and binding nature of its decision.<sup>156</sup> In his view, the TFV “merely submits to the Chamber a draft implementation plan for reparations”, and its mandate, as defined in paragraphs 1 to 4 of rule 98 of the Rules, consists primarily of implementing the reparations orders of the Trial Chamber.<sup>157</sup> He argues that “reparations proceedings before an international criminal court lie at the heart of the international legal order, which continues to be the privilege of the judge of the competent court called upon to decide on the effectiveness of a victim’s right to reparations for harm suffered when such a claim is made during the reparations phase”.<sup>158</sup> He concludes that, therefore, the TFV’s mandate “cannot be transformed into the power to judge, which, under the Rome Statute, is a task only judges are authorized to carry out, their job being to interpret legal decisions”.<sup>159</sup> He further submits that, to decide whether a victim is eligible, the TFV would have to interpret legal concepts concerning for example “descendants of the deceased, burial sites, livelihood, source of income, exclusive

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<sup>151</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 12.

<sup>152</sup> See [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 17 (where Mr Al Mahdi requests “the Bench” to assess the eligibility of individual applications). See also p. 7 (where Mr Al Mahdi requests “the Court” to do so).

<sup>153</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), (d) at p. 7.

<sup>154</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 17.

<sup>155</sup> [LRV’s Response to the TFV’s Observations](#), para. 18.

<sup>156</sup> [LRV’s Response to the TFV’s Observations](#), paras 18-19.

<sup>157</sup> [LRV’s Response to the TFV’s Observations](#), paras 19, 22.

<sup>158</sup> [LRV’s Response to the TFV’s Observations](#), para. 24.

<sup>159</sup> [LRV’s Response to the TFV’s Observations](#), para. 23.

dependence”, which the TFV has no authority to do, and which is not part of his mandate.<sup>160</sup>

53. The LRV contends that the Trial Chamber erred in its interpretation of the statutory provisions since regulation 118 (2) of the Regulations of the Registry does not authorise the TFV to decide on reparations applications, and that at the stage of when an order for reparations is issued by the Court, the Trial Chamber is assumed to have assessed the merits of the applications.<sup>161</sup> In his view, in the *Lubanga* case, the Appeals Chamber has ruled that it is only when the Trial Chamber awards collective reparations that the Trial Chamber is not required to rule on the merits of the individual requests for reparations.<sup>162</sup>

### (c) Determination by the Appeals Chamber

54. The arguments of the LRV under the second ground of appeal and the submissions of the TFV raise the question as to whether and, if so, to what extent, the Trial Chamber may delegate aspects of the determinations relevant to reparations to the TFV. The Appeals Chamber notes that all the arguments raised by the LRV under this ground of appeal are submitted in relation to individual reparations, and more particularly, the screening process to identify beneficiaries of individual reparations. In this respect, the LRV argues that the Trial Chamber erred in granting a “power of adjudication” to a non-judicial entity, namely the TFV.<sup>163</sup>

55. In approaching this issue, the Trial Chamber considered the victims’ applications before it, alongside the parties’ submissions and reports by experts, and decided on the category of victims it found should receive individual reparations.<sup>164</sup> It found that “individual reparations are to be granted to: (i) those whose livelihoods exclusively depended upon the Protected Buildings and (ii) those whose ancestors’ burial sites were damaged in the attack”.<sup>165</sup> It decided to request the TFV to screen the current and future applicants for compliance with this category, setting out “general

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<sup>160</sup> [LRV’s Response to the TFV’s Observations](#), para. 32.

<sup>161</sup> [LRV’s Response to the TFV’s Observations](#), paras 25, 28.

<sup>162</sup> [LRV’s Response to the TFV’s Observations](#), para. 29.

<sup>163</sup> See [LRV’s Appeal Brief](#), p. 11.

<sup>164</sup> [Impugned Decision](#), paras 57, 73-74, 76.

<sup>165</sup> [Impugned Decision](#), para. 145.

parameters” that the TFV should follow, bearing also in mind that “[t]his screening process itself must respect the rights of both the victims and the convicted person”.<sup>166</sup>

56. The Appeals Chamber notes that the Trial Chamber, in reaching its decision to set up an administrative screening process, considered that the potential number of victims of Mr Al Mahdi’s crimes could be significantly higher than the number represented at the time by the LRV.<sup>167</sup> In this respect, the Appeals Chamber also notes that the pre-trial and trial proceedings in this case had proceeded relatively quickly. The Trial Chamber stated that it had so far received “only 139 applications during the reparations phase” and that “the names of all victims meeting its parameters for individual reparations are simply not known and considers that it would be impracticable for the Chamber to attempt to identify and assess them all itself”.<sup>168</sup> The Appeals Chamber 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.

57. The Appeals Chamber also notes that the Trial Chamber set out, in the Impugned Decision, an eligibility criteria, the “exclusive link” requirement, of which the 139 applicants would not have been aware at the time of submitting their applications to the Trial Chamber. Therefore, in remitting the matter to the TFV, the Trial Chamber left open the possibility for new victims to submit applications, but also for those who had already submitted their applications, to submit additional supporting documents of such a nature as to prove the “exclusive link”.

58. The Appeals Chamber observes that, in the instant case, the Trial Chamber considered, in a general manner, the applications filed before it, and made a principled decision as to the category of persons who should receive individual reparations. Thus, contrary to what is argued by the LRV, the Trial Chamber did, in fact, consider the victims’ claims for reparations and individual applications. The Trial Chamber did this, sought submissions from the parties and submissions from experts and ultimately, on reaching its decision as to the modalities of reparations, requested the

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<sup>166</sup> [Impugned Decision](#), para. 146.

<sup>167</sup> [Impugned Decision](#), para. 141.

<sup>168</sup> [Impugned Decision](#), para. 141.

assistance of the TFV in screening the victims who would ultimately be eligible for individual reparations, based on a category it had defined in the Impugned Decision. The victims, thereafter, had the opportunity to file an appeal against this decision and the eligibility criteria it set out (article 82 (4) of the Statute).<sup>169</sup> The Trial Chamber has stated that it will issue two subsequent decisions, approving the work of the TFV.<sup>170</sup>

59. The Appeals Chamber notes that, as relevant to the present sub-ground of appeal, the Trial Chamber delegated a relatively limited task to the TFV, namely the determination of whether the 139 current applicants as well as any future applicants fall within the group of individuals that are, according to the Trial Chamber's determination, entitled to individual reparations. In so doing, the Trial Chamber maintained a high level of control over the activities of the TFV, while the TFV could seek further guidance from the Trial Chamber, if required.

60. As has been stated more fully above,<sup>171</sup> the applicable legal texts at the Court confer discretion on the trial chamber in its determination of reparations. Beyond article 75 (1) of the Statute and rule 97 (1) of the Rules, there are no provisions that regulate the content of a chamber's final decision on reparations. The Court's legal texts, however, envisage scenarios whereby the TFV may assist a trial chamber in the implementation of an order,<sup>172</sup> with rule 98 (2) of the Rules providing that:

The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. [...]

61. The Regulations of the TFV expand on the role of the TFV when such an award is deposited with it, detailing what should occur in situations where the Court identifies a beneficiary and those in which it does not (*see* regulations 59 to 68 of the Regulations of the TFV).

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<sup>169</sup> *See* [Lubanga Reparations Appeal Judgment](#), para. 180.

<sup>170</sup> [Impugned Decision](#), para. 136.

<sup>171</sup> *See* para. 34.

<sup>172</sup> Article 75 (2) of the Statute provides that the Court may make an order directly against the convicted person and that, "[w]here appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79". Rule 98 (3) of the Rules referring to such awards (being made through the TFV), relates this possibility only to collective awards.

62. The Appeals Chamber notes that no award has been “deposited” with the TFV in the case at hand. However, the situation is analogous in the Appeals Chamber’s view to the extent that the TFV, due to Mr Al Mahdi’s indigence, has been requested to complement this award, thus being the body that will ultimately award the payments to victims.<sup>173</sup> Thus, the Appeals Chamber considers that the Trial Chamber’s decision is in conformity with rule 98 (2) of the Rules and the underlying rationale of this provision, namely that there may be situations in which it may be “impossible or impracticable to make individual awards directly” and that the Trial Chamber may need to rely on the TFV to enhance the efficiency and effectiveness of the reparations process.

63. As far as the Regulations of the TFV are concerned, the Appeals Chamber also notes that regulation 60 refers to a scenario where the “names and/or locations of the victims are not known”, whereas in the case at hand, the Court knows the identities of the 139 individuals who have already submitted an application and whose eligibility for individual reparations are to be determined by the TFV. However, the Appeals Chamber notes that, while the names of 139 applicants may be known, it is yet unknown whether they will be eligible as individual victims (beneficiaries) and it is unknown how many other individuals may apply in the future. The Appeals Chamber notes in this regard that the Trial Chamber “consider[ed] that the names of all the victims meeting its parameters for individual reparations are simply not known and consider[ed] that it would be impracticable for the Chamber to attempt to identify and assess them all itself”.<sup>174</sup> Similarly, in respect of the group of unidentified victims referred to by the Trial Chamber, the Appeals Chamber notes that the Regulations of the TFV clearly envisage a situation where, in implementing an award under rule 98 (2) of the Rules, the TFV is given responsibility for identifying a group of beneficiaries, when not already identified by the Trial Chamber (regulations 60 to 65 of the Regulations of the TFV).

64. The Appeals Chamber also recalls more generally that, in previously setting out general principles on reparations, it found that one of the five essential elements for an order for reparations under article 75 of the Statute was that the order “must

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<sup>173</sup> See [Impugned Decision](#), para. 138, Disposition, p. 60.

<sup>174</sup> [Impugned Decision](#), para. 141.

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 for which the person was convicted*” (emphasis added).<sup>175</sup> This jurisprudence illustrates that the actual assessment of individual applications must not necessarily be carried out by the Trial Chamber, as long as it sets out the eligibility criteria. A footnote in the Report of the Working Group on Procedural Matters, of 13 July 1998, also contains the views of some delegations on how this provision should be interpreted and on the extent to which a trial chamber should assess individual applications.<sup>176</sup>

65. It is also noted that, in the case of *Lubanga*, the Appeals Chamber held that:

[W]hen only *collective* reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations.<sup>177</sup>

66. While the Appeals Chamber expressly left open whether this also applied when a trial chamber decided to award reparations on an individual basis,<sup>178</sup> the Appeals Chamber’s holding in *Lubanga* nevertheless indicates, together with rule 97 (1) of the

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<sup>175</sup> [Lubanga Reparations Appeal Judgment](#), para. 1 at p. 7. The Appeals Chamber notes that the LRV refers to the [Lubanga Reparations Appeal Judgment](#) in its submissions. See [LRV’s Appeal Brief](#), para. 48, fn. 20. In this respect, the Appeals Chamber notes that he does not provide any further reference beyond merely referring to the whole judgment. The Appeals Chamber recalls that parties are requested to provide precise references, and on this basis, dismisses his contention that the jurisprudence set out in the [Lubanga Reparations Appeal Judgment](#) provides legal support to his argument.

<sup>176</sup> See Report of the Working Group on Procedural Matters, [UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7](#), p. 5, fn. 6. Footnote 6, at the end of the second sentence of article 73 (1) of the Statute, in this report – what was to become article 75 – stated: “Some delegations had the following view: This provision intends that where there are only a few victims the Trial Chamber may make findings about their damage, loss and injury. *Where there are more than a few victims, however, the Trial Chamber will not attempt to take evidence from or enter orders identifying separate victims or concerning their individual claims for reparations. Instead, the Trial Chamber may make findings as to whether reparations are due because of the crimes and will not undertake to consider and decide claims of individual victims.* In similar fashion, where there are more than a few victims, this provision will not authorize their separate appeals to the Appeals Chamber. It is anticipated that the Rules will limit the number of victims who can appeal and will require that if there are large numbers of victims, their appeals will be jointly presented by a single representative. It was understood that the Rules of Procedure and Evidence would have to address such issues” (emphasis added). See also W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute (2nd Edition)* (Oxford University Press 2016), p. 1138.

<sup>177</sup> [Lubanga Reparations Appeal Judgment](#), para. 152.

<sup>178</sup> [Lubanga Reparations Appeal Judgment](#), para. 152: “In so holding, the Appeals Chamber limits itself to the circumstances of the Impugned Decision and clarifies that this holding is without prejudice to the question of whether a Trial Chamber would be required to rule on each individual reparations request received if it decides to award reparations on an individual basis pursuant to rule 98 (2) of the Rules of Procedure and Evidence or to award reparations on both an individual and collective basis.”



Rules, that it is within a trial chamber's discretion to grant, or not to grant, individual reparations and that, therefore, victims do not have a right to an individual award as such. This lends further support to the conclusion that the Trial Chamber may delegate aspects of the assessment of applications for individual reparations to the TFV.<sup>179</sup> In this regard, the Appeals Chamber stresses that, in any event, and as developed in more detail below, the Trial Chamber will exercise judicial control over the overall process.<sup>180</sup>

67. The LRV argues that, in delegating to the TFV the assessment of the applicants' eligibility for individual reparations, the Trial Chamber deprived the applicants of their right to "judicial review if the Trust Fund turns down their applications for reparations."<sup>181</sup> The Appeals Chamber notes that the Trial Chamber explicitly stated that "[n]o administrative review mechanism is available to the Defence for victims screened as eligible".<sup>182</sup> However, it remained silent on the question as to whether applicants themselves would have any recourse.

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<sup>179</sup> The Appeals Chamber notes that the Inter-American Court of Human Rights ("IACtHR") has required the assistance of States to identify reparations beneficiaries after the issuance of its judgments on reparations and based on the findings contained therein. In the case of *Mapiripán Massacre v. Colombia*, the IACtHR granted compensation payment to the next of kin of the victims of the massacre, noting that some of the next of kin were still to be identified. The IACtHR ruled that "non-identification of all the next of kin of the victims is due to the very circumstances of the massacre and to the deep fear they have suffered" and stated "its deep concern regarding the fact that there were possibly many other persons who faced that situation and were not identified in the proceeding before the Court". See *Mapiripán Massacre v. Colombia*, "Judgment of September 12, 2005 (Merits, Reparations, and Costs)", 15 September 2005, [Series C, no. 134](#), paras 183, 257, 259, 261, 288-290. It instructed the State of Colombia to proceed with the identification of those next of kin, and the payment of reparations, through the establishment of a national "Official mechanism to monitor compliance with the reparations ordered". See para. 311. The official mechanism was instructed to operate on the basis of a list of those found to be victims of the massacre by the IACtHR and contained in the judgment, and applicants required to "prove [before the official mechanism] their relationship or kinship with the victim, through sufficient means of identification or by means of two attesting witnesses." See paras 257 (b), 261, 309, 311 referring to paras 288, 290. See also *Ituango Massacres v. Colombia*, "Judgment", 1 July 2006, [Series C, no. 148](#), para. 358; *Plan de Sánchez Massacre v. Guatemala*, "Reparations", 19 November 2004, [Series C, no. 105](#), para. 67.

<sup>180</sup> *Infra* paras 68, 70, 72, 98.

<sup>181</sup> [LRV's Appeal Brief](#), para. 44. He also submits that, by stating that "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 Trial Chamber "provide[d] a right of recourse for the defence but not for the victims/applicants". [LRV's Appeal Brief](#), para. 44 referring to [Impugned Decision](#), para. 146 (v). In this regard, the Appeals Chamber notes that the LRV misconstrues the Impugned Decision as the Trial Chamber, in the latter, was referring to Mr Al Mahdi's right to appeal the Impugned Decision, having stated that he could not challenge any decision on eligibility of a particular victim by the TFV.

<sup>182</sup> [Impugned Decision](#), para. 146 (v).

68. The Appeals Chamber notes that the entire procedure for implementation of the Impugned Decision, including the screening process by the TFV, will remain under the supervision of the Trial Chamber. The Trial Chamber, in the Impugned Decision, set out a calendar to this end and specified that “the present order [was] the first of three Chamber determinations to be made during the reparations proceedings”.<sup>183</sup> It stated that:

Following this order, the TFV will propose a draft implementation plan reflecting the parameters of the Chamber’s order, including the objectives, outcomes and necessary activities that comprehensively respond to all of the reparations modalities that can realistically be implemented. [...] the plan will be subject to the Chamber’s approval in a second decision. Upon approval, the TFV will then identify discrete implementation partners in order to implement the Chamber’s award, and the Chamber will approve selected projects in a third decision.<sup>184</sup>

69. The Appeals Chamber finds that the oversight of the Trial Chamber exercising judicial control over the screening process shall include that the Trial Chamber finally endorse the results of the screening, with the possibility of amending the conclusions of the TFV on the eligibility of applicants for individual reparations, upon request of those applicants, or *proprio motu* by the Trial Chamber. The Appeals Chamber is of the view that this will ensure that a contested determination of who should be eligible for individual reparations remains within the scope of judicial control.

70. Turning back to the specificities of this case, the Appeals Chamber notes that, as argued by the LRV, the category of beneficiaries defined by the Trial Chamber does not settle such issues as whether indirect victims should receive individual awards (for example, members of the family of “those whose livelihoods exclusively depended upon the Protected Buildings”), nor the amount of individual reparations which should be awarded to each victim. However, again, the Appeals Chamber notes that the Trial Chamber has stated that it will approve any implementation plan of the TFV, and the Appeals Chamber finds that the Trial Chamber shall make the final determination on individual eligibility in a case where a victim contests the determination made by the TFV, or where the Trial Chamber deems necessary. They are therefore issues on which the Trial Chamber will ultimately be able to rule.

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<sup>183</sup> [Impugned Decision](#), para. 136.

<sup>184</sup> [Impugned Decision](#), para. 136.

71. The Appeals Chamber also observes that, should the TFV encounter any difficulty in interpreting or implementing the Impugned Decision, regulation 57 of the Regulations of the TFV requires it to “consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award”.

72. In conclusion, the Appeals Chamber considers that the Trial Chamber did not err when it delegated the particular aspects it did, relating to the administrative screening of the applications for individual reparations, to the TFV. It is within the discretion of a trial chamber to request, on a case-by-case basis, the assistance of, for example, the TFV to undertake the administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the trial chamber. To this extent, the LRV’s arguments are rejected. At the same time, however, the Appeals Chamber finds that it is for the Trial Chamber, in the exercise of its judicial functions, to make final determinations on individual victim applications where administrative decisions of the TFV are contested or *proprio motu*. Therefore, victim applicants, who are not found eligible for individual reparations, are entitled to request that the Trial Chamber review any such decision.

## 2. *Error related to confidentiality*

### (a) **Relevant part of the Impugned Decision**

73. As seen above, the Trial Chamber considered that the “screening process [...] must respect the rights of both the victims and the convicted person”.<sup>185</sup> This included that both the applicants and Mr Al Mahdi “must be given an opportunity to make representations before the TFV assesses any applicant’s eligibility”.<sup>186</sup> It stated that “[i]n 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”.<sup>187</sup> The Trial Chamber then stated:

Anyone who wishes to be considered for individual reparations must make their identity known to both the TFV and the Defence. The Defence steadfastly requests the proof of identity of those seeking individual reparations, but the Chamber notes that one of its appointed experts cautions against turning over victims’ names to the Defence. It is true that the regulations governing the TFV

<sup>185</sup> [Impugned Decision](#), para. 146.

<sup>186</sup> [Impugned Decision](#), para. 146 (iii).

<sup>187</sup> [Impugned Decision](#), para. 146 (iii).

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. Involving the Defence in this way assists the TFV in having all relevant information before it during the screening. This in turn will increase the accuracy of the screening itself and ensure the integrity of the overall procedure. The Chamber emphasises that no identity of a reparations applicant may be transmitted to the TFV or Defence without the victim's consent. [Footnotes omitted.]<sup>188</sup>

#### **(b) Submissions of the parties and participants**

74. The LRV argues, in the LRV's Notice of Appeal, that victims' consent should always be sought before their personal information is transmitted to the TFV and other participants.<sup>189</sup> He adds that the TFV should not be "given discretion to lift confidentiality restrictions as soon as it is asked to do so".<sup>190</sup> The LRV therefore requests that the Appeals Chamber grant "initial measures of confidentiality" pursuant to regulation 23 *bis* of the Regulations, which may later be lifted with the victims' consent for disclosure purposes.<sup>191</sup>

75. As regards disclosure of identifying information of victims to the defence, the LRV submits, in the LRV's Notice of Appeal, that the Trial Chamber misapplied regulations 59 and 60 of the Regulations of the TFV regarding confidentiality, as those provisions "do not create an obligation to reveal victims' identities to the Defence".<sup>192</sup> In the LRV's Response to the TFV's Observations, when arguing that the TFV should not assess victims' applications in the manner required by the Trial Chamber, he states that when the Registrar provides any information from applications to the TFV that is necessary for implementation of an order, "the Chamber is assumed to have assessed the merits of the applications, and the Registry

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<sup>188</sup> [Impugned Decision](#), para. 146 (iv).

<sup>189</sup> [LRV's Notice of Appeal](#), paras 32-34.

<sup>190</sup> [LRV's Appeal Brief](#), para. 52.

<sup>191</sup> [LRV's Notice of Appeal](#), para. 40 (c); [LRV's Appeal Brief](#), para. 51.

<sup>192</sup> [LRV's Notice of Appeal](#), para. 35.

transmits to the Trust Fund only the non-confidential information included in the applications to assist the Trust Fund in developing its draft implementation plan with a view to implementing reparations”.<sup>193</sup>

76. The LRV submits more generally that “it is crucial to maintain a high degree of confidentiality, even during the reparations phase, to ensure the safety of the victims” and he contends that “[t]he victims should not be forced to choose between reparations and security”.<sup>194</sup> He submits that “[t]he victims have a compelling need for their safety to be ensured against a background of considerable insecurity” and that transmitting only redacted versions to Mr Al Mahdi would not impair his rights, since it would have no consequence on the criminal sentence nor on the amount of the harm for which Mr Al Mahdi was found to be liable.<sup>195</sup> The LRV claims that the principles of proportionality and necessity ought to justify the transmission of redacted versions of reparations applications to the defence.<sup>196</sup> In support of his argument, the LRV refers to ICTY jurisprudence where confidentiality measures were granted “when there are special considerations regarding, in particular, ongoing armed conflict”,<sup>197</sup> referring also to a decision related to measures granted based on a witness’ security concerns.<sup>198</sup>

77. In Mr Al Mahdi’s Response to the TFV’s Observations, Mr Al Mahdi recalls that he “did not have access to sufficient information in the highly redacted application forms transmitted to [him] to be able to take a position on the definitive victim status of the applicants”.<sup>199</sup> Mr Al Mahdi “reiterates [his] request for the provision of significantly less redacted versions of the applications already

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<sup>193</sup> [LRV’s Response to the TFV’s Observations](#), para. 28.

<sup>194</sup> [LRV’s Response to the TFV’s Observations](#), para. 44.

<sup>195</sup> [LRV’s Response to the TFV’s Observations](#), para. 45.

<sup>196</sup> [LRV’s Response to the TFV’s Observations](#), para. 46.

<sup>197</sup> [LRV’s Response to the TFV’s Observations](#), para. 47.

<sup>198</sup> [LRV’s Response to the TFV’s Observations](#), paras 48-49. The LRV submits that an ICTY Chamber in the *Blaškić* case, referring to its own jurisprudence set out in a decision in the *Tadić* case, stated as follows: “In balancing the interests of the accused, the public and witness R, this Trial Chamber considers that the public’s right to information and the accused’s right to a public hearing must yield in the present circumstances to confidentiality in the light of the affirmative obligation under the Statute and the Rules to afford protection to victims and witnesses. This Trial Chamber must take into account witness R’s fear of the serious consequences to members of his family if information about his identity is made known to the public or the media.” The Appeals Chamber notes that the LRV does not provide full references for this quotation.

<sup>199</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 17.

transmitted to [him]”.<sup>200</sup> He requests, as regards individual reparations, to be afforded the possibility of submitting observations on, *inter alia*, the documents provided by the applicants as proof of their identity.<sup>201</sup> It is not clear whether Mr Al Mahdi requests access to a lesser redacted version of all applications, or only of applications of those seeking individual reparations. However, the Appeals Chamber understands Mr Al Mahdi’s submissions to link this issue with applications for individual reparations only.<sup>202</sup>

### (c) Determination by the Appeals Chamber

78. The LRV requests that the Appeals Chamber grant “initial measures of confidentiality” in order to ensure that identifying information of victims who sought anonymity is not transmitted to the TFV or Mr Al Mahdi without their consent.<sup>203</sup> He asks that these “initial measures of confidentiality” be granted pursuant to regulation 23 *bis* of the Regulations of the Court.

79. The Appeals Chamber notes that, although the Trial Chamber stated that “anyone who wishes to be considered for individual reparations must make their identity known to both the TFV and the Defence”, it stated that “no identity of a reparations applicant may be transmitted to the TFV or Defence without the victim’s consent”.<sup>204</sup> In this sense, the Trial Chamber did not lift any protective measures, nor did it order “disclosure of confidential information when the victims’ applications are communicated to the Trust Fund and potentially to the other participants”<sup>205</sup> or give discretion to the TFV to “lift confidentiality restrictions as soon as it is asked to do so”.<sup>206</sup> The Appeals Chamber notes that, on 6 October 2017, the Registrar transmitted public redacted versions of the applications for reparations, redacting identifying information of applicants to, among others, the TFV and Mr Al Mahdi.<sup>207</sup> The

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<sup>200</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 17.

<sup>201</sup> [Mr Al Mahdi’s Response to the TFV’s Observations](#), (e) at pp. 7-8 referring to [Final Defence Submissions](#), para. (e) at p. 19.

<sup>202</sup> See [Mr Al Mahdi’s Response to the TFV’s Observations](#), para. 17, (e) at pp. 7-8.

<sup>203</sup> [LRV’s Notice of Appeal](#), para. 40 (c); [LRV’s Appeal Brief](#), para. 51.

<sup>204</sup> [Impugned Decision](#), para. 146 (iv) referring to [Lubanga Reparations Appeal Judgment](#), paras 160-162.

<sup>205</sup> [LRV’s Notice of Appeal](#), para. 34.

<sup>206</sup> [LRV’s Appeal Brief](#), para. 52.

<sup>207</sup> Registry, “Transmission of the Public Versions of Applications for Reparations Pursuant to the Trial Chamber’s Order ICC-01/12-01/15-228 of 11 July 2017”, 6 October 2017, [ICC-01/12-01/15-241](#), with 139 public redacted annexes.

Appeals Chamber therefore dismisses this argument as not arising from the Impugned Decision.

80. The Appeals Chamber notes that, in his submissions before the Appeals Chamber, the LRV also raises more general concerns as to the disclosure of information relating to the identity of applicants to both the TFV and Mr Al Mahdi.<sup>208</sup> In doing so, he in essence challenges the Trial Chamber's finding that "[a]nyone who wishes to be considered for individual reparations must make their identity known to both the TFV and the Defence".<sup>209</sup>

81. The Appeals Chamber notes that the LRV raised this issue in the LRV's Notice of Appeal<sup>210</sup> but did not develop it further in his subsequently filed appeal brief. However, he returns to the issue in the LRV's Response to the TFV's Observations,<sup>211</sup> which was filed later. In addition, the matter is raised by Mr Al Mahdi in his response to the TFV's observations.<sup>212</sup>

82. Despite the fact that this issue was not substantiated in the LRV's Appeal Brief, in relation to which regulation 58 of the Regulations of the Court,<sup>213</sup> provides that "[t]he appeal brief shall set out the legal and/or factual reasons in support of each ground of appeal", the Appeals Chamber finds it appropriate to assess the merits of the argument. Concerns as to confidentiality and security of victims are clearly before the Appeals Chamber, having been brought forward by both parties, and having been initially raised in the LRV's Notice of Appeal. The Appeals Chamber also notes that the Trial Chamber's approach will have a direct impact on the very possibility for some victims to receive reparations for harm suffered and may affect Mr Al Mahdi's ability to make submissions. In these circumstances, the Appeals Chamber considers

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<sup>208</sup> [LRV's Notice of Appeal](#), paras 32-34.

<sup>209</sup> [Impugned Decision](#), para. 146 (iv).

<sup>210</sup> [LRV's Notice of Appeal](#), paras 32-35.

<sup>211</sup> [LRV's Response to the TFV's Observations](#), paras 42-50.

<sup>212</sup> [Mr Al Mahdi's Response to the TFV's Observations](#), para. 17, (e) at pp 7-8.

<sup>213</sup> Regulation 58 (2) of the Regulations of the Court reads as follows: "The appeal brief shall set out the legal and/or factual reasons in support of each ground of appeal. Reference shall be made to the relevant part of the record or any other document or source of information as regards any factual issue. Each legal reason shall be set out together with reference to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof. Where applicable, the finding or ruling challenged in the decision shall be identified, with specific reference to the page and paragraph number."

that, despite non-compliance with regulation 58 of the Regulations of the Court, and despite the fact that Mr Al Mahdi did not have an automatic right to reply to the LRV's submissions on this issue, it is appropriate, in the interests of justice, and pursuant to regulation 29 (1) of the Regulations of the Court, to consider the merits of issue raised by the LRV and Mr Al Mahdi.

83. The Appeals Chamber recalls that, in deciding that victims' identities needed to be disclosed, the Trial Chamber stated that it considered 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".<sup>214</sup> The Trial Chamber stated that "[t]he Defence steadfastly request[ed] the proof of identity of those seeking individual reparations", referring to submissions made by Mr Al Mahdi in respect of proceedings before the Trial Chamber.<sup>215</sup> It noted that "one of its appointed experts caution[ed] against turning over the victims' names to the Defence"; nevertheless, it went on to provide that disclosure was required.<sup>216</sup>

84. The Appeals Chamber notes that, in the proceedings prior to issuance of the Impugned Decision, the identifying information of applicants had been withheld from Mr Al Mahdi. On 29 September 2016, the Trial Chamber set a reparations calendar where it invited the parties, Prosecutor, Registrar and the TFV, among others, to make general submissions on the reparations proceedings by 2 December 2016.<sup>217</sup> The Registrar filed a confidential *ex parte*, available to the Registrar only, version of Annex I to its submissions on reparations<sup>218</sup> and stated that "[t]he clearest message received during the Field mission was that there exist serious and well-founded fears for the security of those who are perceived as collaborating with the 'foreign power'".<sup>219</sup> Confidential Annex II provides a security assessment of the security on

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<sup>214</sup> [Impugned Decision](#), para. 146 (iv).

<sup>215</sup> [Impugned Decision](#), para. 146 (iv).

<sup>216</sup> [Impugned Decision](#), para. 146 (iv).

<sup>217</sup> "Reparations Phase Calendar", [ICC-01/12-01/15-172](#).

<sup>218</sup> Annex I to "Registry's observations pursuant to Trial Chamber VIII's Decision ICC-01/12-01/15-172 of 29 September 2016", dated 2 December 2016 and registered on 5 December 2016, ICC-01/12-01/15-193-Conf-Exp-AnxI; a public redacted version was registered on 5 December 2016 ([ICC-01/12-01/15-193-AnxI-Red](#)) ("Annex I to Registrar Observations"). The Registrar noted that the annex "contain[ed] identifying information related to victims participating in the Case, potential beneficiaries of reparations and other interlocutors. [Registrar Observations](#), para. 2.

<sup>219</sup> [Annex I to Registrar Observations](#), para. 57.



the field, [REDACTED].<sup>220</sup> In the First LRV Submissions, the LRV stated that “[d]ifficulties in locating victims are also compounded by the prevailing instability in northern Mali. [REDACTED]”<sup>221</sup> In his first general observations on reparations, Mr Al Mahdi asked to be “given the opportunity to review the Fund’s proposed victim screening process at the implementation stage, *subject to any protective measures*” (emphasis added).<sup>222</sup>

85. On 16 December 2016, the Registrar transmitted its first batch of 136 victims’ applications for reparations contained in confidential annexes only available to the LRV and the Registrar.<sup>223</sup> A confidential version – redacting the applicants’ names and identifying information – of these applications was made available to Mr Al Mahdi on 22 December 2016.<sup>224</sup> The Registrar noted in this respect: “[p]ursuant to regulation 23bis(1) of the Regulations of the Court [...], the Applications are transmitted as confidential redacted annexes, since the applicants have raised security concerns regarding the disclosure of their identity to the Defence.”<sup>225</sup> The same process redacting identifying information of applicants in the applications made available to Mr Al Mahdi was repeated with the two additional transmissions by the Registrar of victims’ applications.<sup>226</sup>

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<sup>220</sup> See Annex II to “Registry’s observations pursuant to Trial Chamber VIII’s Decision ICC-01/12-01/15-172 of 29 September 2016”, dated 2 December 2016 and registered on 5 December 2016, ICC-01/12-01/15-193-Conf-AnxII; a public redacted version was registered on 9 December 2016 (ICC-01/12-01/15-193-Conf-AnxII-Red), paras 44-47.

<sup>221</sup> [First LRV Submissions](#), para. 55.

<sup>222</sup> [First Defence Submissions](#), para. 39. In support of this argument, he referred to the jurisprudence of the Appeals Chamber in the case of *Thomas Lubanga Dyilo*. See para. 39 referring to [Lubanga Reparations Appeal Judgment](#), para. 66. The Appeals Chamber notes that while Mr Al Mahdi refers to [Lubanga Reparations Appeal Judgment](#), it seems that he meant to refer to the [Lubanga Amended Order for Reparations](#). Paragraph 66 of the latter only, deals with the relevant issue. The Appeals Chamber notes that in this judgment, it stated that “[t]he Trust Fund shall provide Mr Lubanga with the opportunity to review its proposed screening process of victims at the implementation stage, *subject to any protective measures*” (emphasis added). See [Lubanga Amended Order for Reparations](#), para. 66.

<sup>223</sup> “First Transmission and Report on Applications for Reparations”, [ICC-01/12-01/15-200](#), public with 136 confidential *ex parte* annexes, available to the Registry and LRV only. The Registrar noted in this respect that “[p]ursuant to regulations [sic] 23bis(1) of the Regulations of the Court [...] the annexes to the present submission are classified as confidential *ex parte*, Registry and LRV only, since they contain information that may lead to the identification of victims.” See para. 6.

<sup>224</sup> “First Transmission to the Defence of Redacted Versions of Applications for Reparations”, [ICC-01/12-01/15-202](#), public with 135 confidential redacted annexes.

<sup>225</sup> “First Transmission to the Defence of Redacted Versions of Applications for Reparations”, 22 December 2016, [ICC-01/12-01/15-202](#), with 135 confidential redacted annexes, para. 7.

<sup>226</sup> See [Impugned Decision](#), para. 5.

86. On 24 March 2017, the LRV filed additional evidence in support of applications for reparations transmitted by the Registrar on 16 December 2016 in confidential *ex parte* annexes available to the Trial Chamber, the Registrar and the LRV only, reiterating security concerns and the risks for victims to reveal identifying information.<sup>227</sup> Redacted versions of those documents, redacting identifying information of victims, were made available to Mr Al Mahdi on 28 April 2017.<sup>228</sup> In his final submissions before the Trial Chamber, Mr Al Mahdi requested, as regards individual reparations, to be afforded the possibility of submitting observations on, among others, the documents provided by the applicants as proof of their identity.<sup>229</sup>

87. For the reasons set out below, the Appeals Chamber finds that the Trial Chamber erred in ordering victims to reveal their identity to Mr Al Mahdi as a precondition to having their claims for individual reparations assessed by the TFV, thereby essentially creating an unnecessary obstacle to certain victims to receive reparations.

88. The Appeals Chamber first observes that, as noted both by the Trial Chamber<sup>230</sup> and the LRV,<sup>231</sup> the Regulations of the TFV do not grant the defence the right to have access to the identity of victims applying for reparations.

89. The Appeals Chamber recalls that, in this case, the Registrar, where it deemed necessary, had provided redacted copies of the victims' applications to Mr Al Mahdi, pursuant to regulation 23*bis* (1) of the Regulations of the Court.<sup>232</sup> The Appeals Chamber also notes that, pursuant to the same regulation, it is within the discretion of a trial chamber to decide that those redactions are not justified. However, it is the view of the Appeals Chamber that the Trial Chamber erred in the exercise of this

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<sup>227</sup> “Dépôt de pièces additionnelles en appui aux demandes en réparation déposées par le Greffe en date du 16 décembre 2016 (ICC-01/12-01/15-200)”, 24 March 2017, ICC-01/12-01/15-210-Conf, confidential with 126 confidential annexes *ex parte* available to the Trial Chamber VIII, the Registrar and the LRV only, paras 26-27. A public redacted version of this document, with 126 confidential annexes *ex parte* available to the Trial Chamber VIII, the Registrar and the LRV only, was registered on 28 April 2017 ([ICC-01/12-01/15-210-Red](#)).

<sup>228</sup> [Impugned Decision](#), para. 5.

<sup>229</sup> [Final Defence Submissions](#), (e) at p. 19.

<sup>230</sup> [Impugned Decision](#), para. 146 (iv) referring to regulations 62-65 of the Regulations of the TFV.

<sup>231</sup> [LRV's Notice of Appeal](#), para. 35.

<sup>232</sup> See e.g. “First Transmission to the Defence of Redacted Versions of Applications for Reparations – Public with 135 confidential redacted annexes”, 22 December 2016, [ICC-01/12-01/15-202](#), para. 7. See also [Impugned Decision](#), para. 5.

discretionary decision given the particular circumstances of this case and the stage of the proceedings.

90. When ruling on requests for redactions, a trial chamber must take into account and balance the rights and interests of the parties as per article 68 of the Statute, which provides that “[t]he Court shall take appropriate measures to protect the safety [...] of victims and witnesses. [...] These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. Although said in the context of criminal proceedings, the Appeals Chamber has stated that, in so doing, a chamber should apply the principle of proportionality, in the sense of balancing those two requirements,<sup>233</sup> and make its determination on a case-by-case basis,<sup>234</sup> taking into account the “various interests involved”.<sup>235</sup> The Appeals Chamber has further elaborated on the “appropriate factors”<sup>236</sup> it considered a chamber should take into consideration and balance, and summarized them as such:

Whether information relating to persons at risk may be redacted must be determined on a case-by-case basis. The Appeals Chamber has had previous occasion to set out those factors to be addressed by the Pre-Trial Chamber when considering a request for non-disclosure prior to the hearing to confirm the charges, pursuant to rule 81(4). Those factors can be summarised briefly as: a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it

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<sup>233</sup> “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81’”, 14 December 2006, [ICC-01/04-01/06-773](#), para. 34.

<sup>234</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the ‘Decision on the Prosecutor’s request for redactions for the purposes of disclosure’”, 19 June 2014, [ICC-01/04-01/06-3115-Red \(OA4 OA5 OA6\)](#), para. 5; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9’”, 27 May 2008, [ICC-01/04-01/07-521 \(OA5\)](#) (“Katanga and Ngudjolo Decision on Redaction”), paras 2, 35, 38; *Prosecutor v. Germain Katanga*, “Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’” [ICC-01/04-01/07-476 \(OA2\)](#) (“Katanga Decision on Redaction”), 13 May 2008, paras 52, 57, 58, 65; *Prosecutor v. Germain Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, [ICC-01/04-01/07-475 \(OA\)](#), para. 66; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence’”, 13 October 2006, [ICC-01/04-01/06-568](#), para. 39.

<sup>235</sup> [Katanga and Ngudjolo Decision on Redaction](#), para. 38.

<sup>236</sup> *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, “Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016”, 31 July 2017, [ICC-02/11-01/15-915-Red \(OA9\)](#), para. 1.

is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. [Footnote omitted]<sup>237</sup>

91. As noted above, in the proceedings which took place prior to issuance of the Impugned Decision, Mr Al Mahdi did not have access to the applicants' names and identifying information.<sup>238</sup> The Appeals Chamber also observes that, in the reparations proceedings before the Court to date, in *Lubanga*<sup>239</sup>, in *Katanga*<sup>240</sup> until 11 July 2017<sup>241</sup> and in the on-going proceedings in *Bemba*,<sup>242</sup> the defence was not granted access to the identity of victims applying for reparations who had requested anonymity. In the case of *Lubanga*, Trial Chamber II ruled that Mr Thomas Lubanga Dyilo ("Mr Lubanga") had sufficient access to information enabling him to contest the evidence produced against him, guaranteeing him a fair procedure; this was despite the fact that he had only access to redacted versions of individual applications for reparations.<sup>243</sup>

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<sup>237</sup> [Katanga and Ngujolo Decision on Redaction](#), para. 35. See also *Prosecutor v. Thomas Lubanga Dyilo*, "Reasons for the 'Decision on the Prosecutor's request for redactions for the purposes of disclosure'", 19 June 2014, [ICC-01/04-01/06-3115-Red \(OA4 OA5 OA6\)](#), para. 7; [Katanga Decision on Redaction](#), para. 59.

<sup>238</sup> [Impugned Decision](#), para. 5.

<sup>239</sup> Trial Chamber I, "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, [ICC-01/04-01/06-2904](#), para. 4 referring to Registry "First Report to the Trial Chamber on the applications for reparations", with confidential *ex parte* annex available to the Registry only, 28 March 2012, [ICC-01/04-01/06-2847](#), Registry, "First Transmission to the Trial Chamber of applications for reparations", dated 28 March 2012 and registered on 29 March 2012, [ICC-01/04-01/06-2852](#), with confidential *ex parte* annexes, available to the Registry only.

<sup>240</sup> See Trial Chamber II, "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, [ICC-01/04-01/07-3728-t-ENG](#), fn. 8. The Trial Chamber stated that only confidential redacted versions of the annexes were filed to the defence. See Registry, "Transmission de demandes en réparation à la Défense", dated 24 November 2015 and registered on 25 November 2015, [ICC-01/04-01/07-3619](#), fn.6; "Seconde transmission de demandes en réparations à la Défense", 27 November 2015, [ICC-01/04-01/07-3622](#), fn. 6; "Troisième transmission de demandes en réparations à la Défense", 27 November 2015, [ICC-01/04-01/07-3624](#), fn. 6. See also Trial Chamber II "Decision on the 'Defence Request for the Disclosure of Unredacted or Less Redacted Victim Applications'", 1 September 2015, [ICC-01/04-01/07-3583-t-ENG](#), paras 15, 19, 24. In this decision, Trial Chamber II did not order the full disclosure of the identity of the victims applying for reparations.

<sup>241</sup> See Trial Chamber II, "Decision Granting the Trust Fund for Victims Access to Document ICC-01/04-01/07-3728-Conf-Exp-AnxII and an Extension of the Time Limit to Submit the Draft Implementation Plan for Reparations", 11 July 2017, [ICC-01/04-01/07-3749-t-ENG](#), para. 8. The Appeals Chamber notes that on 11 July 2017, the Trial Chamber granted access to the defence to the confidential version of Annex II of the Reparations Order, including to the identity of the victims who applied for reparations, at the same time that it granted this access to the TFV.

<sup>242</sup> See e.g. Trial Chamber III, "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", 22 February 2010, [ICC-01/05-01/08-699](#), para. 32.

<sup>243</sup> Trial Chamber II, *Prosecutor v. Thomas Lubanga Dyilo*, "Décision fixant le montant des réparations auxquelles Thomas Lubanga Dyilo est tenu", original version registered on 15 December 2017 and

92. In the Impugned Decision, although the Trial Chamber noted that “one of its appointed experts caution[ed] against turning over victims’ names to the Defence”,<sup>244</sup> its focus seems to have been on the need to ensure that Mr Al Mahdi could properly participate in the screening process. In focusing as such, the Appeals Chamber considers that the Trial Chamber accorded too much weight to the role of Mr Al Mahdi in the screening process and failed to properly consider the concerns that had been expressed by the relevant victims, when they had asked for a redacted version of their applications, excluding their identifying information, to be filed in the first place. In reaching its decision, the Trial Chamber mentioned one expert’s caution, but did not make any mention of the concerns that had been made by those victims, and the fact that their identifying information had been redacted until the date of the Impugned Decision. Instead, the Trial Chamber made a wholesale, general ruling, based on concerns for the role of the defence, that all victims’ identities should be disclosed in order for them to receive reparations. It failed to explain why circumstances had changed to the extent they had, to justify such a finding, in particular when these identities had been redacted until the moment of the Impugned Decision.

93. The Appeals Chamber also notes that Mr Al Mahdi’s interests at this stage of the proceedings are limited. In this sense, the Trial Chamber has already set Mr Al Mahdi’s monetary liability and, as argued by the LRV, the results of the screening process will have no impact on this. A wholesale ruling, granting access to all victims’ identifying information, at a stage of the proceedings where the interest of the defence is limited in this way, is disproportionate.<sup>245</sup>

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corrigendum registered on 21 December 2017, [ICC-01/04-01/06-3379-Red-Corr](#), para. 59. In that decision, Trial Chamber II was seized of the issue of whether the information contained in the applications for reparations of victims who requested their identifying information not to be communicated to the defence should be nevertheless taken into consideration by the Trial Chamber when determining Mr Lubanga liability for reparations. Mr Lubanga argued that this information should not be taken into account because the protective measures prevented him to do any serious investigation or assessment of the merits of victims’ claims, and did not allow for an adversarial debate as the guarantees of a fair trial requires. The Trial Chamber rejected Mr Lubanga’s arguments and found that it would take into account the disputed redacted information in its determination of reparations modalities. *See* paras 53-54, 59.

<sup>244</sup> [Impugned Decision](#), para. 146 (iv).

<sup>245</sup> The Appeals Chamber also notes that, in the circumstances of this case, similar reasoning to that applied in relation to the absence of a review mechanism for Mr Al Mahdi over the outcome of the screening process of victims eligible for individual reparations should have been applied. In this regard,

94. Given the particular circumstances of this case, the Appeals Chamber finds that, in balancing the interests of the parties at issue, the Trial Chamber failed to justify why it was appropriate to essentially place the victims in the position where they would have to choose between security concerns and their eligibility to be granted individual reparations.

95. Therefore, the Appeals Chamber finds that applicants for reparations, both those who already applied for reparations and those who will be identified in the future by the TFV, should be eligible to participate in the screening process that the TFV will undertake, even if they wish not to have their identity disclosed to Mr Al Mahdi.

96. The Appeals Chamber also notes that the LRV has argued against disclosure of identifying information to the TFV, which has been charged with identifying beneficiaries of individual reparations in this case. The Appeals Chamber considers that for the TFV to exercise such functions, it needs to be able to verify the identity of the applicants, and assess the authenticity of documents submitted in support of the applications. Therefore, victims who wish to obtain individual reparations must make their identity known to the TFV or consent for such information to be transmitted to the TFV. In this regard, the Appeals Chamber stresses that no identity can be transmitted without the victims' consent to the TFV, as already indicated by the Trial Chamber's instruction to the Registrar in the Impugned Decision.<sup>246</sup> Similarly, the Appeals Chamber stresses that even when victims consent to the disclosure of their identity to the TFV, the information is otherwise confidential and needs to be protected as such by the TFV.

## V. APPROPRIATE RELIEF

97. On an appeal pursuant to article 82 (4) of the Statute, the Appeals Chamber may confirm, reverse or amend the reparations order under appeal (rule 153 (1) of the Rules). In the present case it is appropriate to amend the Impugned Decision as set out below.

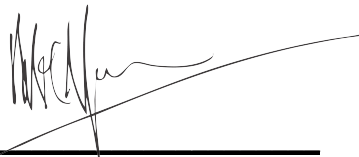
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the Trial Chamber stated that “[a] denial of eligibility of any particular applicant during the screening process will not reduce Mr Al Mahdi’s liability total liability in any way, giving him a limited interest during the screening process”. See [Impugned Decision](#), para. 146 (v).

98. The Appeals Chamber has found that the Trial Chamber should maintain judicial control over the entire reparations proceedings, including the screening process that will be undertaken by the TFV. Applicants for individual reparations should be able to contest before the Trial Chamber the decision taken by the TFV on their eligibility for individual reparations, and it is for the Trial Chamber to make the final determination in this respect. The Trial Chamber may also review the assessment by the TFV *proprio motu*. The Impugned Decision is amended to this extent.

99. The Appeals Chamber has also found that the Trial Chamber erred in ordering that access to applicants' identifying information should be granted to Mr Al Mahdi, as a condition for the applicants to have their applications for reparations reviewed by the TFV. This finding is reversed and the Impugned Decision amended to the extent that the TFV is authorised to also consider applications for individual reparations made by applicants who do not wish to have their identifying information disclosed to Mr Al Mahdi.

Done in both English and French, the English version being authoritative.



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**Judge Howard Morrison**  
**Presiding Judge**

Dated this 8<sup>th</sup> day of March 2018

At The Hague, The Netherlands