

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 17 August 2017

**TRIAL CHAMBER VIII**

**Before:** Judge Raul C. Pangalangan, Presiding Judge  
Judge Antoine Kesia-Mbe Mindua  
Judge Bertram Schmitt

**SITUATION IN THE REPUBLIC OF MALI**

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

**Public**

**Reparations Order**

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

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Mr James Stewart  
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**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**Office of Public Counsel for  
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**Office of Public Counsel for the Defence**

**States' Representatives**

Competent authorities of the  
Republic of Mali

**Amici Curiae**

Queen's University Belfast Human  
Rights Centre  
The Redress Trust  
La Fédération internationale des ligues  
des droits de l'Homme  
L'Association malienne des droits de  
l'Homme  
UNESCO

**REGISTRY**

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Mr Herman von Hebel

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**Victims and Witnesses Unit**

Mr Nigel Verill

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Mr Patrick Craig

**Victims Participation and Reparations  
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Trust Fund for Victims

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**TRIAL CHAMBER VIII** ('Chamber') of the International Criminal Court ('Court' or 'ICC') issues the following 'Reparations Order' in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, having regard to Articles 75 and 79 of the Rome Statute ('Statute'), Rules 85 and 94-99 of the Rules of Procedure and Evidence ('Rules'), Regulation 117 of the Regulations of the Court and Regulations 49-72 of the Regulations of the Trust Fund for Victims ('Regulations of the TFV').

## **I. Procedural history**

1. On 27 September 2016, following an admission of guilt, the Chamber convicted Mr Al Mahdi of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute. Ten protected objects were attacked in Timbuktu, Mali, between around 30 June 2012 and 11 July 2012 ('Protected Buildings'): (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door; and the two mausoleums adjoining the Djingareyber Mosque, namely the (ix) Ahmed Fulane Mausoleum and (x) Bahaber Babadié Mausoleum. The Chamber sentenced Mr Al Mahdi to nine years of imprisonment.<sup>1</sup>

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<sup>1</sup> Judgment and Sentence, [ICC-01/12-01/15-171](#) ('Judgment').

2. On 29 September 2016, the Chamber set a reparations phase calendar ('Calendar Decision').<sup>2</sup> The Chamber granted extensions of time to this calendar as deemed necessary during the reparations proceedings.<sup>3</sup>
3. On 25 and 31 October 2016, the Chamber granted applications by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other *amici curiae* to file submissions on reparations related issues.<sup>4</sup> The Chamber granted all such applications it received during the reparations phase.
4. On 2 December 2016, the Chamber received general submissions on the reparations proceedings from the: (i) Trust Fund for Victims ('TFV');<sup>5</sup> (ii) accepted *amici curiae*, including UNESCO;<sup>6</sup> (iii) Legal Representative of Victims ('LRV');<sup>7</sup> (iv) Defence for Mr Al Mahdi ('Defence');<sup>8</sup> (v) Office of the Prosecutor

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<sup>2</sup> Reparations Phase Calendar, [ICC-01/12-01/15-172](#).

<sup>3</sup> Decision Granting an Extension of Time for Filing of TFV Submissions, 12 May 2017, [ICC-01/12-01/15-219](#) (extended deadline for final submissions to 16 June 2017 for the LRV, Defence and TFV); Decision on LRV requests for submission of additional reparation applications and for an extension of time, 20 March 2017, [ICC-01/12-01/15-209](#) (granting permission for the LRV to file any materials in its possession, including newly collected reparations applications and supporting documents, by 24 March 2017); Decision Granting an Extension of Time for Filing of Experts' Report and Amending Reparations Calendar, 9 March 2017, [ICC-01/12-01/15-206-Red](#) (confidential version notified same day) (granting the request by Chamber appointed experts for additional time to submit their reports); Decision Appointing Reparations Experts and Partly Amending Reparations Calendar, 19 January 2017, [ICC-01/12-01/15-203-Red](#) (confidential version notified same day) ('Expert Appointment Decision'); Decision on Registry Request for Extension of Time to Identify Experts and Partly Amending the Reparations Phase Calendar, 21 October 2016, [ICC-01/12-01/15-177](#) (partly granting the request by the Registry for an extension of time to identify potential experts).

<sup>4</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>5</sup> Submissions on the reparations proceedings, [ICC-01/12-01/15-187](#) ('First TFV Submissions').

<sup>6</sup> 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](#) ('HRC/Redress Submissions'); Joint observations of FIDH and AMDH on the reparations proceedings, [ICC-01/12-01/15-189-tENG](#) (English translation notified on 24 January 2017) ('FIDH/AMDH Submissions'); Unesco Amicus Curiae Observations, [ICC-01/12-01/15-194](#) ('UNESCO Submissions').

<sup>7</sup> Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation, [ICC-01/12-01/15-190-Red-tENG](#) (redacted version notified on 3 January 2017; English translation of confidential version notified on 24 January 2017 and public redacted version notified on 25 July 2017) ('First LRV Submissions').

<sup>8</sup> General Defence observations on reparations, [ICC-01/12-01/15-191-tENG](#) (English translation notified on 26 January 2017) ('First Defence Submissions').

(‘Prosecution’)<sup>9</sup> and (vi) Registry.<sup>10</sup> The Malian authorities were invited to file a general submission on reparations, but elected not to do so.

5. On 16 December 2016, and in accordance with a deadline set by the Chamber,<sup>11</sup> the Registry transmitted its first batch of victim applications for reparations.<sup>12</sup> Confidential versions of these applications (redacting the applicants’ names and identifying information) were made available to the Defence on 22 December 2016. The LRV supplemented these forms with supporting materials on 24 March 2017,<sup>13</sup> and on the same date the Registry filed additional applications in the case record.<sup>14</sup> Confidential redacted versions of these further materials were made available to the Defence on 24 April 2017. In total, 139 reparations applications (by 137 individuals and two organisations) are currently before the Chamber.<sup>15</sup>
6. On 19 January 2017, following receipt of both a list of proposed experts solicited from the Registry<sup>16</sup> and corresponding submissions from the LRV, Defence and Prosecution,<sup>17</sup> the Chamber appointed four experts to assist in the determination of reparations.<sup>18</sup>

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<sup>9</sup> Prosecution’s Submissions on Reparations, [ICC-01/12-01/15-192-Red](#) (redacted version notified on 7 December 2016).

<sup>10</sup> Registry’s observations pursuant to Trial Chamber VIII’s Decision ICC-01/12-01/15-172 of 29 September 2016, [ICC-01/12-01/15-193](#) (notified on 5 December 2016, with two annexes) (‘Registry Submissions’).

<sup>11</sup> Calendar Decision, [ICC-01/12-01/15-172](#), para. 2(iv).

<sup>12</sup> First Transmission and Report on Applications for Reparations, [ICC-01/12-01/15-200](#) (with 136 annexes; English translations of selected annexes notified on 15 August 2017).

<sup>13</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-Red](#) (with 126 annexes; redacted version of cover filing notified 28 April 2017; English translations of selected annexes notified on 15 August 2017).

<sup>14</sup> Second Transmission and Report on Applications for Reparations, [ICC-01/12-01/15-211](#) (with five annexes).

<sup>15</sup> Of the 137 individual applicants, 46 (33%) are male and 91 (66%) are female.

<sup>16</sup> List of Proposed Experts Pursuant to Trial Chamber VIII’s Decisions ICC-01/12-01/15-172 of 19 September 2016 and ICC-01/12-01/15-177 of 21 October 2016, 9 December 2016, [ICC-01/12-01/15-197](#) (with 21 annexes).

<sup>17</sup> *Observations de la Défense sur l’identification des experts devant intervenir dans la phase de réparations*, 9 December 2016, [ICC-01/12-01/15-198-Red](#) (redacted version notified on 14 July 2017); *Observations du Représentant légal des victimes sur le panel d’experts identifiés par le Greffe en application de la décision ICC-01/12-01/15-172*, 9 December 2016, [ICC-01/12-01/15-196-Red](#) (redacted version notified on 14 July 2017);

7. On 28 April 2017, the Court received the reports from the appointed experts.<sup>19</sup> Confidential redacted versions of the reports were made available to the parties on 3 May 2017. For the purposes of reparations proceedings, the ‘parties’ are understood to be the Defence and LRV.
8. On 16 June 2017, the Chamber received final submissions on reparations from the LRV,<sup>20</sup> Defence<sup>21</sup> and TFV.<sup>22</sup>

## II. Overview

9. The LRV, representing the 139 reparations applicants, submits that the Chamber should adopt collective reparation measures for the upkeep, restoration and rehabilitation of the Protected Buildings. The LRV also seeks individual reparation measures aimed at monetary compensation for the material and mental harm suffered by the victims.<sup>23</sup>
10. The specific relief sought by the LRV is for the Chamber to:
  - (i) Grant the individual reparations sought by the 137 natural person applicants;
  - (ii) Grant the reparations sought individually for each of the Protected Buildings to repair the spiritual harm and facilitate their daily maintenance;

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Prosecution’s Observations on Identification of Experts on Reparations, 8 December 2016, [ICC-01/12-01/15-195-Red](#) (redacted version notified on 14 July 2017).

<sup>18</sup> Expert Appointment Decision, [ICC-01/12-01/15-203-Red](#).

<sup>19</sup> *Formally notified by* Transmission of Experts’ Reports pursuant to Trial Chamber Decision ICC-01/12-01/15-203-Red of 19 January 2017, 1 May 2017, [ICC-01/12-01/15-214](#) (with three annexes; confidential redacted versions of annexes notified to the parties on 3 May 2017 and to the TFV on 4 May 2017; corrigendum of annexes II and III notified on 4 May 2017; public redacted versions of annexes notified on 4 and 14 August 2017). The annexed reports will hereinafter be referred to as ‘First Expert Report’, ‘Second Expert Report’ and ‘Third Expert Report’, respectively.

<sup>20</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, [ICC-01/12-01/15-224-Corr-Red-tENG](#) (confidential translation notified on 19 July 2017 and public redacted translation notified on 10 August 2017) (‘Second LRV Submissions’).

<sup>21</sup> Final Submissions of the Defence for Mr Al Mahdi in Anticipation of the Order for Reparations, ICC-01/12-01/15-226-Conf-tENG (English translation notified on 17 July 2017) (‘Second Defence Submissions’).

<sup>22</sup> Final Submissions on the reparations proceedings, [ICC-01/12-01/15-225](#) (‘Second TFV Submissions’).

<sup>23</sup> First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), paras 110-24, 147.

- (iii) Grant each victim applicant a further 250 euros per person to reflect the collective harm suffered;
  - (iv) Grant the Malian State a symbolic one euro award for the material and moral harm suffered;
  - (v) Grant the reparations sought by organisation a/35140/16;<sup>24</sup>
  - (vi) Decide on the measures of collaboration between the LRV and TFV for the implementation of the award; and
  - (vii) Allow the LRV to draw up plans for the implementation of the award and to report back to the TFV and possibly the Chamber.<sup>25</sup>
11. The Defence submits that primarily collective reparations are appropriate, as no bodily harm was suffered. The Defence argues that financial losses must be proven and limited to the period during which the destroyed monuments had not yet been rebuilt by UNESCO. The Defence also submits that psychological harm must be proven by way of showing a direct kinship between the people claiming the harm and the deceased whose mausoleums were attacked.<sup>26</sup>
12. The specific relief sought by the Defence is for the Chamber to:
- (i) Limit its liability assessment only to the acts of which Mr Al Mahdi was convicted;
  - (ii) For indirect victims, to thoroughly verify their link to the direct victims and the harm they allege;
  - (iii) Award predominantly collective reparations, on which the Defence may state its views on the identification of beneficiaries;
  - (iv) Order that individual reparations be scrupulously assessed on a case-by-case basis, affording the Defence the opportunity to make observations in accordance with the principle of adversarial proceedings;

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<sup>24</sup> a/35140/16, ICC-01/12-01/15-200-Conf-Anx132-Red-tENG.

<sup>25</sup> Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), pages 36-37.

<sup>26</sup> First Defence Submissions, [ICC-01/12-01/15-191-tENG](#), page 23.



- (v) Order that the apportionment of reparations be without discrimination between victims who suffered similar harm and that there be no double-counting;
- (vi) Order that Mr Al Mahdi's apology given during the trial be conveyed to Timbuktu, Mali and the international community;
- (vii) Order that modern and traditional justice mechanisms be applied to the extent possible;
- (viii) Determine that reparation for the people of Timbuktu suffices as reparation for the harm suffered by the people of Mali and the international community;
- (ix) Determine the amount of repairs, with due regard for the repair work already done by UNESCO and the fact that Mr Al Mahdi cannot be held liable for the 'extremely high figures' to which the Chamber's appointed experts make reference;
- (x) Rule that the monitoring of Mr Al Mahdi's assets for purposes of recovering from him any monies which the TFV may disburse be limited to his nine-year term of imprisonment, and that said recovery shall not apply to assets acquired after expiration of the sentence;
- (xi) Order that the Defence shall be entitled to comment on all aspects of the reparations proceedings, including the sum-total of the award and the plan for reparations; and
- (xii) Order that a less redacted version of all applications for reparations be disclosed to the Defence and that the reparation process be as transparent as possible.<sup>27</sup>

### III. The importance of international cultural heritage

13. The Chamber considers it necessary to address the importance of cultural heritage, given that it is an essential component of the charges Mr Al Mahdi is convicted of.

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<sup>27</sup> Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, pages 26-28 (relief sought is consolidated from the original list).

14. The international community has recognised in various legal instruments the importance of the human right to cultural life and its physical embodiments. These instruments condemn the destruction of cultural heritage, including in situations of conflict.<sup>28</sup> The Statute provides for punishment of, *inter alia*, attacks on cultural property<sup>29</sup> and for reparations for victims of such attacks. As discussed by one of the experts, cultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future.<sup>30</sup> UNESCO states that ‘the loss of heritage during times of conflict can deprive a community of its identity and memory, as well as the physical testimony of its past. Those destroying cultural heritage seek to disrupt the social fabric of societies’.<sup>31</sup>
15. Cultural heritage is to be understood as encompassing the resources enabling cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations.<sup>32</sup> It includes tangible heritage composed of sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value, as well as intangible heritage comprising traditions, customs and practices, knowledge, vernacular or other languages, forms of artistic expression and folklore.<sup>33</sup> Cultural heritage is considered internationally important regardless of its location and origin.

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<sup>28</sup> [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts \(Protocol I\)](#), 8 June 1977, article 53; [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#), 8 June 1977, article 16; [Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention](#), The Hague, 14 May 1954, article 4; [Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict](#), The Hague, 26 March 1999, article 15. *See also* Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 14-29, *citing, inter alia*, United Nations Security Council resolutions condemning destructions of cultural heritage.

<sup>29</sup> Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute.

<sup>30</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 44-48.

<sup>31</sup> UNESCO Submissions, [ICC-01/12-01/15-194](#), para. 1.

<sup>32</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 4.

<sup>33</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 5.

16. Cultural items considered as cultural heritage are objects, monuments and sites that are considered to be testimonies of human creativity and genius. It is this exceptional quality which warrants their labelling as cultural heritage.<sup>34</sup> Cultural heritage is important not only in itself, but also in relation to its human dimension.<sup>35</sup> Cultural property also allows a group to distinguish and identify itself before the world community.<sup>36</sup>
17. World cultural heritage is a most important category. Greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern.<sup>37</sup>
18. The importance of cultural heritage to communities is illustrated by the fact that the communities themselves often request that the protection of their cultural landmarks be prioritised, even in situations of violence where human life is at risk. As a former Director for Legal Protection of Cultural Heritage explained in a remark quoted by one of the Chamber's *amici curiae*:

We are often asked the question, 'Why protect monuments when people are dying?' The reason is, the people who are dying ring us up and say, 'Please protect our monuments.' If people feel strongly about their heritage, we don't feel the international community can simply stand back and say, 'It's not important. As long as you're not dying, that's all that counts'.<sup>38</sup>

19. The attack against the Protected Buildings not only destroyed and damaged physical structures. Its impact 'rippled out into the community and diminished the link and identity the local community had' with such valuable cultural heritage.<sup>39</sup>

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<sup>34</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 24.

<sup>35</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 4.

<sup>36</sup> HRC/Redress Submissions, [ICC-01/12-01/15-188](#), para. 7.

<sup>37</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 30.

<sup>38</sup> HRC/Redress Submissions, [ICC-01/12-01/15-188](#), para. 8 (quoting Lyndel Prott).

<sup>39</sup> HRC/Redress Submissions, [ICC-01/12-01/15-188](#), para. 6.

20. A legal mechanism of particular significance in this regard is the World Heritage Convention,<sup>40</sup> created for the protection of cultural and natural heritage of outstanding universal value.<sup>41</sup> Inscription on the World Heritage List requires a very strict procedure whereby it must be shown, *inter alia*, that the object or site at stake has an exceptional quality that transcends national borders.<sup>42</sup>
21. As pointed out by one of the Chamber's appointed experts, Timbuktu was inscribed on the World Heritage List in 1988 because: (i) the mosques and holy places of Timbuktu played an essential role in the spread of Islam in Africa at an early period; and (ii) the three great mosques of Timbuktu, restored by the Qadi Al Aqib in the 16<sup>th</sup> century, bear witness to the golden age of the intellectual and spiritual capital at the end of the Askia Dynasty.<sup>43</sup>
22. Because of their purpose and symbolism, most cultural property and cultural heritage are unique and of sentimental value. As a result, they are not fungible or readily replaceable.<sup>44</sup> The destruction of international cultural heritage thus 'carries a message of terror and helplessness; it destroys part of humanity's shared memory and collective consciousness; and it renders humanity unable to transmit its values and knowledge to future generations'.<sup>45</sup> It is an irreplaceable loss that negates humanity.

#### IV. Principles on reparations and applicable law

23. Article 75(1) of the Statute provides that:

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<sup>40</sup> [Convention Concerning the Protection of the World Cultural and Natural Heritage](#), adopted 16 November 1972 and entered into force 17 December 1975, United Nations, Treaty Series, vol. 1037.

<sup>41</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 33.

<sup>42</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 31 and 40-42.

<sup>43</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 41.

<sup>44</sup> HRC/Redress Submissions, [ICC-01/12-01/15-188](#), para. 7.

<sup>45</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 44.

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

24. The Court has relied upon the UN Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>46</sup> and the UN Basic Principles on Reparations for Victims ('UN Basic Principles')<sup>47</sup> to fulfil its Article 75(1) obligation to 'establish principles relating to reparations.'
25. In the *Lubanga* case, the Appeals Chamber established reparations principles drawing on the UN Basic Principles and held that 'principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers'.<sup>48</sup> In the *Katanga* Reparations Order, Trial Chamber II relied heavily on principles discussed in the *Lubanga* Reparations AO.<sup>49</sup>
26. The Chamber finds that reparations of crimes against cultural heritage are adequately addressed under the same framework and thus sees no reason to deviate from the relevant principles formulated by the Appeals Chamber in *Lubanga*.<sup>50</sup> They are briefly recalled in the present order.

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<sup>46</sup> United Nations General Assembly Resolution 40/34 ('Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'), 29 November 1985, [UN Doc. A/RES/40/34](#).

<sup>47</sup> United Nations General Assembly Resolution 60/147 ('Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'), 21 March 2006, [UN Doc. A/RES/60/147](#).

<sup>48</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, [ICC-01/04-01/06-3129](#), para. 55, [ICC-01/04-01/06-3129-AnxA](#), para. 5 ('*Lubanga* Reparations AJ', with its Annex A as '*Lubanga* Reparations AO').

<sup>49</sup> *Ordonnance de réparation en vertu de l'article 75 du Statut*, 24 March 2017, [ICC-01/04-01/07-3728](#) ('*Katanga* Reparations Order'), paras 29-30.

<sup>50</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), paras 1-22 and 29-49. See also *Katanga* Reparations Order, [ICC-01/04-01/07-3728](#), paras 29-63.

27. Reparations fulfil two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Court to ensure that offenders are held to account for their acts.<sup>51</sup>
28. Reparations in the present case are designed – to the extent achievable – to relieve the suffering caused by the serious crime committed, address the consequences of the wrongful act committed by Mr Al Mahdi, enable victims to recover their dignity and deter future violations. Reparations may also assist in promoting reconciliation between the victims of the crime, the affected communities and the convicted person.<sup>52</sup>
29. As a general principle, all victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings. The victims of the crime at bar shall have equal access to information relating to the reparations proceedings as part of their entitlement to fair and equal treatment throughout the proceedings.<sup>53</sup> This said, during the implementation phase it may be appropriate to prioritise reparations to those victims who were the most harmed by the convicted person’s conduct.<sup>54</sup>
30. Victims should be able to participate throughout the reparations process and they should receive adequate support in order to make their participation substantive and effective.<sup>55</sup>

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<sup>51</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 2.

<sup>52</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 71.

<sup>53</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), paras 12-13 and 31.

<sup>54</sup> *On similar lines, see Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para.19 (recognising that priority can be given for certain victims ‘who are in a particularly vulnerable situation or who require urgent assistance’). *See* para 140, below, for a discussion of the prioritisation.

<sup>55</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 29.

31. Reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national ethnic or social origin, wealth, birth or other status.<sup>56</sup>
32. When deciding on reparations, the Court shall treat the victims with humanity and shall respect their dignity and human rights, and it will implement appropriate measures to ensure their safety, physical and psychological well-being and privacy, as provided for in Rules 87 and 88 of the Rules.<sup>57</sup>
33. It is of paramount importance that victims receive appropriate, adequate and prompt reparations.<sup>58</sup>
34. Whenever possible, reparations should reflect local cultural and customary practices unless these are discriminatory or exclusionary or they deny victims equal access to their rights.<sup>59</sup> As indicated by one of the Chamber's appointed experts, a gender-sensitive approach to the protection of cultural heritage and to the combating of its destruction is also particularly essential because women and girls may face gender-specific risks, challenges and discrimination in gaining access to and defending cultural heritage.<sup>60</sup>
35. Reparations need to support programmes that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures for a long time. If economic benefits are to be paid, these should also be

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<sup>56</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 16.

<sup>57</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 15.

<sup>58</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 44.

<sup>59</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 47; *See also* Second TFV Submissions, [ICC-01/12-01/15-225](#), paras 16-17.

<sup>60</sup> First Expert Report, [ICC-01/12-01/15-214-AnXI-Red3](#), page 6. *See also* *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 18.

allocated, if possible, by periodic instalments rather than by way of a lump payment.<sup>61</sup>

36. The Chamber emphasises that the present order does not exonerate States from their separate obligations, under domestic law or international treaties, to provide reparations to their citizens. Further, States Parties have the obligation to fully cooperate during all stages of reparations proceedings, in particular during the implementation phase, where their cooperation is especially necessary.<sup>62</sup>
37. The reparations ordered cannot be prejudicial to or inconsistent with the rights of Mr Al Mahdi.<sup>63</sup>
38. Moreover, the Appeals Chamber has held that a reparations order must contain, at a minimum, five essential elements: (i) it must be directed against the convicted person; (ii) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; (iii) it must specify and provide reasons for the type of reparations ordered, be they collective, individual or both; (iv) it must define the harm caused to direct and indirect victims as a result of the crimes of which the person was convicted, as well as identify the modalities of reparations that the Chamber considers appropriate in the circumstances of the specific case before it; and (v) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes of which the person was convicted.<sup>64</sup>

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<sup>61</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 48; Second TFV Submissions, [ICC-01/12-01/15-225](#), paras 23-24.

<sup>62</sup> See *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 50; *Katanga* Reparations Order, [ICC-01/04-01/07-3728](#), paras 323-25.

<sup>63</sup> Rule 97(3) of the Rules; *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 49.

<sup>64</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 32.



## A. Relevant victims

39. In its ‘Decision on Victim Participation at Trial and on Common Legal Representation of Victims’,<sup>65</sup> the Chamber ruled on the criteria to be met for individuals or organisations to be considered as victims. The Chamber sees no reason to deviate from its own jurisprudence at the reparations phase, noting however the different standard of proof to be met by applicants for reparations.<sup>66</sup> As far as the legal criteria are concerned, the Chamber incorporates the applicable law previously set by way of reference<sup>67</sup> and will only recall it here briefly.
40. Pursuant to Rule 85(a) of the Rules, reparations may be granted to direct and indirect individual victims, provided that the harm they suffered is personal.
41. Pursuant to Rule 85(b) of the Rules, reparations may also be granted to legal entities that are direct victims of the crime committed. Legal entities ‘may include, *inter alia*, non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private education institutes [...], companies, telecommunications firms, institutions that benefit members of the community [...] and other partnerships’.<sup>68</sup>

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<sup>65</sup> Decision on Victim Participation at Trial and on Common Legal Representation of Victims, 8 June 2016, [ICC-01/12-01/15-97-Red](#) (confidential version notified same day) (‘Victim Participation Decision’).

<sup>66</sup> See para. 44, below. For participation at trial, only a *prima facie* standard applies. Victim Participation Decision, [ICC-01/12-01/15-97-Red](#), paras 17, 23.

<sup>67</sup> Victim Participation Decision, [ICC-01/12-01/15-97-Red](#), paras 16-19 and 23-26.

<sup>68</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), para. 8.

## B. Harm suffered, types of reparations and modalities

### 1. Harm

42. To be eligible for reparations, a victim must have suffered harm as a result of the commission of the crime of which Mr Al Mahdi was convicted. The Chamber is not limited to admissible evidence for this purpose, nor need it limit itself to the kinds of harm identified in the Judgment.<sup>69</sup>
43. The Chamber endorses the definition of ‘harm’ adopted by the Appeals Chamber in the *Lubanga* case, namely as denoting ‘hurt, injury and damage’. For individuals, the harm does not necessarily need to have been direct, but it must have been personal to the victim. Harm may be material, physical or psychological. Organisations must demonstrate direct harm to their properties. For moral harm specifically, moral harm should be estimated without consideration of the economic situation of the local population.<sup>70</sup>
44. It must be established that the crime committed by Mr Al Mahdi is the actual (‘but/for’) and ‘proximate’ cause of the harm for which reparation is sought.<sup>71</sup>

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<sup>69</sup> See *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 185 (‘In amending the Impugned Decision, the Appeals Chamber stresses that it limits itself to the circumstances of this case. In this regard, the limitations set in the present judgment with respect to the harm caused to direct and indirect victims as a result of the crimes for which Mr Lubanga was convicted for purposes of reparations is without prejudice to other potential scenarios, such as where a Trial Chamber makes a finding in the order for reparations of a harm for which reparations may be awarded: 1) that is based on evidence presented under regulation 56 of the Regulations of the Court during the trial only for the purposes of reparations and which was not relied upon for factual findings relevant to the conviction and sentence of the person; 2) is based on evidence received at a reparation hearing, in written submissions from the parties and participants, or from experts who were engaged for the purpose of providing such evidence; or 3) is based on evidence contained in a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence that identifies a harm that is not mentioned in the decisions on conviction and sentence. The Appeals Chamber notes that the above scenarios are relevant to the time frame prior to the issuance of an order for reparations and that the Court’s statutory framework provides for the convicted person to be able to challenge any such evidence that could potentially be relied upon in the eventual order for reparations’).

<sup>70</sup> *Katanga* Reparations Order, [ICC-01/04-01/07-3728](#), para. 189.

<sup>71</sup> The Chamber notes that the Appeals Chamber has ruled that the causation standard ought to be determined on a case-by-case basis and sees no compelling reason to deviate from the standard identified in the *Lubanga* case. *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), paras 11 and 59.

‘Proximate cause’ is a cause that is legally sufficient to result in liability,<sup>72</sup> and in assessing proximate cause the Chamber will consider, *inter alia*, whether it was reasonably foreseeable that the acts and conduct underlying the conviction would cause the resulting harm. The standard of proof to be met in establishing this causal link is that of a balance of probabilities.<sup>73</sup>

## 2. *Types and modalities of reparations*

45. Reparations can either be individual<sup>74</sup> or collective.<sup>75</sup> They are not mutually exclusive and can be awarded concurrently. Individual businesses and families may also receive financial support in the implementation of collective reparations.<sup>76</sup> Reparations can also be awarded through the TFV to an organisation,<sup>77</sup> but this is not an alternative to awards for individual and/or collective reparations.
46. Reparations ‘modalities’ are the specific methods identified to address the kinds of harm requiring reparations. With regard to modalities, Article 75 of the Statute gives a non-exhaustive list, including restitution, compensation and rehabilitation.
47. Compensation is something, typically money, awarded to one or more victims in recognition of the harm they suffered.
48. Rehabilitation is aimed at restoring the victims and their communities to their former condition. Rehabilitation may include, for instance, economic development or social, medical or legal services.

<sup>72</sup> ‘Proximate Cause’ under ‘Cause’, Black’s Law Dictionary (10<sup>th</sup> ed. 2014).

<sup>73</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), paras 22 and 65.

<sup>74</sup> Rule 98(1)-(2) of the Rules.

<sup>75</sup> Rule 98(3) of the Rules.

<sup>76</sup> See *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 155.

<sup>77</sup> Rule 98(4) of the Rules.

49. Reparations can also be symbolic in character. Symbolic reparations may be particularly appropriate to repair harm caused to a community.

### C. Scope of liability

50. The present order is made against Mr Al Mahdi only. The convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, to his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.<sup>78</sup>

## V. Order for reparations against Mr Al Mahdi

### A. Relevant victims

51. In the present section, the Chamber explains who it considers to be the relevant victims for the purposes of its assessments below. In its Judgment, the Chamber has concluded that the destruction of the Protected Buildings affected not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.<sup>79</sup>
52. However, the Chamber notes already that the degree and nature of harm suffered varies for each of the three groups identified. It is self-evident that the community of Timbuktu suffered disproportionately more harm as a result of the attack on the Protected Buildings.<sup>80</sup> The Chamber only received reparations applications pertaining to the community of Timbuktu – no application has been submitted solely for the interests of the national or international community beyond Timbuktu. Notably, UNESCO itself did not submit any

<sup>78</sup> *Lubanga* Reparations AO, [ICC-01/04-01/06-3129-AnxA](#), paras 20-21.

<sup>79</sup> Judgment, [ICC-01/12-01/15-171](#), para. 80.

<sup>80</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 6 (quoting a joint statement of two UN Special Rapporteurs in 2012: '[T]he destruction of tombs of ancient Muslim saints in Timbuktu, a common heritage of humanity, is a loss for us all, but for the local population it also means the denial of their identity, their beliefs, their history and their dignity').

application for reparation and stated instead that ‘local communities [...] have been the principal victims’.<sup>81</sup>

53. Nevertheless, the Chamber is well aware of the specific nature of the crime for which Mr Al Mahdi was convicted. The destruction of cultural heritage erases part of the heritage of all humankind. The Chamber finds it appropriate to acknowledge the suffering endured by the Malian community and the international community as a whole as a result of the destruction of the Protected Buildings – all but one of which were UNESCO World Heritage Sites. In this respect, the Chamber endorses the statement of one of the experts, namely that ‘the international community should not be forgotten [...] as a collective to which harm was done’.<sup>82</sup> The expert further states that

[V]arying degrees of access to and enjoyment of cultural heritage may be recognised, taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages, so it may make sense to prioritize reparation to those groups closer to the heritage in question while making sure to recognize broader connections.<sup>83</sup>

54. The Chamber considers that addressing the harm suffered by the community of Timbuktu will also effectively address the broader harm suffered by Malians and the international community as a whole. In this respect, the Chamber fully endorses the view expressed by one of its appointed experts:

The persons harmed by the crimes for which Al Mahdi is responsible include the guardian families who were responsible for the maintenance of the sites, the other faithful inhabitants of Timbuktu, the rest [of] the population in Mali, and the international community. However, the latter two groups (the broader Malian population and the international community), do not require additional reparative measures, as those directed at the local population of Timbuktu inherently will effectively address the broader harm suffered by Malians and by the international

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<sup>81</sup> UNESCO Submissions, [ICC-01/12-01/15-194](#), para. 15.

<sup>82</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 27.

<sup>83</sup> First Expert Report, ICC-01/12-01/15-214-Conf-AnxI-Red, page 27.

community as a whole. In other words, the measures directed at the more specific harm will by necessary implication addressed [*sic*] the more general harm.<sup>84</sup>

55. If the Chamber limits its harm assessment only to the Timbuktu community, that will also maximise the effect of the reparations awarded in the present case. In the words of another of the appointed experts: '[S]ince ultimately it is the local population that is in the best position to preserve the heritage in question, therefore the measures of reparation might most sensibly be aimed at strengthening their capacity to do so'.<sup>85</sup>
56. Hence, the Chamber limits its assessment of the various kinds of harm in the next sub-section only to the harm suffered by or within the community of Timbuktu, *i.e.* organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes<sup>86</sup> or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack.

## **B. Kinds of harm suffered, types of reparations and modalities**

57. In this section, the Chamber will analyse the different kinds of harm alleged in the information before it. Recalling that reparations findings are not limited to admissible evidence,<sup>87</sup> the Chamber notes that in its assessment it has freely considered all submissions, applications,<sup>88</sup> supporting materials, expert reports

<sup>84</sup> Second Expert Report, ICC-01/12-01/15-214-Conf-AnxII-Red, para. 126.

<sup>85</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 28.

<sup>86</sup> It is noted that many inhabitants of Timbuktu fled Timbuktu due to the occupation. Second TFV Submissions, [ICC-01/12-01/15-225](#), para. 15, *citing* First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), paras 15-16. *See also* FIDH/AMDH Submissions, [ICC-01/12-01/15-189-tENG](#), paras 36-37.

<sup>87</sup> *See Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 185.

<sup>88</sup> Although the present order focuses primarily on the 139 reparations applications before it, the Chamber has also taken into account the information provided by two victims who requested reparations in their applications to participate at trial, but did not subsequently submit a further reparations application. *See* Annex 2 to the Transmission of the public redacted version of three applications for participation in the proceedings, 25 May 2016, [ICC-01/12-01/15-90-Anx2-Red2](#) (a/35001/16; public redacted version of application notified on 21 June 2016) and Annex 1 to the Transmission of the public redacted version of five applications for participation in the proceedings, 25 July 2016, [ICC-01/12-01/15-142-Anx1-Red2](#) (a/35003/16; cover filing notified on 26 July 2016 and public redacted version of application notified on 20 September 2016).

and other relevant information. For each kind of harm, the Chamber will: (i) summarise the relevant views of the victim applicants; (ii) summarise any other relevant information received (above all that contained in the reports of the appointed experts); (iii) conclude whether the crime committed by Mr Al Mahdi is the actual and proximate cause of the harm; (iv) consider any submissions from the parties which diverge from how the Chamber intends to specify the reparation types and modalities; and (v) specify the reparation types and modalities, if any, it considers appropriate for the harm in question.

58. Preliminarily, the Chamber notes the dire security situation in Timbuktu<sup>89</sup> and the corresponding difficulties potential victims faced in both filing their applications and supporting them. These difficulties are compounded by the emphasis on customary practices in managing life in Timbuktu,<sup>90</sup> which leads to the creation of relatively fewer official and business records. The Chamber has taken this into account when evaluating what the victims of Mr Al Mahdi's crimes can be reasonably expected to provide in support of their claims.
59. The Chamber also notes the Defence's argument that it is necessary for the Chamber to identify the specific eligible victims to be in a position to subsequently evaluate the harm suffered.<sup>91</sup> The Chamber rejects this argument to the extent that it means that reparations can be assessed only on the basis of individual victim applications. As regards individual reparations, and as discussed further below, the Regulations of the TFV specifically contemplate awarding individual reparations in cases when the Court does not identify

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<sup>89</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), pages 32, 42; Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras. 82, 92; First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 100; Annex 2 of the Registry Submissions, ICC-01/12-01/15-193-Conf-AnxII, paras 13, 18, 46, 50; FIDH/AMDH Submissions, [ICC-01/12-01/15-189-tENG](#), paras 51–55.

<sup>90</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 87-124; First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), paras 95, 99; Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), paras 35, 38.

<sup>91</sup> First Defence Submissions, [ICC-01/12-01/15-191-tENG](#), para. 56.

individual beneficiaries.<sup>92</sup> As regards collective reparations, when considering whether the number of victims in a case makes a collective reparations award more appropriate, the Chamber is not limited to the number of reparations applicants before it.<sup>93</sup> To conclude otherwise when determining collective reparations would also be inconsistent with the Appeals Chamber conclusion that ‘certain crimes may have an effect on a community as a whole’ and ‘if there is a sufficient causal link between the harm suffered by members of that community and the crimes of which [the convicted person] was found guilty, it is appropriate to award collective reparations to that community, understood as a group of victims.’<sup>94</sup>

### 1. *Damage to the Protected Buildings*

#### a) *Property damaged in the attack*

60. In the Judgment, the Chamber concluded that all the Protected Buildings were attacked and destroyed to one degree or another.<sup>95</sup> These buildings reflected part of Timbuktu’s history. They were among the most cherished buildings in the city, and were perceived as protecting the population of Timbuktu.<sup>96</sup>

61. The victims ask for reparations to restore, maintain and protect the Protected Buildings. The following extracts are taken from the translations of application forms:

- *‘I would like the ICC to give money or building materials for the upkeep of the mausoleums.’<sup>97</sup>*

<sup>92</sup> Regulations 60-65 of the Regulations of the TFV. See paragraphs 141-146, below.

<sup>93</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 148(f).

<sup>94</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 212.

<sup>95</sup> Judgment, [ICC-01/12-01/15-171](#), paras 38, 63.

<sup>96</sup> Judgment, [ICC-01/12-01/15-171](#), para. 78.

<sup>97</sup> a/35009/16, ICC-01/12-01/15-210-Conf-Anx11-Red-tENG, page 2.



- *'The Court must provide money to fix and care for (protect) the mausoleums. A wall should be built to protect the mausoleums.'*<sup>98</sup>
- *'I would like the Court to give money to help us build and maintain the holy sites. This will give us relief and help us make some progress.'*<sup>99</sup>
- *'In reparation for the harm, compensation to be used to support activities to foster resilience to the effects of the destruction, to overcome them and to re-establish stronger emotional and spiritual ties to this cultural property is desirable.'*<sup>100</sup>

62. The Chamber received information that the loss of the Protected Buildings affected the entire community of Timbuktu.<sup>101</sup>
63. Since the attacks, UNESCO – together with other stakeholders – has rebuilt or restored each of the Protected Buildings.<sup>102</sup> UNESCO does not ask for any reparations for itself, but it has made clear that it would support any ICC action aimed at assisting local communities.<sup>103</sup>
64. The attacks on the Protected Buildings lie at the heart of this case and form the basis for Mr Al Mahdi's conviction. The Chamber is satisfied that Mr Al Mahdi's crime is the actual and proximate cause of the damage to the Protected Buildings.
65. The Defence submits that, when considering reparations for repairing the Protected Buildings, the Chamber should take into account the fact that they have been restored.<sup>104</sup> The Chamber is unconvinced and considers the fact that

<sup>98</sup> a/35010/16, ICC-01/12-01/15-210-Conf-Anx12-Red-tENG, page 2.

<sup>99</sup> a/35029/16, ICC-01/12-01/15-210-Conf-Anx22-Red-tENG, page 2.

<sup>100</sup> a/35144/16, ICC-01/12-01/15-200-Conf-Anx134-Red-tENG, page 2.

<sup>101</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 56-60; a/35029/16, ICC-01/12-01/15-210-Conf-Anx22-Red-tENG, page 2; a/35004/16, ICC-01/12-01/15-210-Conf-Anx7-Red-tENG, page 2; a/35081/16, ICC-01/12-01/15-200-Conf-Anx74-Red-tENG, page 2; a/35009/16, ICC-01/12-01/15-210-Conf-Anx11-Red-tENG, page 2.

<sup>102</sup> UNESCO Submissions, [ICC-01/12-01/15-194](#), para. 12. *See also* Third Expert Report, [ICC-01/12-01/15-214-AnxIII-Red2](#), pages 35-99.

<sup>103</sup> UNESCO Submissions, [ICC-01/12-01/15-194](#), para. 15.

<sup>104</sup> Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, para. 35.

the Protected Buildings have been restored by UNESCO and others to have no impact on whether Mr Al Mahdi is liable for the damage caused.<sup>105</sup> Remedial efforts by a third party in the time elapsed between the destruction and the issuance of the reparations order do not alter the amount of damage originally done. To place undue weight on this fact would be to understate the amount of harm actually caused and the corresponding reparations required to remedy it. The fact that UNESCO has no intention of collecting any reparations is likewise immaterial. The Chamber will not speculate on the extent to which *bona fide* third parties may assert their rights against the convicted person once the reparations order is issued. The Chamber's only role at this point is to decide on the convicted person's liability, taking into account the scope and extent of any damage, loss or injury caused.<sup>106</sup> In the present case, the Chamber finds that Mr Al Mahdi is liable for the destruction of the Protected Buildings.

66. The Chamber also received information that certain graves directly adjacent to the Protected Buildings were damaged during Mr Al Mahdi's attack.<sup>107</sup> The Defence contests that Mr Al Mahdi can be held liable for any such damage.<sup>108</sup> The Chamber does consider the Defence arguments to be persuasive on this point. The Chamber has insufficiently precise information before it on which to determine the number of directly adjacent burial sites that may have been destroyed, the circumstances of their destruction or the costs of their restoration. None of the reparations applicants before the Chamber is asking specifically for reparations for this kind of damage, nor is the LRV seeking reparations on this basis in its relief sought. It must also be emphasised that the Chamber found in the Judgment that Mr Al Mahdi made efforts to prevent

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<sup>105</sup> *In agreement with* FIDH/AMDH Submissions, [ICC-01/12-01/15-189-tENG](#), paras 39-41.

<sup>106</sup> See Rule 97(1) of the Rules.

<sup>107</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 77-79; First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), pages 21-22; FIDH/AMDH Submissions, [ICC-01/12-01/15-189-tENG](#), paras 17-18, 41.

<sup>108</sup> Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, paras 24-25.

destruction to directly adjacent burial sites when attacking the Protected Buildings.<sup>109</sup> The Chamber is unable to conclude that Mr Al Mahdi's attack is the actual and proximate cause of the damage to any directly adjacent burial sites.

67. As for the types and modalities of reparations needed, the Protected Buildings belonged to the entire community of Timbuktu and their loss was felt by the community as a whole. The Chamber considers that collective reparations are the most appropriate way to address the damage caused. As for the modalities, the Chamber considers that the harm caused by the destruction of the Protected Buildings will be satisfactorily addressed by measures for their protection and maintenance. Noting that renovations have already been performed by UNESCO, the Chamber considers that the appropriate modality of reparations shall be measures aimed at rehabilitating the Protected Sites with effective measures to guarantee non-repetition of the attacks directed against them. These measures are to be taken to the extent possible and following consultations with government authorities as necessary. The Chamber emphasises that these reparations should be tailored to the individual concerns regarding each of the Protected Buildings.

*b) Apology for the property damage*

68. Certain applicants, the LRV, *amici curiae* and appointed experts stress that there are victims in the present case who view Mr Al Mahdi's apology as insufficient.<sup>110</sup>

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<sup>109</sup> Judgment, [ICC-01/12-01/15-171](#), paras 89-93.

<sup>110</sup> a/35055/16, ICC-01/12-01/15-200-Conf-Anx48-Red-tENG, page 2; a/35109/16, ICC-01/12-01/15-200-Conf-Anx101-Red-tENG, page 2; a/35133/16, ICC-01/12-01/15-200-Conf-Anx125-Red-tENG, page 1; First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), paras 42-46; HRC/Redress Submissions, [ICC-01/12-01/15-188](#), paras 81-87; First Expert Report, ICC-01/12-01/15-214-Conf-AnxI-Red, page 41.

69. The Chamber recognises that it is ultimately up to each individual victim to decide whether he or she considers Mr Al Mahdi's apology to be sufficient. Some victims may already be satisfied with the apology given, and others will not be satisfied no matter what kind of further apologies are given. This is inevitable, and eminently understandable. But the Chamber must engage with the sufficiency of Mr Al Mahdi's apology on some level in order to determine what reparations are appropriate in the present case.
70. The Chamber has already concluded that it considered Mr Al Mahdi's apology to be genuine, categorical and empathetic.<sup>111</sup> The Chamber particularly recalls that Mr Al Mahdi recognised the suffering endured by Timbuktu, the people throughout Mali and the international community:

I am really sorry, I am really remorseful and I regret all the damage that my actions have caused. I regret what I have caused to my family, my community in Timbuktu, what I have caused my home nation, Mali, and I'm really remorseful about what I had caused **the international community as a whole**.<sup>112</sup>

71. The Chamber does not consider that a further apology above and beyond what Mr Al Mahdi has already given to be necessary. However, as a symbolic measure to ensure that all victims have access to Mr Al Mahdi's apology, the Chamber orders the Registry to produce an excerpt of the video of Mr Al Mahdi's apology<sup>113</sup> and post it on the Court's website with the corresponding transcript translated into the primary languages spoken in Timbuktu. If any of the victims wish to receive a hard copy of the apology in a language they fully understand and speak, the Registry shall make this available to them upon request. Further ways of using Mr Al Mahdi's existing apology may be advanced by the TFV during the implementation phase of the present order.

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<sup>111</sup> Judgment, [ICC-01/12-01/15-171](#), paras 103-05.

<sup>112</sup> Transcript of Hearing, 22 August 2016, [ICC-01/12-01/15-T-4-Red-ENG](#), page 8, lines 13-16 (emphasis added).

<sup>113</sup> Transcript of Hearing, 22 August 2016, [ICC-01/12-01/15-T-4-Red-ENG](#), page 8 line 3, to page 9 line 23.

## 2. Consequential economic loss

72. When pronouncing Mr Al Mahdi's sentence, the Chamber concluded that Mr Al Mahdi caused economic harm.<sup>114</sup>

73. The victims are asking for compensation for the effect the attacks on the Protected Buildings had on their livelihood. Some victims explain how their livelihoods exclusively depended upon the Protected Buildings: these include the guardians of the mausoleums, the *maçons* tasked with prominent responsibilities in maintaining them<sup>115</sup> and people whose businesses could not exist without the Protected Buildings. Others explain how their livelihoods have been indirectly harmed, noting the losses of tourism and economic activity in the years following the attack. The following extracts are taken from the translations of application forms:

- *'Our [REDACTED]'s mausoleum was a source of economic income for us [REDACTED] because the gifts from the pilgrims were given to us.'*<sup>116</sup>
- *'Definite financial assistance is necessary because since the attack on the mausoleum there have been fewer pilgrims and therefore fewer donations.'*<sup>117</sup>
- *'Before the events, we [...] used to benefit from donations by pilgrims to the site. Today we earn almost nothing.'*<sup>118</sup>
- *'Many people depend on the mausoleums for their livelihood, for example, imams, marabouts and caretakers. People came from all over the world to see the mausoleums and to receive blessings. They gave gifts, money,*

<sup>114</sup> Judgment, [ICC-01/12-01/15-171](#), para. 108.

<sup>115</sup> The LRV defines a '*maçon*' (mason) as follows: 'a pivotal figure in the historical and religious shrine. He alone is the embodiment of expertise in the building of the shrine and its bequeathal to the next generation. He is greatly skilled in the substantial aspects of the mausoleum and oversees building and burials. He is selected in a unique and fitting process by the prominent family of the descendants of the mausoleum'. First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 25(f).

<sup>116</sup> a/35020/16, ICC-01/12-01/15-210-Conf-Anx13-Red-tENG, page 2.

<sup>117</sup> a/35030/16, ICC-01/12-01/15-210-Conf-Anx23-Red-tENG, page 3.

<sup>118</sup> a/35022/16, ICC-01/12-01/15-210-Conf-Anx15-Red-tENG, page 2.

*offerings and so on... This doesn't happen anymore because people are afraid to come to Timbuktu.*<sup>119</sup>

74. Expert reports and other submissions to the Chamber attest to direct economic losses caused by the attacks to those whose livelihoods were exclusively dependent on the mausoleums. Moreover, the Chamber received information that consequential economic loss was suffered as a result of the attack.<sup>120</sup>
75. The Chamber is satisfied that Mr Al Mahdi's crime is both the actual and proximate cause of the economic harm. It was reasonably foreseeable that attacking cultural property integral to the community in Timbuktu would have a lingering economic impact. Indeed, the Protected Buildings were targeted in large part because of their prominent community role.<sup>121</sup>
76. As indicated by the Chamber's experts,<sup>122</sup> the general consequential economic loss caused by the attack reverberated across the entire community in Timbuktu. The Chamber considers that the harm caused by Mr Al Mahdi's actions is primarily collective in character. It is much larger and of a different nature than the harm suffered by the 139 applicants grouped together. Aggregating their losses and prioritising their compensation would risk dramatically understating and misrepresenting the economic loss actually suffered.

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<sup>119</sup> a/35002/16, ICC-01/12-01/15-200-Conf-Anx6-Red-tENG, page 2. The LRV defines a 'marabout' as follows: 'in the sense of a seer, but with the difference that the Marabout has a part in the role played by religious beliefs and practices within the observance of the body of rites and precepts by the population of Timbuktu'. First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 25(g).

<sup>120</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, pages 123-134; Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 80-84. *See also* First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), paras 66-70.

<sup>121</sup> Judgment, [ICC-01/12-01/15-171](#), paras 34-37.

<sup>122</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, pages 123-134; Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 80-84.

77. Nevertheless, the LRV argues that compensation should be given to all reparations applicants who suffered financial losses, and that a further 250 euros be granted to each victim applicant to address their collective harm.<sup>123</sup>
78. When focusing on the extent of compensation, the Chamber considers it more equitable to use individual reparations to compensate victims on the basis of the extent of the harm suffered or sacrifice made, rather than solely on whether a victim had applied for reparations.
79. The Chamber notes that reparations applicants in the present case already obtain several procedural advantages which are not necessarily available to other members of the Timbuktu community who suffered similar harm. These applicants will have their claims considered first in the course of the screening procedure specified later in the present order.<sup>124</sup> By virtue of having already prepared applications and supporting materials, the applicants can take part in this screening procedure without significant additional effort.<sup>125</sup> The applicants provided information considered by the Chamber in tailoring the reparations award, giving them more influence over the parameters set in the present order. The applicants also continue to avail themselves of the assistance of the LRV, a Court appointed lawyer who receives legal assistance to represent their interests and advocate for them.
80. However, going beyond these procedural advantages by compensating the applicants – to the exclusion of similarly harmed people – puts undue emphasis on the filing of applications rather than on the extent of the harm suffered or the sacrifice made by the victims. There is no reason to believe that the reparations applicants, simply by virtue of applying, suffered to a different

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<sup>123</sup> Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-t-ENG](#), page 37.

<sup>124</sup> See para. 146, below.

<sup>125</sup> See para. 146(ii), below.

degree compared with the rest of the Timbuktu community. As noted by the LRV himself, there is a large risk of frustration in awarding reparations only to those who have reparations applications pending before the Chamber.<sup>126</sup> The Chamber's appointed experts also recommend that reparations in the present case should be awarded on a collective basis as far as possible.<sup>127</sup>

81. Accordingly, the Chamber awards individual reparations for consequential economic loss only to those whose livelihoods *exclusively* depended upon the Protected Buildings. 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<sup>128</sup> and the appointed experts,<sup>129</sup> 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<sup>130</sup> – but not owners of businesses with broader purposes who have been harmed by the loss of the Protected Buildings.
82. The Chamber considers that the number of victims and the scope of the consequential economic loss make a collective award more appropriate for those beyond this identified group. This 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. As indicated by the Appeals Chamber, 'the decision not to award reparations on an individual

<sup>126</sup> Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), paras 87-91.

<sup>127</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 125; First Expert Report, ICC-01/12-01/15-214-Conf-AnxI-Red, page 42.

<sup>128</sup> First LRV Submissions, ICC-01/12-01/15-190-Conf-tENG, para.67.

<sup>129</sup> Second Expert Report, ICC-01/12-01/15-214-Conf-AnxII-Red, paras 66, 130, 133.

<sup>130</sup> See First LRV Submissions, ICC-01/12-01/15-190-Conf-tENG, para. 68.



basis does not prejudice the individuals who filed individual reparations requests with respect to their eligibility to participate in any collective reparations programme'.<sup>131</sup>

83. The Chamber therefore considers that the economic harm caused by Mr Al Mahdi necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings and (ii) collective reparations for the community of Timbuktu as a whole. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation to address the financial losses suffered. The modalities for collective reparations should be aimed at rehabilitating the community of Timbuktu in order to address the economic harm caused. Collective measures in this regard may include community-based educational and awareness raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a 'microcredit system' that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity.<sup>132</sup>

### 3. *Moral harm*

84. When pronouncing Mr Al Mahdi's sentence, the Chamber concluded that Mr Al Mahdi had caused moral harm.<sup>133</sup>
85. Every victim applicant before the Chamber alleges some sort of moral harm as a result of the attack on the Protected Buildings. The Chamber considers that the victims established the following forms of moral harm to the requisite standard: (i) mental pain and anguish, including losses of childhood,

<sup>131</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 155.

<sup>132</sup> See First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 43; Annex 1 to the Registry Submissions, [ICC-01/12-01/15-193-AnxI-Red](#), para. 44; a/35140/16, ICC-01/12-01/15-200-Conf-Anx132-Red-tENG, page 2.

<sup>133</sup> Judgment, [ICC-01/12-01/15-171](#), para. 108.

opportunities and relationships among those who fled Timbuktu because the Protected Buildings were attacked and (ii) disruption of culture.<sup>134</sup> The following quotes are taken from translations of some of the application forms:

- *'I was completely emotionally devastated by the destruction of the mausoleums'.<sup>135</sup>*
- *'I was a victim of the destruction of the mausoleum, upset and shaken in my body and to the depths of my being.'<sup>136</sup>*
- *'I have never suffered so deeply in my life [...] Mentally, I was devastated. I felt humiliated by the destruction. I am still suffering [...] I am still affected mentally.'<sup>137</sup>*
- *'I was so shocked and hurt on the day of the destruction that I could have died.'<sup>138</sup>*
- *'[M]y faith shattered and my belief unsettled.'<sup>139</sup>*
- *'I lost everything with the destruction – my childhood, my belief and my attachment.'<sup>140</sup>*
- *'My faith is shattered. My family fled [.] [...] I lost everything and all my faith.'<sup>141</sup>*
- *'The whole city suffered on the day the mausoleums were destroyed. I wept and many others wept, because we were in great pain. The saints are all important to us. They are ancestors of all of us. We used to seek blessings from them and make offerings to them at every milestone in our lives:*

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<sup>134</sup> Forms of moral harm related to disruption of culture have been recognised in international human rights jurisprudence. Inter-American Court of Human Rights ('IACtHR'), *Plan de Sánchez Massacre v. Guatemala, Judgment (Reparations)*, 19 November 2004 ('Sánchez Reparations Judgment'), paras 77, 85-88; IACtHR, *Yakye Axa Indigenous Community v. Paraguay, Judgment (Merits, Reparations and Costs)*, 17 June 2005, paras 154, 203.

<sup>135</sup> a/35006/16, ICC-01/12-01/15-210-Conf-Anx9-Red-tENG, page 2.

<sup>136</sup> a/25113/14, ICC-01/12-01/15-200-Conf-Anx3-Red-tENG, page 2.

<sup>137</sup> a/35000/16, ICC-01/12-01/15-200-Conf-Anx5-Red-tENG, page 2.

<sup>138</sup> a/35002/16, ICC-01/12-01/15-210-Conf-Anx6-Red-tENG, page 2.

<sup>139</sup> a/35049/16, ICC-01/12-01/15-200-Conf-Anx42-Red-tENG, page 2.

<sup>140</sup> a/35063/16, ICC-01/12-01/15-200-Conf-Anx56-Red-tENG, page 2.

<sup>141</sup> a/35067/16, ICC-01/12-01/15-200-Conf-Anx60-Red-tENG, page 2.

*births, deaths, sickness, travel, etc. That's why the destruction harmed us. We didn't think it was possible.*<sup>142</sup>

- *'I cried a lot on the day of the destruction. My family, my friends and all the people of Timbuktu suffered. We will never forget. The Saints of Timbuktu are the descendants of Allah. When we used to ask for their blessings, they would be given. When the mausoleums were destroyed, we were shattered as well. The pain is still there today. The city has changed. Timbuktu is no longer what it was; even if the saints protect us still, it's not the same as before. We lost everything; today we have nothing.'*<sup>143</sup>
- *'The destruction of the sacred shrines of my ancestors caused me suffering [...] I suffered, as did the other members of my family. When there was a problem in our family, it was the only place in which we gathered and prayed for protection.'*<sup>144</sup>

86. The Chamber has also received a variety of other information describing the emotional distress and harm suffered across the Timbuktu community. In particular, the Protected Buildings were widely perceived in Timbuktu as being the protectors of the community from outside harm. The attack on the Protected Buildings not only destroyed cherished monuments, but also shattered the community's collective faith that they were protected.<sup>145</sup>

87. The Chamber is satisfied that Mr Al Mahdi's crime is both the actual and proximate cause of this moral harm. It was reasonably foreseeable that attacking cultural property integral to the community in Timbuktu would cause these kinds of distress.

<sup>142</sup> a/35010/16, ICC-01/12-01/15-210-Conf-Anx12-Red-tENG, page 2.

<sup>143</sup> a/35029/16, ICC-01/12-01/15-210-Conf-Anx22-Red-tENG, page 2.

<sup>144</sup> a/35056/16, ICC-01/12-01/15-200-Conf-Anx49-Red-tENG, page 2.

<sup>145</sup> Third Expert Report, [ICC-01/12-01/15-214-AnxIII-Red2](#), pages 146-49; Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 65; First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 29; a/35069/16, ICC-01/12-01/15-200-Conf-Anx62-Red-tENG, page 2; a/35140/16, ICC-01/12-01/15-200-Conf-Anx132-Red-tENG, page 2; a/35138/16, ICC-01/12-01/15-200-Conf-Anx130-Red-tENG, page 2; a/35135/16, ICC-01/12-01/15-200-Conf-Anx127-Red-tENG, page 2; a/35130/16, ICC-01/12-01/15-200-Conf-Anx122-Red-tENG, page 2.

88. The LRV argues at length that the moral harm suffered is best addressed by giving compensation to the applicants as individual and collective reparations.<sup>146</sup> For the same reasons provided when discussing consequential economic loss, the Chamber considers such a compensation-centric approach for the benefit of the reparations applicants to be problematic.<sup>147</sup> The Chamber again emphasises that it considers that such a course understates the variety of other information proving that Timbuktu's community at large – and not only the victim applicants – suffered moral harm.
89. The Chamber considers that the community-wide impact of moral harm is minimised by the Defence, namely when it argues in its submissions that psychological harm in the present case can be proven only by asking for a direct kinship between the people claiming the harm and the deceased whose mausoleums were attacked.<sup>148</sup> The Chamber agrees with the Defence – and LRV,<sup>149</sup> for that matter – that those whose ancestors' burial sites were damaged in the attack (such as the 'descendants of the saints') have a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population.<sup>150</sup> The Chamber therefore considers that individual reparations through compensation are necessary to address the mental pain and anguish they suffered. But the remainder of the reparations awarded to the entire community of Timbuktu must be collective in character.
90. The Chamber therefore orders that the moral harm caused by Mr Al Mahdi necessitates: (i) individual reparations for the mental pain and anguish of those whose ancestors' burial sites were damaged in the attack and (ii) collective

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<sup>146</sup> Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), paras 44-59.

<sup>147</sup> See paras 77-82, above.

<sup>148</sup> First Defence Submissions, [ICC-01/12-01/15-191-tENG](#), page 23.

<sup>149</sup> First LRV Submissions, ICC-01/12-01/15-190-Conf-tENG, para. 77.

<sup>150</sup> See also First Expert Report, ICC-01/12-01/15-214-Conf-AnxI-Red, page 21.

reparations for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation and collective reparations through rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Buildings. These collective reparations can also include symbolic measures – such as a memorial, commemoration or forgiveness ceremony – to give public recognition of the moral harm suffered by the Timbuktu community and those within it.

91. As emphasised previously, Chamber considers that the effects of these measures will ripple out so as to address the moral suffering endured by people throughout Mali and the international community.
92. The Chamber also notes the LRV's specific request in relation to organisation a/35140/16 which – in addition to requesting modalities already addressed by the Chamber in discussing consequential economic loss – requests the 'establishment of an aid and counselling programme tailored to the needs of the people of Timbuktu that [it] would manage'.<sup>151</sup> Such a programme would be consistent with the indicated reparations modalities for moral harm, but the Chamber considers it a matter for the implementation phase to decide whether and to what extent this specific organisation will be involved in the implementation of the award.

#### 4. *Bodily harm*

93. The Chamber convicted Mr Al Mahdi only of directing an attack against the Protected Buildings. The common plan underlying this conviction was to attack

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<sup>151</sup> a/35140/16, ICC-01/12-01/15-200-Conf-Anx132-Red, page 2.

these sites only.<sup>152</sup> He was not convicted of any crimes against persons, nor did the Chamber make any factual findings in relation to crimes against persons.

94. Some victims allege in their applications that bodily harm – either to their families or themselves – was suffered as a result of the attack.<sup>153</sup>
95. The Chamber also received supporting materials that moral harm resulting from death was suffered in connection with the destruction of the mausoleums.<sup>154</sup>
96. The Defence indicates that Mr Al Mahdi does not contest the rights of victims to claim compensation for deaths caused during and as a result of the attacks, but submits there is no evidence supporting such claims.<sup>155</sup>
97. The Chamber considers that many victims allege bodily harm with only the most summary of assertions that this happened during the attack, making it difficult to ascertain the circumstances of these deaths and how they occurred in the course of the attack against the Protected Buildings. This makes it impossible to tell if the bodily harm was caused by those attacking the Protected Buildings with Mr Al Mahdi or by others in a manner which he neither knew of nor could reasonably anticipate. The Chamber emphasises

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<sup>152</sup> Judgment, [ICC-01/12-01/15-171](#), paras 36-38, 54.

<sup>153</sup> *Egs* a/35096/16, ICC-01/12-01/15-200-Conf-Anx89-Red-tENG, page 2 ('My nephew [REDACTED] was killed during the attack and destruction.');

a/35102/16, ICC-01/12-01/15-200-Conf-Anx94-Red-tENG, page 1 ('I experienced the destruction and I lost my [REDACTED] since they fired when he tried to resist.');

a/35092/16, ICC-01/12-01/15-200-Conf-Anx85-Red-tENG, page 1 ('I was present during the destruction. I was devastated since at that very moment I lost my belongings and close family members were killed. I don't forgive.');

a/35039/16, ICC-01/12-01/15-200-Conf-Anx32-Red-tENG, page 2 ('The destruction caused me suffering. They killed my [REDACTED] during the destruction of the mosque.').

<sup>154</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 69-73; First Expert Report, ICC-01/12-01/15-214-Conf-AnxI-Red, page 42. *See also* Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), paras 60-65.

<sup>155</sup> Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, para. 26.

again that no factual findings in the Judgment suggest that bodily harm played any part in the criminal plan for which Mr Al Mahdi was convicted.<sup>156</sup>

98. As conceded by the LRV, victims in the present context must be ‘confined solely to the victims who suffered from the crime of which Mr Al Mahdi was found guilty’.<sup>157</sup> On the basis of the information before it, the Chamber does not consider that any bodily harm suffered was sufficiently foreseeable as to conclude that Mr Al Mahdi’s crime is its actual and proximate cause.

99. As such, the Chamber orders no reparations for this kind of harm.

#### 5. *Damage to property other than the Protected Buildings*

100. The Chamber convicted Mr Al Mahdi only of directing an attack against the Protected Buildings. As stated previously, the common plan underlying his conviction was to attack these sites only.<sup>158</sup> He was not convicted of any other kind of property loss or damage, nor did the Chamber make any factual findings in that regard.

101. The victims allege that they lost personal property (household items, livestock, store wares, etc.) as a result of the attack on the Protected Buildings.<sup>159</sup> Many of these victims allege this loss occurred when they fled Timbuktu in the wake of the attack on the Protected Buildings.<sup>160</sup>

<sup>156</sup> See Judgment, [ICC-01/12-01/15-171](#), paras 36-38, 54.

<sup>157</sup> First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 51.

<sup>158</sup> Judgment, [ICC-01/12-01/15-171](#), paras 36-38, 54.

<sup>159</sup> a/35046/16, ICC-01/12-01/15-200-Conf-Anx39-Red-tENG, page 2 (‘They took our herd of cows and pillaged my house.’); a/35047/16, ICC-01/12-01/15-200-Conf-Anx40-Red-tENG, page 2 (‘I lost everything in the destruction. My herds were stolen and my house was destroyed.’); a/35093/16, ICC-01/12-01/15-200-Conf-Anx86-Red-tENG, page 2 (‘I had a shop where I sold things before the events. On the day of the destruction, everything was pillaged.’); a/35115/16, ICC-01/12-01/15-200-Conf-Anx107-Red-tENG, page 1 (‘I was present during the destruction and I was affected to the depths of my soul. Our entire house was destroyed [...]’).

<sup>160</sup> a/35133/16, ICC-01/12-01/15-200-Conf-Anx125-Red-tENG, page 2 (‘I fled leaving everything behind me. I feel great mental suffering and physical exhaustion. I left my animals and belongings, which were pillaged.’); a/35056/16, ICC-01/12-01/15-200-Conf-Anx49-Red-tENG, page 1 (‘I experienced the destruction and I was

102. The Chamber considers that it has not received sufficient information to conclude that Mr Al Mahdi's crime is the actual and proximate cause of this kind of harm.<sup>161</sup> As was the case with allegations of bodily harm, the lack of details in the supporting materials before it makes it difficult for the Chamber to ascertain the circumstances of this damage, who caused it and how it occurred in the course of the attack against the Protected Buildings. This makes it impossible to determine whether it was sufficiently foreseeable that Mr Al Mahdi's acts and conduct would lead to this kind of damage. At times, the lack of detail also makes it unclear whether reparations are being sought on account of harm suffered in the attack on the Protected Buildings, or on the contrary on account of other events that occurred during the occupation of Timbuktu. Even if property loss or damage was incurred when victims fled during the period of the attack, the Chamber does not consider it substantiated that Mr Al Mahdi's crime was its proximate cause.

103. As such, although the Chamber does consider that Mr Al Mahdi can be considered liable for certain consequential economic losses following the destruction of the Protected Buildings<sup>162</sup> and for moral harm suffered by those who fled the area as a result of this destruction,<sup>163</sup> he cannot be held liable for any other property damaged while the attack on the Protected Buildings was ongoing.

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present. [...] I fled to take refuge. The jihadists took everything from my house during the destruction.');

a/35036/16, ICC-01/12-01/15-200-Conf-Anx29-Red-tENG, page 2 ('We fled with [...] when the mausoleum was destroyed[.] [...] All my belongings were pillaged.');

a/35117/16, ICC-01/12-01/15-200-Conf-Anx109-Red-tENG, page 1 ('I was devastated. I was affected and I fled, leaving all my animals and goods behind.').

<sup>161</sup> *In agreement*, see Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), para. 79.

<sup>162</sup> See paras 72-83, above.

<sup>163</sup> See paras 84-92, above.



## 6. Conclusion

104. For the reasons above, and pursuant to Rule 98(2)-(3) of the Rules, the Chamber orders that reparations must be awarded in the manner specified for the following kinds of harm:

- i. Damage to the Protected Buildings: collective reparations through rehabilitation of the sites of the Protected Buildings;
- ii. Consequential economic loss: individual reparations for those whose livelihoods exclusively depended upon the Protected Buildings and collective reparations for the community of Timbuktu as a whole – these reparations are to be implemented through compensation to address the individual financial losses suffered and rehabilitation to address the economic harm caused to the community of Timbuktu; and
- iii. Moral harm: individual reparations for those whose ancestors' burial sites were damaged in the attack and collective reparations for the community of Timbuktu as a whole – these reparations are to be implemented through individual compensation and collective rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Buildings.

105. Above and beyond the modalities indicated in the sub-sections above, the Chamber again emphasises the general principles of non-discrimination which must fundamentally underlie the reparations ordered.<sup>164</sup> To every extent possible, these reparations must be implemented in a gender and culturally sensitive manner which does not exacerbate – and in fact addresses – any pre-existing situation of discrimination preventing equal opportunities to victims.

106. Although the Chamber recalls its general consideration that it has limited its assessment only to the community of Timbuktu, it notes the LRV's request to award nominal damages to the Malian State for the harm suffered above.<sup>165</sup>

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<sup>164</sup> See especially paragraph 34, above.

<sup>165</sup> Second LRV Submissions, ICC-01/12-01/15-224-Conf-Corr-tENG, para. 11 (indicating this request stems from a consultation with the Malian authorities).

With regard to its considerations in paragraph 53 above, the Chamber considers a symbolic gesture of this kind to be appropriate and further directs that the Malian State receive one euro as part of the reparations award.

107. Similarly, the Chamber considers that one symbolic euro should equally be granted to the international community, which is best represented by UNESCO given the specific nature of the case.
108. The Chamber cannot conclude to the requisite standard of proof that Mr Al Mahdi is liable for bodily harm or other kinds of property loss or damage. In this regard, the Chamber emphasises the relatively narrow scope of this case relative to the wider range of human rights violations alleged to have occurred in Timbuktu and elsewhere throughout Mali. Mr Al Mahdi cannot be held responsible for these broader tragedies, but the Chamber encourages the TFV to consider acting under Rule 98(5) of the Rules to provide general assistance to those affected.

### **C. Scope of liability**

109. The Chamber will now consider the extent of Mr Al Mahdi's liability for each kind of harm found to be established in the previous section.
110. The Chamber recalls that a convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case.<sup>166</sup> In the present case, the Chamber has taken into consideration that: (i) Mr Al Mahdi is convicted as a co-perpetrator, pursuant to Article 25(3)(a) of the Statute; (ii) Mr Al Mahdi organised the attack on the Protected Buildings and (iii) Mr Al Mahdi directly participated in the attacks

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<sup>166</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 118.

on five of the Protected Buildings. These considerations must be weighed while bearing in mind the fact that Mr Al Mahdi can be held liable only for harm stemming from the attack on the Protected Buildings. He cannot be held liable for other harm done during the occupation of Timbuktu, and even for any other harm done to the city's cultural heritage.

111. The Chamber does not consider it necessary to decide whether the figures given below constitute the sum-total of harm suffered in the course of the attack on the Protected Buildings. Its conclusions are specific to Mr Al Mahdi and what it considers to be a fair assessment of his liability alone.
112. The Chamber notes the LRV's submission that the TFV should undertake to give a precise figure of what resources are available in the present case.<sup>167</sup> However, the Chamber considers such information to be unnecessary for several reasons. First, the present award is levied against Mr Al Mahdi personally – the resources of the TFV are irrelevant to the question of Mr Al Mahdi's liability. Second, it is for the TFV to decide whether it will use its resources to complement a reparations award.<sup>168</sup> Even if the Chamber were given a preliminary indication of the TFV's available resources, this figure would have no bearing on whether the TFV will in fact use these resources in the present case. Third, and as noted by the TFV itself,<sup>169</sup> the amount of a TFV complement may be increased at a later point in the implementation process on account, *inter alia*, of successful fundraising efforts for the awards contained in the reparations order. As the TFV's available resources are not a fixed figure, there is no need to seek such information.

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<sup>167</sup> First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 144.

<sup>168</sup> Regulation 56 of the Regulations of the TFV.

<sup>169</sup> TFV, *The Prosecutor v. Jean Pierre Bemba Gombo*, Observations relevant to reparations, 31 October 2016, [ICC-01/05-01/08-3457](#), para. 76.

113. The Chamber also notes the Defence's argument that the amount of reparations should be a set and reasonable amount that reflects Mr Al Mahdi's financial abilities.<sup>170</sup> Given that all the information before the Chamber confirms that Mr Al Mahdi is indigent,<sup>171</sup> accepting this argument would entail setting Mr Al Mahdi's liability at or near zero.
114. The Chamber disagrees that Mr Al Mahdi's indigence has an impact on its reparations award. The Appeals Chamber has determined that it is an error to conclude that a convicted person's indigence is relevant to whether he or she should be liable for any reparations awarded.<sup>172</sup> Rule 97(1) of the Rules provides that the Chamber shall take into account the 'scope and extent of any damage, loss or injury' – but the personal financial circumstances of the convicted person are not mentioned. Taking such circumstances into account would inevitably lead to understating the harm suffered and depriving victims of their right to a remedy. A convicted person's financial circumstances may affect how a reparations award is enforced – such as by affording an option to make reasonable payments in instalments – and the Chamber does not intend to impose hardships on Mr Al Mahdi that make it impossible for him to reintegrate into society upon his release. But the enforcement of reparations awards is under the auspices of the Presidency and is beyond the current question of setting Mr Al Mahdi's personal liability.

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<sup>170</sup> First Defence Submissions, [ICC-01/12-01/15-191-t-ENG](#), para. 41(b). In the Second Defence Submissions, on page 28(n), the Defence requests that it be entitled to comment on all aspects of the reparations proceedings, including the sum-total amount of the reparations award. Yet other Defence submissions demonstrate its awareness that it is the present order – and not some future decision – that will set Mr Al Mahdi's total liability. In any case, the Defence has had many opportunities to make submissions on the sum-total amount of reparations in the lead-up to the present order.

<sup>171</sup> The Registry's Observations on Mr Ahmad Al Faqi Al Mahdi's Solvency and Conduct while in Detention, 21 July 2016, [ICC-01/12-01/15-134](#) (with two annexes). In Annex I, it is indicated that 'inquiries so far conducted involving the Registry, the Office of the Prosecutor, the Malian authorities and public sources have not produced any evidence to contradict Mr Al Mahdi's claim to have no assets'. In the same annex, the Registry undertakes to keep the Chamber abreast of any developments in this same annex, but to date no developments of significance have been reported. ICC-01/12-01/15-134-Conf-Exp-AnxI, para. 6; *see also* ICC-01/12-01/15-227-Conf-Exp (with annex).

<sup>172</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), paras 102-05.

115. In this connection, the Chamber is not persuaded by the Defence submission that it is within the Chamber's competence to limit to the term of imprisonment the time period within which the TFV is authorised to claim any reimbursement from Mr Al Mahdi.<sup>173</sup> The statutory scheme does not confer any such power on the Chamber, nor is one derivable from the *Lubanga* Reparations AJ.<sup>174</sup> Even if setting such a limitation was permissible, the Chamber considers it would be unfair for it to do so. After all, it is Mr Al Mahdi – not the TFV – who is responsible for the harm caused to the victims.

1. *Damage to the Protected Buildings*

116. The Chamber received information that UNESCO has spent over 2.53 million euros in rebuilding Timbuktu's mausoleums and rehabilitating the mosques and libraries of manuscripts.<sup>175</sup> However, this number reflects the total of all such projects UNESCO undertook, and not only the restoration of the 10 Protected Buildings at issue in the present case. The Chamber received information from the appointed experts that the number most representative of the actual cost of the work in restoring the mausoleums is just over 96,600 euros.<sup>176</sup>

117. Prosecution Witness P-104 also provided an expert report containing figures in CFA francs for the restoration of six of the Protected Buildings.<sup>177</sup> This report was relied upon in the Judgment for the proposition that the victims suffered

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<sup>173</sup> First Defence Submissions, [ICC-01/12-01/15-191-tENG](#), para. 41(d); Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, para. 55.

<sup>174</sup> In the First Defence Submissions ([ICC-01/12-01/15-191-tENG](#), para. 41), the Defence refers to para. 74 of the *Lubanga* Reparations AJ in this context, but this paragraph clarifies only the point that 'the Trust Fund is an intermediary, but does not replace the convicted person'. *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 74.

<sup>175</sup> UNESCO Submissions, [ICC-01/12-01/15-194](#), para. 12 (Converted from three million US dollars).

<sup>176</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, page 134.

<sup>177</sup> Expert Report, MLI-OTP-0024-0537, 0564, 0597, 0607, 0618, 0635, 0646.

economic harm.<sup>178</sup> Converting P-104's numbers into euros<sup>179</sup> and increasing the total proportionately to reflect the other four Protected Buildings not mentioned yields a similar figure of just over 97,000 euros.

118. The Chamber considers these numbers to reasonably approximate Mr Al Mahdi's liability for this harm, and accordingly sets Mr Al Mahdi's liability for this harm at 97,000 euros.

## 2. *Consequential economic loss*

119. Two of the Chamber's appointed experts provide a thorough accounting of all the relevant economic activity in Timbuktu from the time of the attack until the reconstruction efforts completed in 2015. These experts arrive at a total amount of economic harm of over 44.6 million euros.<sup>180</sup> No other expert attempts to quantify the consequential economic loss in a comparably rigorous manner.<sup>181</sup>

120. There are many interlinked causes for the consequential economic loss in Timbuktu, including tourism losses, transportation difficulties, security concerns and population flight. The Chamber appreciates the difficulties in distinguishing between economic losses caused by the destruction of the Protected Buildings and those caused by the broader situation in Northern Mali.<sup>182</sup> That said, the Chamber considers that this 44.6 million euro figure clearly overstates the amount of loss for which Mr Al Mahdi can be held liable for several reasons.

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<sup>178</sup> Judgment, [ICC-01/12-01/15-171](#), para. 108, n. 184.

<sup>179</sup> 1 euro is approximately 656 CFA francs.

<sup>180</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, page 132.

<sup>181</sup> The author of the Second Expert Report provides some monetary amounts in relation to admission fees between 2012 and 2015, but concedes that the attack led to an overall decline in earning capacity that is 'not easily quantifiable'. Second Expert Report, ICC-01/12-01/15-214-Conf-AnxII-Red, paras 80-84.

<sup>182</sup> First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), page 32.

121. First, this 44.6 million euro estimate includes economic loss to both Timbuktu and Bamako in the relevant period. As the Chamber stated earlier, it considers that addressing the harm suffered by the people of Timbuktu sufficiently addresses the more attenuated harm suffered by the people of Mali and the international community more generally. As such, the totals in relation to Bamako<sup>183</sup> should not be considered in setting Mr Al Mahdi's liability. For the same reasons, other conclusions of these experts measuring economic loss at the international level – which are in fact above and beyond the 44.6 million euro estimate – will also not be considered.<sup>184</sup>
122. In this regard, the Defence argues that financial losses must be limited to the period in which the destroyed monuments had not yet been rebuilt by UNESCO.<sup>185</sup> This rebuilding period can be generally understood as running from the time of the attack until 2015,<sup>186</sup> although it is noted that some repairs continued after this time frame.<sup>187</sup> The appointed experts' figures on the economic loss in Timbuktu concentrate on the period between 2012 and 2015.<sup>188</sup> The Chamber considers that it has insufficiently specific information to reach conclusions about any consequential economic loss beyond the Defence's indicated time frame, so the Defence concerns on this point are moot.
123. Second, the 44.6 million euro figure which the experts arrived at seems to incorporate expenses for the work done by the *maçons* during reconstruction

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<sup>183</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, page 132 (9.16 million euros).

<sup>184</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, page 145.

<sup>185</sup> Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, para. 61; First Defence Submissions, [ICC-01/12-01/15-191-tENG](#), page 23.

<sup>186</sup> UNESCO Submissions, [ICC-01/12-01/15-194](#), para. 12; Third Expert Report, [ICC-01/12-01/15-214-AnxIII-Red2](#), page 125.

<sup>187</sup> For example, according to press articles the Sidi Yahya mosque re-opened only in 2016. DW, [Timbuktu's restored Sidi Yahya mosque 'carries political weight'](#), 20 September 2016.

<sup>188</sup> See especially Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, pages 124-28. The experts state at one point on page 125 that they do make estimates for the period between 2015 and 2017, but all the concrete figures in relation to the economic loss in Timbuktu are for the three year period of 2012-2015.

efforts and surveillance of the repairs.<sup>189</sup> As the Chamber has already taken this into account when setting the liability for the damage caused to the Protected Buildings, doing so again would constitute double-counting. To the extent the costs referenced relate to the Protected Buildings' standard repairs and maintenance, these expenses are incurred independently of the harm caused by Mr Al Mahdi's crime and he cannot be held liable for them.

124. Third, in arriving at their estimate, the experts take into account tourism transportation costs to and from Timbuktu.<sup>190</sup> The Chamber considers that Mr Al Mahdi can be held liable to an appropriate extent only for the loss of spending by tourists and their transport while in Timbuktu. This, however, is distinct from the costs incurred by those same tourists on their way to Timbuktu in the first place and on their return home after they leave Timbuktu. The latter costs relate to national and international economic activity which can most fairly be said to go beyond the harm to the community of Timbuktu for which Mr Al Mahdi is held liable. The Chamber considers that these costs must likewise be excluded.

125. Fourth, and most significantly, the experts appear to estimate the entirety of tourism losses from the time of the attack until 2015. However, Mr Al Mahdi can be held liable for these losses only to the extent that they are incurred as a result of the destruction of the Protected Buildings. In other words, the experts dramatically overstate Mr Al Mahdi's liability by estimating losses resulting

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<sup>189</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, pages 123-124 (27.6 million CFA francs, or approximately 42,000 euros).

<sup>190</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red, pages 126, 128. The losses removed are for car and plane transport to/from Timbuktu – transport costs incurred while in Timbuktu (such as chauffeur costs) are retained. These items, once removed, amount to a total of 3.11 billion CFA francs (1,296,000,000 + 720,000,000 + 274,500,000 + 823,500,000), which converts to 4.74 million euros.



from the period of occupation of Timbuktu and the damage caused by the jihadists<sup>191</sup> more generally.

126. The experts estimate that economic activity in Timbuktu dropped by 20% between 2015 and 2017, and that only half of this loss (10%) can be attributed to the loss of the historic mausoleums.<sup>192</sup> The experts appear to proceed on an understanding that Mr Al Mahdi is 100% liable for the losses they identify from 2012 to 2015, but the Chamber considers that this is clearly an over-estimate because it conflates Mr Al Mahdi's liability with all the other reasons why tourism declined in Timbuktu over this period. As stated previously, with no further information provided for the 2015-2017 time period the Chamber cannot make any conclusions on Mr Al Mahdi's liability for economic losses during this period. But this 10% reduction is the only specific number given by any of the appointed experts isolating how much of the consequential economic loss suffered in Timbuktu is attributable to Mr Al Mahdi's acts and conduct. The Chamber considers it appropriate to use a 10% reduction as a starting point also for the 2012-2015 period.

127. But even if the estimate of consequential economic loss is lowered to 10%, Mr Al Mahdi's liability is still overstated. This is because – above and beyond the other factors previously considered – the 10% figure also reflects tourism losses due to damage to mausoleums and other cultural heritage beyond the scope of the present case. It is impossible to measure how much of this 10% loss is because of Mr Al Mahdi's specific attack against the Protected Buildings, because to do so with precision would require knowing the intentions of an unidentifiable group of potential tourists.

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<sup>191</sup> Third Expert Report, [ICC-01/12-01/15-214-AnxIII-Red2](#), page 125.

<sup>192</sup> Third Expert Report, [ICC-01/12-01/15-214-AnxIII-Red2](#), page 125.

128. Bearing all these reductions in mind, the Chamber sets Mr Al Mahdi's liability for consequential economic loss at 2.12 million euros.

### 3. *Moral harm*

129. There is an inherent difficulty in addressing and measuring monetary values for moral harm. As submitted by the LRV, 'a price cannot be put on dignity, as it cannot be put on faith, and so both are that much more difficult to restore'.<sup>193</sup> The inherently irreplaceable nature of historical buildings cannot be remedied by reconstruction, and this must be emphasised when consideration is given to how the moral harm suffered is to be addressed and measured. As stated by an ICTY Trial Chamber describing the destruction of cultural heritage sites: '[r]estoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings'.<sup>194</sup> As found above, the Chamber considers that any complete assessment of the loss suffered must include liability for moral harm.

130. Two of the experts appointed by the Chamber state that the moral harm suffered in the present case is at least as great as the economic loss suffered.<sup>195</sup> There is no evident methodology leading to this conclusion beyond assertions of the widespread moral harm suffered in Timbuktu. This broader moral harm is caused by a variety of factors, and Mr Al Mahdi's acts and conduct can be said to have caused only part of it. Noting that it has determined these same experts' conclusions on economic loss to be highly excessive, the Chamber is

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<sup>193</sup> First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 73.

<sup>194</sup> ICTY, Trial Chamber I, *Prosecutor v. Miodrag Jokić*, Sentencing Judgement, 18 March 2004, [IT-01-42/1-S](#), para. 52.

<sup>195</sup> Third Expert Report, ICC-01/12-01/15-214-Conf-AnxIII-Red , page 148.

not persuaded that what these experts state is a sufficiently substantiated starting point for establishing Mr Al Mahdi's liability. This is not to say that the Chamber does not believe that the moral harm is less *important* than the economic loss suffered (quite the contrary), but rather that the Chamber does not have enough information to *quantify* this harm at the same level as the economic loss.

131. In contrast, another of the Chamber's appointed experts estimated in monetary terms the mental pain and anguish suffered in the present case at approximately 437,000 USD. The expert derived this figure from an award identified in a similar case, whereby in 2009 the Eritrea Ethiopia Claims Commission reflected the unique cultural significance of the damaged Stela of Matara with a 23,000 USD award. The expert then revised this number upwards to reflect the fact that 10 Protected Buildings were destroyed and nine of them held world heritage status.<sup>196</sup>

132. The Chamber considers that the latter expert's methodology allows for a reasonable starting point for determining the approximate amount of mental pain and anguish overwhelmingly established in the present case. The figure the expert arrived at needs to be revised to reflect inflation<sup>197</sup> and converted into euros. The result would again need to be revised upwards to reflect the disruption of culture suffered, although there is no way of objectively estimating such a consideration.<sup>198</sup>

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<sup>196</sup> Second Expert Report, ICC-01/12-01/15-214-Conf-AnxII-Red, paras 66-67, *citing* Eritrea Ethiopia Claims Commission, *The State of Eritrea v. The Federal Democratic Republic of Ethiopia*, [Final Award \(Eritrea's Damages Claims\)](#), 17 August 2009, paras 217-23.

<sup>197</sup> 1 USD in 2009, at the time of the case cited by the expert, is worth about 1.14 USD in 2017.

<sup>198</sup> The author of the Second Expert Report makes reference to the *Plan de Sánchez Massacre v. Guatemala* judgment whereby the IACtHR concluded that 20,000 USD of non-pecuniary harm had been suffered, among other things, for disruption of culture. But disruption of culture was one of several kinds of non-pecuniary harm determined by the IACtHR, and it is unclear from this case as to what fraction of the 20,000 USD award derives

133. Taking these considerations into account, the Chamber sets Mr Al Mahdi's liability for moral harm at 483,000 euros.

#### 4. Total liability

134. Adding up Mr Al Mahdi's liability across the various kinds of harm caused, the Chamber sets his total liability at 2.7 million euros. This amount is exclusive of any internal administration costs incurred by the TFV during the implementation phase, for which Mr Al Mahdi is not liable.

## VI. Implementation

135. The Chamber has concluded that Mr Al Mahdi is liable for 2.7 million euros in expenses for individual and collective reparations. The Chamber has also ordered some symbolic measures.

136. The Chamber notes the TFV's mandate as an implementing agency upon being seized of a reparations award<sup>199</sup> and considers that the present order is the first of three Chamber determinations to be made during the reparations proceedings. 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.<sup>200</sup> The deadline for this draft implementation plan is set in the disposition of the present order, and the plan will be subject to the

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specifically from this factor. Second Expert Report, ICC-01/12-01/15-214-Conf-AnxII-Red, para. 62, citing IACtHR, [Sánchez Reparations Judgment](#), paras 77, 87-88.

<sup>199</sup> See generally Regulation 50(b) of the Regulations of the TFV; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, [ICC-01/04-01/06-2953](#), A A2 A3 OA21, para. 53 (delineating the reparations phase into 'two distinct parts: 1) the proceedings leading to the issuance of the order for reparations; and 2) the implementation of the order for reparations, which the Trust Fund may be tasked with carrying out').

<sup>200</sup> See Regulations 54 and 57 of the Regulations of the TFV.

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 the selected projects in a third decision.

137. Bearing all this in mind, it is not the Chamber's responsibility at this time to give detailed information about the implementation component of the reparations phase. However, the Chamber will advance the following preliminary considerations to guide the implementation of its order.
138. First, and noting Mr Al Mahdi's indigence, the Chamber appreciates that it is within the TFV's discretion to complement any individual or collective reparations. The Chamber encourages the TFV to complement the individual and collective awards to the extent possible,<sup>201</sup> and to engage in fundraising efforts to the extent necessary to complement the totality of the award.
139. Second, the Chamber notes that the modalities of reparations it has ordered mutually reinforce each other. In other words, addressing the discrete moral harm may have residual effects that ameliorate the discrete forms of economic harm and vice versa. As such, the Chamber does not consider that the TFV is limited to the Chamber's intermediate liability calculations set out above when designing an implementation plan, only its final determination on Mr Al Mahdi's total liability.
140. Third, the Chamber emphasises its view that the limited number of individual reparations ordered should be prioritised when implementing the award. The TFV's general position is to prioritise collective awards,<sup>202</sup> but, as indicated

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<sup>201</sup> The TFV recently confirmed that it considers it can complement both individual and collective awards. TFV, *The Prosecutor v. Germain Katanga*, Notification pursuant to regulation 56 of the TFV Regulations regarding the Trust Fund Board of Director's decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations, 17 May 2017, [ICC-01/04-01/07-3740](#), para. 18.

<sup>202</sup> [ICC-01/04-01/07-3740](#), para. 30.

above, the groups identified by the Chamber for individual reparations are singled out because of the particular extent to which they were harmed by Mr Al Mahdi's conduct. The Chamber would like this prioritisation to be reflected in the implementation phase to the extent possible, and insofar as individual reparations do not hinder broader reconciliation or stigmatise individual victims *vis-à-vis* the community of Timbuktu.

141. Fourth, and recalling its previous findings on a wide variety of harm suffered in the present case, the Chamber notes that the number of applications received in the present case pales in comparison to the number of persons who were in fact harmed. The Chamber also notes that it has received only 139 applications during the reparations phase, despite determining that collective harm was suffered across Timbuktu (a city of approximately 70,000 people around the time of the attack). The LRV acknowledges that 'the victims whom he met on his assignment in Mali represent just a fraction of the victims in the case'.<sup>203</sup> The Chamber also notes the information received that the security situation in Timbuktu makes travelling there or contacting victims difficult.<sup>204</sup> For these reasons, the Chamber considers 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.

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

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<sup>203</sup> First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 54.

<sup>204</sup> See para. 58, above. See also First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 129; Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), paras 14-15.

reparations on both an individual and collective basis'.<sup>205</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>206</sup> the Regulations of the TFV explicitly contemplate individual reparations for unidentified beneficiaries.<sup>207</sup> This is in juxtaposition to the TFV Regulations governing individual reparations in cases where the Court identifies each beneficiary.<sup>208</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>209</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>210</sup>
145. The Chamber recalls that individual reparations are to be awarded to: (i) those whose livelihoods exclusively depended upon the Protected Buildings and (ii) those whose ancestors' burial sites were damaged in the attack. Given the role

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<sup>205</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), para. 152.

<sup>206</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), paras 142, 167.

<sup>207</sup> Regulations 60-65 of the Regulations of the TFV.

<sup>208</sup> Regulation 59 of the Regulations of the TFV.

<sup>209</sup> Regulations 62-65 of the Regulations of the TFV.

<sup>210</sup> The TFV has made submissions confirming its capacity to conduct administrative screenings. See First TFV Submissions, [ICC-01/12-01/15-187](#), paras 56-63.

of the descendants of the saints in guarding and maintaining the Protected Buildings, it is likely that many of those identified in each of these groups will be the same individuals. Bearing this in mind, the Chamber considers that one screening for both categories is sufficient. It is also emphasised at the outset that anyone not participating in the screening can still participate in collective reparations programmes – the screening process concerns only individual reparations.

146. This screening process itself must respect the rights of both the victims and the convicted person.<sup>211</sup> The Chamber considers that the full details of this screening are to be determined by the TFV, but it can already set out the following general parameters:

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

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<sup>211</sup> Rule 97(3) of the Rules.



information made available and to which the Defence has had an opportunity to access and respond.

- (iv) 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,<sup>212</sup> but the Chamber notes that one of its appointed experts cautions against turning over victims' names to the Defence.<sup>213</sup> It is true that the regulations governing the TFV verification procedure in this context do not expressly specify any role for the Defence,<sup>214</sup> but these same regulations also make clear that the TFV verification procedure is subject to additional principles specified in the Court's order.<sup>215</sup>

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

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<sup>212</sup> First Defence Submissions, [ICC-01/12-01/15-191-tENG](#), paras 39, 56(b); Second Defence Submissions, ICC-01/12-01/15-226-Conf-tENG, para. 63, page 26 at (e).

<sup>213</sup> First Expert Report, ICC-01/12-01/15-214-Conf-AnXI-Red, page 40.

<sup>214</sup> See Regulations 62-65 of the Regulations of the TFV.

<sup>215</sup> Regulation 62 of the Regulations of the TFV provides that: '[t]he Secretariat shall verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, *in accordance with any principles set out in the order of the Court.*' (emphasis added). Regulation 63 also discusses the standard of proof for the verification exercise '[s]ubject to any stipulations set out in the order of the Court'.

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.<sup>216</sup>

- (v) The result of the screening for each applicant is to be communicated to both the applicant and the Defence. No administrative review mechanism is available to the Defence for victims screened as eligible.

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. It is not setting Mr Al Mahdi's liability, as this is also set in the present order. A denial of eligibility of any particular applicant during the screening process will not reduce Mr Al Mahdi's total liability in any way, giving him only a limited interest during the screening process. 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

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<sup>216</sup> *Lubanga* Reparations AJ, [ICC-01/04-01/06-3129](#), paras 160-62.

and administrative screening process set forth in the present order before the Appeals Chamber.<sup>217</sup>

147. Fifth, the Chamber has received conflicting information about the extent to which traditional justice mechanisms should be used in implementing the Chamber's order. Some note the paramount role these play in Timbuktu's culture and how the validity of any reparations order depends on using them.<sup>218</sup> Others emphasise that certain traditional justice mechanisms in Timbuktu have a history of discrimination, especially against women, and that care should be taken in relying upon them.<sup>219</sup> Given this conflicting information, the Chamber will not require that traditional justice mechanisms be part of the implementation of its award.

148. Lastly, the Chamber emphasises that implementation of the present order must be responsive to local conditions while being consistent with the Court's reparations principles, including the principle of non-discrimination. The TFV is expected to devise a draft implementation plan bearing this dichotomy in mind, consulting all relevant stakeholders – including the parties – and recommending any implementation measures it considers appropriate.<sup>220</sup> The parties will also be given an opportunity to file written submissions on the draft implementation plan proposed. As emphasised above, the TFV's discretion in drafting the implementation plan will be subject to approval by way of a second decision of the Chamber.

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<sup>217</sup> Article 82(4) of the Statute.

<sup>218</sup> See Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 89, 103, 112-13, 119, 121-23. See also Third Expert Report, [ICC-01/12-01/15-214-AnxIII-Red2](#), pages 136-42; First LRV Submissions, [ICC-01/12-01/15-190-Red-tENG](#), para. 133; Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), para. 74, 98.

<sup>219</sup> Second Expert Report, [ICC-01/12-01/15-214-AnxII-Red2](#), paras 89, 114-18, 124; First Expert Report, [ICC-01/12-01/15-214-AnxI-Red3](#), pages 48-49.

<sup>220</sup> As requested in Second LRV Submissions, [ICC-01/12-01/15-224-Corr-Red-tENG](#), paras 101, 110.

## VII. Disposition

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**ORDERS** individual, collective and symbolic reparations for the community of Timbuktu as specified in paragraphs 56, 67, 71, 83, 90, 106 and 107 of the present order;

**ACKNOWLEDGES** that the destruction of the Protected Buildings has caused suffering to the people throughout Mali and the international community;

**ASSESES** Mr Al Mahdi's liability for these reparations at 2.7 million euros;

**ENCOURAGES** the TFV to take steps to complement the reparations award and provide broader assistance for victims in Mali as set out in paragraphs 108 and 138 of the present order;

**ORDERS** the Registry to comply with the symbolic measures identified in paragraph 71 of the present order forthwith;

**SETS** a deadline for the TFV's draft implementation plan for 16 February 2018; and

**DIRECTS** the LRV and Defence to file any observations on the draft implementation plan within 30 days of its notification.

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



Judge Raul C. Pangalangan, Presiding Judge



Judge Antoine Kesia-Mbe Mindua



Judge Bertram Schmitt

Dated 17 August 2017

At The Hague, The Netherlands