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Pénale
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**International
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TRIAL CHAMBER VIII

**Before: Judge Raul C. Pangalangan
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

**Public redacted version of "Submissions of the Legal Representative of Victims
on the principles and forms of the right to reparation" dated 2 December 2016
(ICC-01/12-01/15-190-Conf)**

Source: The Legal Representative of Victims, Mr Mayombo Kassongo

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

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I. Introduction

1. The conflict in northern Mali in 2012 has taken a great toll, including in Timbuktu, the mythical city, ravaged and defiled at the hands of members of Ansar Dine and their allies. To this day, the wounds, both physical and mental, remain unhealed and the victims are all too often forgotten and neglected by the Malian courts.
2. The passing of judgment on Mr Al Mahdi on 27 September 2016 kindled the hope of the Timbuktu victims – hope that their misfortune would be acknowledged and their pain at least somewhat assuaged.
3. The Chamber’s decision of 29 September 2016¹ ushered in the reparation phase, which is essential to that end. It allows the International Criminal Court (“the Court”) to bring to bear reparative and restorative justice which serves victims, as foreseen by the framers of the Rome Statute (“the Statute”).²
4. Trial Chamber VIII (“the Chamber”) has now the opportunity to set a precedent. Now is the opportunity to institute an innovative reparation regime and to set in train, swiftly and efficaciously, a reparation process which will bring succour to the victims and reverberate from Timbuktu far and wide into the international community. That opportunity, as the Appeals

¹ ICC-01/12-01/15-172.

² Upon inaugurating the Rome Conference, United Nations Secretary-General Kofi Annan stated: “the overriding interest must be that of the victims, and of the international community as a whole. I trust you will not flinch from creating a court strong and independent enough to carry out its task. It must be an instrument of justice, not expediency. It must be able to protect the weak against the strong”: UN Meeting Coverage and Press Release, “UN Secretary-General declares overriding interest of International Criminal Court Conference must be that of victims and world community as a whole”, Press Release SG/SM/6597, 15 June 1998.

Chamber has underscored, cannot be allowed to slip by: “The success of the Court is, to some extent, linked to the success of its system of reparations.”³

5. It is the submission of the Legal Representative of Victims (“the Legal Representative”) that the principles determined by the Appeals Chamber in the case of *The Prosecutor v. Lubanga* find application in the case of *The Prosecutor v. Al Mahdi*.⁴ Be that as it may, those general principles must be tailored to the particularities of the situation in Mali and the *sui generis* harm suffered by victims in the case. The Legal Representative will expound on these particularities and distinctive features in the body of these submissions.

II. Procedural history

6. Whereas many crimes were committed in northern Mali in 2012, international criminal justice was brought to bear on Mr Al Mahdi in respect of a single charge: the war crime of attacking protected objects under article 8(2)(e)(iv) of the Statute.⁵
7. Mr Al Mahdi was transferred to The Hague on 26 September 2015 and appeared in court for the first time on 30 September 2015.⁶ The single charge levied against him was confirmed on 24 March 2016.⁷
8. Once the trial phase commenced on 8 June 2016, the Chamber appointed Mr Mayombo Kassongo as Legal Representative in the case. In all, eight

³ ICC-01/04-01/06-3129-AnxA, para. 3.

⁴ The body of decisions of the Court on the right to reparation, as it stands, is reviewed and rehearsed in decision ICC-01/04-01/06-3129 and annex A.

⁵ That single charge was laid by the Office of the Prosecutor in the indictment (ICC-01/12-01/15-62) and confirmed by the Pre-Trial Chamber after the confirmation hearing (ICC-01/12-01/15-84-Conf).

⁶ ICC-01/12-01/15-T-1-FRA.

⁷ ICC-01/12-01/15-84-Conf.

victims were admitted to participate at trial,⁸ three in an individual capacity and five organisations.⁹

9. The trial against Mr Al Mahdi was held from 22 to 24 August 2016.¹⁰ Mr Al Mahdi pleaded guilty to the charge.¹¹ On 24 August 2016, the Legal Representative, with the Chamber's leave, made oral submissions on Mr Al Mahdi's guilt and the determination of the sentence.¹²
10. By decision of 27 September 2016, the Chamber found Mr Al Mahdi guilty as a co-perpetrator of the war crime of attacking protected objects and sentenced him to nine years of imprisonment.¹³
11. On 29 September 2016, the Chamber set the Reparations Phase Calendar ("Calendar"), whereby it invited submissions on the reparation proceedings from the parties, the Office of the Prosecutor ("the Prosecution"), the Registry, the Trust Fund for Victims ("TFV") and the Malian authorities by 2 December.¹⁴
12. The Single Judge also granted leave to file amicus curiae briefs by that same date to Queen's University Belfast Human Rights Centre, the Redress Trust, the *Fédération internationale des ligues des droits de l'Homme* ("FIDH"), the

⁸ ICC-01/12-01/15-97-Red; ICC-01/12-01/15-156-Conf; Victim a/35008/16 withdrew after decision ICC-01/12-01/15-156-Conf was issued, see ICC-01/12-01/15-T-4-Conf-FRA.

⁹ The victims who are natural persons and who were admitted to participate in the proceedings as individuals are a/35000/16, a/35001/16 and a/35002/16. The victims who are legal persons and who were admitted to participate in the proceedings as organisations are a/35003/16, a/35004/16, a/35005/16, a/35006/16 and a/35007/16.

¹⁰ ICC-01/12-01/15-T-4-Conf-FRA; ICC-01/12-01/15-T-5-Conf-FRA, ICC-01/12-01/15-T-6-FRA.

¹¹ ICC-01/12-01/15-T-4-Conf-FRA.

¹² ICC-01/12-01/15-T-6-FRA.

¹³ ICC-01/12-01/15-171.

¹⁴ ICC-01/12-01/15-172.

Association Malienne des droits de l'Homme ("AMDH") and the United Nations Educational, Scientific and Cultural Organisation ("UNESCO").¹⁵

13. Having determined how to set about his task, as explained hereunder, the Legal Representative hereby presents, in accordance with the Chamber's Calendar, submissions on the reparation phase in the case of *The Prosecutor v. Al Mahdi*. The principles specifically address the rule concerning the right to reparation as it finds application in international precedent; the determination of victim status in the case; the identification of the harm *sensu lato* suffered by the victims in said case; the identification of a fully established causal nexus; and the identification of a form of reparation suited to the matter at hand.

III. Information-gathering exercise undertaken by the Legal Representative

14. Once judgment was handed down by the Chamber, the Legal Representative met with the Registry's Victims Participation and Reparations Section ("VPRS") and the TFV to discuss views and positions on the reparation phase.¹⁶
15. From [REDACTED] to [REDACTED], the Legal Representative and his team travelled to [REDACTED], to inquire with the victims he represents as to their views and expectations regarding the reparation phase. The Legal Representative initially had plans to [REDACTED], but ongoing unrest in northern Mali forced him to cancel. So, 22 victims represented by the Legal Representative who live in Timbuktu came to meet with him in [REDACTED].

¹⁵ ICC-01/12-01/15-178; ICC-01/12-01/15-180.

¹⁶ The Legal Representative met VPRS officials on 13 September 2016, 4 October 2016, 10 October 2016 and 4 November 2016 and TFV officials on 17 October 2016. Joint training for the victims was held in the field by VPRS and the Legal Representative [REDACTED].

16. In all, the Legal Representative met with 106 victims in [REDACTED]. Of them, around 21% still live in Timbuktu and 79% come from there but have been uprooted [REDACTED] since the destruction.¹⁷ Most of these displaced victims come under the remit of [REDACTED], an organisation which advocates for the rights of victims of the crisis in Mali and has applied for reparation as an organisation.
17. In tandem with meetings with the victims he represents, the Legal Representative met a number of experts with whom he was put in contact, by, amongst others, VPRS. He spoke in particular to [REDACTED]¹⁸ and [REDACTED].¹⁹
18. The Legal Representative also made a point of meeting with representatives of Malian civil society through [REDACTED], who was able to provide various contacts, information and suggestions on how to proceed at the reparation phase.²⁰
19. All of these meetings with victims, officials and civil society representatives gave the Legal Representative a good idea of the harm suffered by the victims in the case of *The Prosecutor v. Al Mahdi* and their expectations as to its reparation.
20. It was specifically the Legal Representative's meeting with [REDACTED] that made clear the complexity of defining who is a victim in the context of the war crime of which Mr Al Mahdi was found guilty. Although the destruction of the mausoleums affects primarily the population of Timbuktu, it has, in fact, affected the population of Mali as a whole.

¹⁷ Figures derived from the Legal Representative's interviews of 106 victims [REDACTED].

¹⁸ Interview held [REDACTED].

¹⁹ Interviews held [REDACTED].

²⁰ Interview held [REDACTED].

21. At his meeting with the Legal Representative, [REDACTED] also took issue with the absence of a great many actors who, in his opinion, should play an active part in the proceedings before the Court. He cited amongst others the African Union, African [human] rights NGOs and representatives of the communities and groupings of Timbuktu. The Legal Representative shares that same view.
22. Through meetings with experts and [REDACTED], the Legal Representative also became alive to the importance of undertaking communication and outreach activities vis-à-vis the victims to explain to the communities of Timbuktu specifically, and to Mali as a whole, the forms of reparation decided by the Chamber. All of the experts whom the Legal Representative met raised the need to so involve local authorities and communities. Having regard to those considerations, the Legal Representative suggests the implementation of a reparation scheme which involves the local traditional and religious leaders.
23. By way of this document, the Legal Representative therefore advises the Chamber of his position on the principles and forms of the right to reparation which should find application in the case at bar; conveys to the Chamber the views of the victims and experts whom he met; and puts before the Chamber for consideration the form of reparation which, in his opinion, befits the case at hand.

IV. Certain uses of terms arising from information gathered *in situ* from the victims.

24. Of note is that the purport of certain terms the victims used in the course of their meetings with the Legal Representative differs from their meaning in common parlance or in the continental, Romano-Germanic legal tradition. Some points of reference are therefore necessary to understand the requests

set out in the application forms for reparation²¹ to be filed by 16 December 2016 in accordance with the Calendar prescribed by the Chamber.

25. They are glossed below:

- (a) **Collective**: in the sense of connected to the community;
- (b) **Group of displaced people** [*collectif des déplacés*]: the displaced people of northern Mali, including Timbuktu;
- (c) **Faith**: in the sense of that which takes place in Timbuktu; the set of mystical and mythical religious practices based on ancestral knowledge and passed down the generations. Hence, the victims speak of their faith being shattered;
- (d) **Shattered faith**: [in] the realm of spirituality, it denotes spiritual turmoil – a lost opportunity to receive a blessing;
- (e) **Dates**: low levels of literacy mean that dates will be approximate, be they dates of birth or of destruction;
- (f) **Maçon [mason]**: 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;
- (g) **Marabout**: 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;
- (h) **Forgiveness**: in the sense of the associated apology or act or behaviour of the victim in the law of civil liability;
- (i) **Peuhl**: denotes both the language and community;
- (j) **Fear**: in the sense of *pretium doloris* [pain and suffering];
- (k) **Plan**: in the sense of collective scheme;
- (l) **Project**: in the sense of large-scale scheme;
- (m) **Sonrhai**: denotes both the language and community;
- (n) **Suffering**: in the sense of *pretium doloris*;
- (o) **Tamashek**: denotes both the language and community.

²¹ New dedicated application form for reparation issued by the Registry for the case of *The Prosecutor v. Al Faqi Al Mahdi*.

V. Principles and procedures applicable to reparation

A. Legal framework of reparation

26. Article 75 of the Statute and Section III(4) of the Rules of Procedure and Evidence (“the Rules”) delineate the guiding considerations in matters of reparation. The Regulations of the Court and the Regulations of the Registry also contain applicable provisions. The Regulations of the Trust Fund for Victims (“the Regulations of the TFV”) lay the parameters of the TFV’s activities, including those connected to implementation of Court orders.
27. In accordance with article 21 of the Statute, the international human rights instruments should also find application in any determination of the legal status of the Timbuktu victims. It is worthy of note that the Pre-Trial Chamber has adverted to the 1985 Declaration of Basic Principles of Justice and the 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 adopted by the Commission on Human Rights,²² in holding that for the purposes of appraisal of harm, “mental suffering” and “economic loss” constitute forms of harm.²³
28. The Court has on a number of occasions also drawn on the case law of the Inter-American Court of Human Rights (“IACtHR”) on reparation. Thus, the Pre-Trial Chamber ruled that “in accordance with internationally recognised human rights, emotional suffering and economic loss constitute harm within the meaning of rule 85 of the Rules.”²⁴ The Appeals Chamber held that the

²² 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, Official Document United Nations Human Rights Commission, 61st session, Doc. UN E/2005/23 (Part I), E/CN.4/2005/134 (Part II) (2005) 140.

²³ ICC-01/04-101-tEN, para. 115.

²⁴ ICC-01/04-101-tEN, para. 116.

Trial Bench had not erred in referring to that precedent for the purpose of guidance.²⁵

29. Whereas the statutory and regulatory regime on the right to reparation is established, the Court has yet to define its implementation in many respects.

B. Reparation seeks to bring a form of reparative justice to bear

30. A line of authority acknowledges the right of victims of violations of international law to reparation as a fundamental principle. In 1928, the Permanent Court of International Justice held that any breach of international law casts a duty of reparation.²⁶ In *Velásquez Rodríguez v. Honduras*, the IACtHR recognised reparation of the harm which ensues from human rights violations as a “general concept of law”.²⁷

31. The Court has been foremost among jurisdictions in seeking to give pride of place to victims in international criminal law.²⁸ In the first “Decision establishing the principles and procedures to be applied to reparations”, Trial Chamber I laid down: “reparations, as provided in the Statute and Rules, are to be applied in a broad and flexible manner, allowing the Chamber to approve the widest possible remedies for the violations of the rights of the victims and the means of implementation.”²⁹ In the context of *Lubanga*, the Chamber was of the view that reparation must, to the extent achievable, “relieve the suffering caused by the serious crimes committed; afford justice

²⁵ ICC-01/04-01/06-1432, para. 33.

²⁶ Permanent Court of International Justice, Case Concerning the Factory at Chorzów (Germany v. Poland), 1928, p. 29: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”

²⁷ IACtHR, *Velásquez Rodríguez v. Honduras (merits)*, Judgment of July 29, 1988, paras. 166-174; IACtHR, *Velásquez Rodríguez v. Honduras (reparations)*, Judgment of July 21, 1989, para. 25.

²⁸ See, for example, ICC-01/04-01/06-8-Corr, para. 136: “the reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature.”; ICC-01/04-01/06-3129-AnxA, para. 3.

²⁹ ICC-01/04-01/06-2904, para. 180.

to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of [the victims]”.³⁰

32. In the case at bar, it is the Legal Representative’s submission that reparation must strive to enable the victims to alleviate the suffering occasioned by the attack, restore their dignity and, where possible, regain the standard of living which they enjoyed before the attack.

C. The magnitude of the damage occasioned by the destruction of the cultural and historical heritage of Timbuktu

33. States gathered at the General Assembly of the United Nations recently affirmed that “the destruction of cultural heritage, which is representative of the diversity of human culture, erases the collective memories of a nation, destabilizes communities and threatens their cultural identity”, and emphasized that “the importance of cultural diversity and pluralism as well as freedom of religion and belief for achieving peace, stability, reconciliation and social cohesion”.³¹
34. The 2007 Fribourg declaration on cultural rights states, moreover, that such rights “are essential to human dignity. For this reason they form an integral part of human rights and must be interpreted according to the principles of universality, indivisibility and interdependence”.³²

³⁰ ICC-01/04-01/06-2904, para. 180.

³¹ Resolution adopted by the General Assembly on 28 May 2015, Saving the cultural heritage of Iraq, A/RES/69/281, 9 June 2015.

³² Fribourg Declaration, Cultural Rights, Article 1, [French version] available at: [<http://droitsculturels.org/ressources/wp-content/uploads/sites/2/2012/07/DeclarationFribourg.pdf>].

35. The destruction of cultural heritage is not a petty offence. It remains a crime, even absent attendant bloodshed. So the Chamber construed it in its Decision of 27 September 2016.³³
36. The destruction of the mausoleums and the door of the Sidi Yahia Mosque is by nature nihilistic and has nothing to offer the population other than leaving it adrift, which the extremists exploit as a weapon of war.
37. The preservation of cultural property, in as much as it promotes cultural diversity, is now acknowledged as an ingredient of peace and dignity.³⁴ In that vein, the Legal Representative argues that to safeguard culture is to safeguard peoples by showing respect for their way of life and providing them with the vital resources to build and rebuild their lives.
38. In Timbuktu, the sixteen cemeteries and the Saints' mausoleums are integral to the local religious dispensation. Much more than a mere pile of stones, these centuries-old³⁵ religious shrines, which were included on the World Heritage List in 1988,³⁶ hold profound religious and emotional significance for the inhabitants of Timbuktu. According to local beliefs, the Saints interred therein are a bulwark which keeps the city from misfortune of any kind. That cultural and historical heritage was destroyed by Mr Al Mahdi and his co-perpetrators. The group did not attack mere grave-sites, but the precious relics of African and world history. The Chamber must not construe narrowly the damage alleged lest cause be given to absolve Mr Al Mahdi and his co-perpetrators of responsibility.

³³ ICC-01/12-01/15-171.

³⁴ Fribourg Declaration, Cultural Rights, Article 1, [French version] available at: [<http://droitsculturels.org/ressources/wp-content/uploads/sites/2/2012/07/DeclarationFribourg.pdf>].

³⁵ The Secretary-General of the Ministry of Artisanry and Tourism told the Legal Representative that in 2012, that Ministry, together with Ministry of Culture, was about to embark on celebrations to mark the thousandth anniversary of the city of Timbuktu. The celebrations were cancelled because of the occupation of the city.

³⁶ World Heritage Committee, 12th session, Decision CONF 0001 XIV.A, 119Rev, C(ii)(iv)(v).

39. The cultural expert and head of the *Mission culturelle de Tombouctou* [Cultural Mission of Timbuktu], which oversaw the reconstruction of the sites undertaken by UNESCO, underscored that above and beyond the significance of the term of imprisonment meted out to Mr Al Mahdi, “[TRANSLATION] the trial has to serve a purpose, it has to show the world that if human life cannot be taken with impunity, by the same token, a World Heritage shrine cannot be destroyed with impunity”.³⁷
40. For that reason, the Legal Representative submits that rehabilitation of the sites must go beyond material reparation. In handing down its order for reparations, the Chamber must have regard for the uniqueness of the monuments destroyed and the magnitude of the damage perpetrated by Mr Al Mahdi. The Chamber must follow the tide of History by recognising the right to reparation of those who fell victim to violations of cultural rights and the destruction of cultural, historical and religious heritage.
41. Several of the victims with whom the Legal Representative met have, moreover, voiced dissatisfaction with the sentence passed by the Chamber on 27 September 2016. In their view, the nine-year term of imprisonment is insufficient and they now expect reparation which takes account of the crimes committed in their totality.

D. The impact of Mr Al Mahdi’s apologies on the reparations phase: the issue of forgiveness

42. When trial commenced on 22 August 2016, Mr Al Mahdi extended his apologies for the crime held against him to “[TRANSLATION] [his] nearest and dearest and [his] brothers in Timbuktu, to [his] motherland, the Republic of

³⁷ Jeune Afrique, “*Destruction des mausolées de Tombouctou: les habitants suspendus au verdict de la CPI*”, [Destruction of Timbuktu mausoleums: the population awaits the ICC verdict] 27 September 2016, available at: [<http://www.jeuneafrique.com/360549/societe/destruction-mausolees-de-tombouctou-habitants-suspendus-verdict-de-cpi/?=zambie>].

Mali in its entirety, and to humanity as a whole, to the four corners of the earth".³⁸

43. The Legal Representative must point out that the apologies, even if sincere, cannot make amends for the harm perpetrated as a whole. So, despite the guilty plea he entered and the remorse and apologies he expressed to the victims, Mr Al Mahdi is not absolved of liability towards the victims to make reparation for the harm occasioned by the crime of which he was found guilty.
44. From the interviews held by the Legal Representative it is apparent that the issue of forgiveness has divided the population of Timbuktu. Some victims underscore that forgiveness is a precept of Islam and that Mr Al Mahdi must be forgiven because "[TRANSLATION] God forgives all sin" and invites the faithful to follow suit. Yet many victims struggle to grant forgiveness and have questioned the sincerity of Mr Al Mahdi's apologies. For instance, several victims have said on the subject: "[TRANSLATION] while forgiveness comes out my mouth, it does not come from the bottom of my heart".
45. In the circumstances, the Legal Representative takes the view that whereas Mr Al Mahdi's apologies at trial may have constituted a mitigating circumstance in the determination of the sentence the same cannot be said for determination of the reparation. Accordingly, the Chamber will draw a distinction between criminal and civil action. As one of the victims told the Legal Representative, "[TRANSLATION] forgiveness requires deeds, and not words alone".³⁹ Apologies alone, as sincere as they may be, cannot make amends for the harm suffered and allow the victims to return to their previous lives and regain their dignity.

³⁸ ICC-01/12-01/15-T-4-CONF-FRA, p. 8, lines 4-7.

³⁹ See a/35002/16's application form for reparation.

46. Of further note here is that whereas forgiveness occupies a central position in Islam, the right to reparation also exists in Islamic law, including in the Maliki school prevalent in Mali.⁴⁰ Islamic law casts a duty on whoever occasioned the damage to restore the *status quo ante*. Reparation in kind, where possible, is required and pecuniary reparation is foreseen only where the harm affects property which has no equivalent and cannot be repaired in kind. Islamic law prescribes that endeavours always be made towards returning the damaged property to exactly as it was. The utmost must be done to that end. This principle of reparation of harm to the fullest extent possible founds the reparation of harm, material or mental, in Islamic law.⁴¹

VI. Definition and identification of victims in the *Al Mahdi* case

A. Identification of victims in the case

47. Rule 85 of the Rules defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” and/or “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”
48. The concept should be construed in the light of the 1985 Declaration of Basic Principles of Justice and the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation. The two instruments define victims widely to include the indirect victims of a crime, that is to say, members of the

⁴⁰ OECD/Sahel and West Africa Club, West African Studies, An Atlas of the Sahara-Sahel: Geography, Economics and Security, Laurent Bossard (ed.), OECD Publications (2014), pp. 192-193 [of the French edition].

⁴¹ Chafik Chehata, *La théorie de la responsabilité civile dans les systèmes juridiques des pays du Proche Orient*, in *Revue Internationale de droit comparé*, Volume 19, No. 4, October - December, 1967, pp. 883-915.

immediate family or household, or dependants of the direct victim and persons who suffered harm in assisting victims.⁴² That interpretation is consonant with the intention of the Rome Conference's Working Group on Procedural Matters that the phrase "in respect of" in article 75(1) of the Statute be considered vis-à-vis the two international instruments and that it also extend to the victims' families and successors.⁴³

49. The Court's previous decisions have thus made plain that the harm suffered by the victim may be direct or indirect but must always be personal harm and ensue from the crimes of which a person stands convicted.⁴⁴
50. The Chambers have laid down four criteria for victim status: (1) establishment of the identity of the natural or legal person; (2) verification as to whether the applicant has sustained damage; (3) verification as to whether a crime within the Court's jurisdiction may be established; and (4) verification as to whether harm arose from the commission of a crime within the jurisdiction of the Court.⁴⁵
51. The Legal Representative takes the view that any person who meets the foregoing criteria must be eligible for reparation. The concept of "victim" must, therefore, be confined solely to the victims who suffered from the crime of which Mr Al Mahdi was found guilty.
52. Rule 94(1) of the Rules mandates that victims' applications for reparation made under article 75 of the Statute contain certain particulars to allow the

⁴² Basic Principles and Guidelines on the Right to Reparation, *supra* footnote 20, principle 8; 1985 Declaration of Basic Principles of Justice, *supra* footnote 20, principle 2.

⁴³ David Donat-Cattin, "Article 75: Reparations to Victims", in Otto Triffterer ed., *Commentary of the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Munchen, Beck, 2008, pp. 1402-1403.

⁴⁴ See, for example, ICC-01/04-01/06-1432, paras. 38-39; ICC-01/04-01/06-3129, paras. 8 and 79-80.

⁴⁵ See, for example, ICC-01/04-101-tEN-Corr, paras. 79 and 94; ICC-01/04-423-Corr-tENG, paras. 139-141; ICC-01/04-01/06-601-tEN, para. 9; ICC-01/04-01/06-1432, paras. 61-65.

Chamber to define its position as regards the criteria. The rule requires victims to provide, to the extent possible, any relevant supporting documentation that enables verification of the veracity of the information imparted.

53. In consultation with VPRS, the Legal Representative made submissions on the Registry's dedicated application form for reparation.⁴⁶ Specifically, the Legal Representative stated his concerns about the nature of the supporting documentation required of victims applying for reparation. As will be explained hereunder, by reason of the circumstances and particularities of the situation in Mali, the Legal Representative would suggest that the Chamber find a *modus operandi* for a comprehensive assessment of the material provided by the victims to substantiate the harm suffered.
54. The Legal Representative further draws attention to the fact that the victims whom he met on his assignment [REDACTED] represent just a fraction of the victims in the case. The crime committed by Mr Al Mahdi and his co-perpetrators affected a great many victims. Many of them fled Timbuktu at the time of the attack and so are geographically remote from it and not readily located.
55. Difficulties in locating victims are also compounded by the prevailing instability in northern Mali. Every week sees attacks by armed groups present in the region targeting civilians and the military. [REDACTED].⁴⁷

⁴⁶ The Legal Representative conveyed his submissions and comments on the Registry's draft form by e-mail on 18 October 2016.

⁴⁷ On 6 November 2016, AQMI broadcast a video of the public execution of two Malian civilians who had been accused of collaborating with French military forces. That same day, one Togolese peacekeeper and two Malian civilians were killed in an ambush near Douentza. Forty-eight hours earlier, a French non-commissioned officer was killed by a mine near Kidal in an attack for which Ansar Dine claimed responsibility. On 7 November, an international NGO was attacked near Timbuktu by unidentified armed men. See for example, *L'Orient Le Jour*, "AQMI diffuse une vidéo sur

56. For that reason, the Legal Representative respectfully prays the Chamber to adopt a wide-ranging and comprehensive method of interpretation of victim status. The importance of so doing is justified by the very nature of the crime committed: the monuments which Mr Al Mahdi and his co-perpetrators destroyed did not belong only to the custodians of the mausoleums or even just the city of Timbuktu. They were included on the World Heritage List and so belonged to humanity as a whole and Africa in particular. The Legal Representative must lay stress on the importance of the Chamber's heeding what Africa has to say about the crime committed by Mr Al Mahdi and about how it should be made good.
57. Moreover, as Mr Al Mahdi was prosecuted only for the destruction of historical and religious monuments, and whereas it is accepted that other acts of violence were committed in Timbuktu and the region, the Legal Representative argues that it will be for the TFV, separately from the order for reparations issued against Mr Al Mahdi, to help those other victims as part of its assistance remit. Regulation 50(a) of the Regulations of the TFV allows the Trust Fund to put in place activities to assist victims who are ineligible for reparation awarded in respect of Mr Al Mahdi.

*l'exécution de deux Maliens accusés de 'collaboration'" ["AQMI broadcasts a video of the execution of two Malians accused of 'collaboration'"], 6 November 2016 [available at: <http://www.lorientlejour.com/article/1016748/mali-aqmi-diffuse-une-video-sur-lexecution-de-deux-maliens-accuses-de-collaboration.html>]; *Le Monde*, "Au Mali, les djihadistes toujours à l'attaque" [Mali: jihadists still on the attack], 7 November 2016 [available at: http://www.lemonde.fr/afrique/article/2016/11/07/au-mali-les-djihadistes-toujours-a-l-attaque_5026848_3212.html#fIWC0yq1ttDIzCZV.99]; *RFI Afrique*, "Une ONG attaquée près de Tombouctou" [NGO attacked near Timbuktu], 8 November 2016 [available at: <http://www.rfi.fr/afrique/20161108-mali-niafunke-tounka-ong-attaquee-pres-tombouctou>].*

B. Victims admitted to participate in the proceedings

58. As noted above, the Chamber has authorised eight victims to participate in the proceedings in the *Al Mahdi* case –⁴⁸ three in an individual capacity and five organisations.⁴⁹
59. The Legal Representative submits that the eight victims should enjoy a presumption of admissibility for reparation insofar as the Chamber has already considered their applications for participation and none of the parties to the trial have called their victim status into question. Some of these participating victims filled new application forms for reparation with the help of VPRS and the Legal Representative so as to flesh out further: (1) the harm suffered by the victims; (2) the causal nexus between the crime committed by Mr Al Mahdi and the harm; and (3) the forms of reparation which they expect.
60. The Legal Representative wishes, however, to draw the Chamber’s attention to the fact that the five victims admitted to participate as organisations⁵⁰ filled application forms for reparation as individuals. It is the case that although, in the view of the Legal Representative, the victims represent five of the destroyed mausoleums, there is no supporting documentation attesting to the existence in law of the mausoleums as legal persons. For that reason, the Legal Representative respectfully prays the Chamber to admit the victims as natural persons at the reparation phase.

⁴⁸ ICC-01/12-01/15-97-Red; ICC-01/12-01/15-156-Conf; Victim a/35008/16 withdrew after Decision ICC-01/12-01/15-156-Conf was issued, see ICC-01/12-01/15-T-4-Conf-FRA.

⁴⁹ The victims who are natural persons and who were admitted to participate in the proceedings as individuals are a/35000/16, a/35001/16 and a/35002/16. The victims who are legal persons and who were admitted to participate in the proceedings as organisations are a/35003/16, a/35004/16, a/35005/16, a/35006/16 and a/35007/16.

⁵⁰ a/35003/16, a/35004/16, a/35005/16, a/35006/16 and a/35007/16.

C. Victims not admitted to participate in the proceedings

61. The eligibility of victims to participate at the reparation phase is not contingent on their participation at trial. As the Appeals Chamber notes, “[a]ll victims are to be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings leading to the decision under article 74 of the Statute.”⁵¹
62. The Legal Representative underscores the importance of that consideration. Any differential treatment between victims who participated at trial and those who applied only for reparation would give rise to a sense of discrimination and disbelief on their part.

VII. Identification of the harm suffered by the victims in the *Al Mahdi* case

63. The Statute and the Rules leave the concept of harm undefined. The Appeals Chamber has, however, construed it as encompassing “hurt, injury and damage”. The Court has consistently held that harm need not be direct but it must have been personal to the victim. Harm may be material, physical and psychological.⁵²
64. The Legal Representative wishes to point out to the Chamber that the victims in the *Al Mahdi* case were often victims of other crimes committed contemporaneously in Timbuktu. The Legal Representative underscores the concomitance of that harm with the destruction of historical and cultural property of which Mr Al Mahdi was found guilty.

⁵¹ ICC-01/04-01/06-3129-AnxA, para. 12.

⁵² ICC-01/04-01/06-3129-AnxA, para. 10.

A. Material harm

65. Before 2012, the Timbuktu region earned much of its revenue from tourism. As [REDACTED] told the Legal Representative, a three-month tourist season generated over six months of revenue for much of the population of Timbuktu. Tourism was mainly cultural and religious. Tourism centred to a great extent on the mosques, mausoleums and manuscripts of Timbuktu. As [REDACTED] put it: “[TRANSLATION] the population of Timbuktu made a living from the ‘mystery of Timbuktu’”.⁵³ One of the victims thus likened Timbuktu to Mecca and told the Legal Representative: “[TRANSLATION] People come from all over to pray and ask for things. We lost all of that with the destruction. We lost our mystery”.
66. The tourist economy was decimated by the crisis. In the words of [REDACTED], “[TRANSLATION] the damage sustained by the Timbuktu area is incommensurable. It will take generations for the situation to return to how it was before 2012”.⁵⁴
67. The [REDACTED] and [REDACTED] themselves have seen their income drop since the mausoleums’ destruction in 2012. One victim explained to the Legal Representative that “[TRANSLATION] there are people in Timbuktu whose livelihood depends solely on the mausoleums. They are their only source of income. Before the destruction, people came from all over the world to see the mausoleums and to pray to the Saints. Even the former President of Algeria came to Timbuktu after dreaming about Ahmed Baba”.⁵⁵ Tourists and

⁵³ [REDACTED].

⁵⁴ [REDACTED]. According to the leaflet given to the Legal Representative [REDACTED], Mali’s revenue from tourism in 2011 amounted to CFAF 100 000 million. Although the Legal Representative was not able to find any post-2012 figures, all of the people he spoke to confirmed that revenue from tourism in Mali in general, and in the north in particular, had plummeted since the crisis.

⁵⁵ The words of a victim at a joint training session held by the Legal Representative and VPRS in [REDACTED] on [REDACTED].

pilgrims would often make offerings and donations [REDACTED]. The offerings were used for the upkeep of the monuments but were also an income for [REDACTED]. [REDACTED] from the donations and offerings.⁵⁶

68. Since the destruction of the mausoleums in 2012, that income has all but dried up. For instance, one victim, [REDACTED], used to [REDACTED].⁵⁷ The victim told the Legal Representative that before 2012 [REDACTED] would earn [REDACTED]. Now, with most pilgrims and tourists staying away, [REDACTED].⁵⁸ [REDACTED] told the Legal Representative that [REDACTED] could no longer afford to pay [REDACTED] because of the drop in donations [REDACTED].⁵⁹

69. Other victims said that upon fleeing Timbuktu, they abandoned all of their worldly possessions in the wake of the destruction out of fear that Mr Al Mahdi and his co-perpetrators would turn their attention to people after striking stone and mortar.⁶⁰ Many victims whom the Legal Representative met remain, for that reason, uprooted in Bamako and other parts of Mali. Some have not returned to Timbuktu since 2012. They have been dispossessed of most of their property, which was often looted in their absence, and some victims remain in the dark as to the whereabouts of one or more of their family members. Over 79% of the 106 victims whom the Legal Representative met *in situ* stated that they had sustained material harm caused by the destruction or the attendant crimes perpetrated.⁶¹

⁵⁶ See, for example, a/35002/16's application form for reparation; a/35006/16's application form for reparation.

⁵⁷ [REDACTED].

⁵⁸ See a/35002/16's application form for reparation.

⁵⁹ See a/35007/16's application form for reparation.

⁶⁰ See, for example, a/35010/16's application form for reparation.

⁶¹ Figures derived from the Legal Representative's interviews of 106 victims [REDACTED].

70. It is also worth noting that UNESCO's reconstruction and rehabilitation of the monuments has been insufficient to revive tourism in the region or to compensate for the economic loss sustained by the victims. The meetings and discussions held *in situ* attribute that to the fact that most Western embassies advise against and sometimes prohibit travel to the area.⁶²
71. Mr Al Mahdi, as one of the pivotal members of the Islamist group Ansar Dine, shares some of the blame for the harm. The destruction of the mausoleums of Timbuktu has effectively destroyed the "mystery of Timbuktu" which drew tourists to the city. The footage of their destruction at the hands of Ansar Dine broadcast in the media and on social networks has further reinforced the sense of prevailing instability in northern Mali and kept tourists away. Whereas it would be incorrect to attribute sole responsibility to Mr Al Mahdi for the material harm sustained by the victims, it would be equally wrong to say that he is blameless. The Appeals Chamber has held: "The convicted person's liability for reparations must be proportionate to the harm caused and, *inter alia*, his or her participation in the commission of the crimes for which he or she was found guilty, in the specific circumstances of the case".⁶³ That being so, the Legal Representative respectfully prays the Chamber to acknowledge Mr Al Mahdi's share of the responsibility for the material harm sustained by the victims in the case.

B. Mental harm

⁶² This is true of, for example, the French government [see: <http://www.diplomatie.gouv.fr/fr/conseils-aux-voyageurs/conseils-par-pays/mali/>], the German government [see: http://www.auswaertiges-amt.de/DE/Laenderinformationen/00-SiHi/Nodes/MaliSicherheit_node.html#doc352198bodyText2], the Canadian government [see: <https://voyage.gc.ca/destinations/mali>] and the Swiss government [see: <https://www.dfae.admin.ch/eda/fr/dfaerepresentations-et-conseils-aux-voyageurs/mali/conseils-voyageurs-mali.html>].

⁶³ ICC-01/04-01/06-3129-AnxA, para. 21.

72. The Legal Representative points out to the Chamber that the crime committed by Mr Al Mahdi inflicted untold mental harm on the victims he met. That harm, by virtue of its being non-pecuniary, assumes a particular character.
73. It is apparent that the mental harm concerns the shattering of faith by dint of the assault on religion, dignity and all that the victim possesses in the sense of that which goes to the essence of his or her existence. This observation is borne out by the applications for reparation. Yet, a price cannot be put on dignity, as it cannot be put on faith, and so both are that much more difficult to restore. It is difficult to reconnect with faith in the aftermath of the profanation of the Saints.
74. Nonetheless, the right to reparation of non-pecuniary harm is acknowledged in international precedent. The IACtHR has framed such harm in the following terms: “non-pecuniary harm can refer both to the suffering and the distress caused to the direct victims and their next of kin, as well as to detriment to the individuals’ very significant values, and also to non-pecuniary changes in the conditions of the victims’ existence”.⁶⁴ Aside the suffering and anguish which may ensue from the commission of a crime,⁶⁵ the IACtHR has recognised the concept of damage to a life plan, *viz.* the “[TRANSLATION] consequences that a human rights violation may have on the principle of personal autonomy of the victim”.⁶⁶ The European Court of Human Rights (“ECtHR”) has had regard for an applicant’s anxiety or

⁶⁴ IACtHR, *Mapiripán Massacre v. Colombia*, (Merits, Reparations and Costs), Judgment of September 15, 2005, para. 282; IACtHR, *Cantoral Benavides v. Peru (Reparations and Costs)*, Judgment of December 3, 2001, para. 53. See also IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, (Merits, Reparations and Costs), Judgment of March 29, 2006, para. 219 for a definition of non-pecuniary damage.

⁶⁵ See, for example, IACtHR, *Castillo Páez v. Peru (Reparations)*, Judgment of November 27, 1998, Series C no. 43, para. 88, wherein the Court acknowledges the suffering of a family as a result of the disappearance of one of its members.

⁶⁶ IACtHR, *Loayza Tamayo v. Peru (Reparations)*, Judgment of November 27, 1998, Series C no. 42, para. 144 *et seq.*

distress and sense of frustration or helplessness.⁶⁷ In the *Plan de Sánchez Massacre* judgment, the IACtHR itemised the factors to be considered in appraising non-pecuniary damage in the light of the community's own structures and internal workings, and the beliefs and rites of the affected communities. They included the impossibility of freely celebrating ceremonies, rites and other traditional manifestations, which affected the reproduction and transmission of their culture.⁶⁸

75. All of the 106 victims whom the Legal Representative met in the *Al Mahdi* case are afflicted by mental harm occasioned by the destruction of historical and religious monuments of which Mr Al Mahdi was found guilty.
76. Many victims experienced the destruction as a humiliation or an assault on their dignity; such feelings were exacerbated by the sense of helplessness vis-à-vis the men from Ansar Dine and by the victims' powerlessness to protect the mausoleums. Many said that they wept during the destruction, that they felt wounded, humiliated and scorned; others spoke of being shaken "[TRANSLATION] to [their] very core".⁶⁹ Some referred to experiencing further bereavement; many voiced their disbelief and all spoke of a sense of shock and of their faith being undermined.
77. Here stress must be laid on the mental harm suffered specifically by [REDACTED]. Although the population of Timbuktu as a whole suffered mental harm as a result of the destruction of the holy sites, the harm caused to certain victims was much greater in that [REDACTED]. Although the Legal Representative attaches importance to treating all of the victims on a par and

⁶⁷ ECtHR, 27 July 1987, *Feldbrugge v. The Netherlands (Article 50)*, Application no. 8562/79, Series A/99, para. 11.

⁶⁸ IACtHR, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, Judgment of November 19, 2004, para. 87.

⁶⁹ See a/35026/16's application form for reparation.

without discrimination, he respectfully prays the Chamber to have regard for the particular magnitude of the harm suffered by [REDACTED].

C. Collective harm

78. In *Lubanga*, the Appeals Chamber acknowledged that certain crimes may have an effect on a community as a whole.⁷⁰ That position applies to all of the applications for reparation made in the case at bar.
79. In this vein, the Legal Representative submits that the war crime of which Mr Al Mahdi was found guilty affects the community of Timbuktu as a whole. What is more, it was Timbuktu as emblem of the cultural melting pot, tolerance and universal knowledge which came under attack from the enemies of peace and dialogue between civilisations.
80. The victims and experts whom the Legal Representative met all underscored the importance which the mausoleums and mosques of Timbuktu held for the community of Timbuktu as a whole. On Mondays and Fridays, almost the entire population of Timbuktu would come to reflect at the graves of the Saints housed in the mausoleums. There they prayed, brought donations and offerings and sought blessings. The spirits of the Saints who were laid to rest there watched over the city and its inhabitants. One victim told the Legal Representative, “[TRANSLATION] the Saints are very important to us; they are ancestors to us all. We seek their blessing and offer them gifts at every milestone in our lives”.⁷¹
81. Of note here is that a belief in guardian spirits, embodied by totem objects or animals, persists in Mali. It brings the community a sense of security and

⁷⁰ ICC-01/04-01/06-3129, para. 212.

⁷¹ See a/55010/16’s application form for reparation.

spiritual harmony. The disappearance of such spirits and totems leaves troublesome evil spirits free to steal inside and sow discord in the community.

82. The soul of a people is embodied by its core values, mythical symbols and totems. The assault on this faith at the hands of Mr Al Mahdi and his co-perpetrators has left a lingering uncertainty as to what the future holds for the population of Timbuktu who, for generations, have believed in the spirits which envelop the city and watch over its inhabitants. Since the destruction of the mausoleums, the population of Timbuktu is undergoing a situation of indescribable spiritual turmoil. For instance, one of the victims told the Legal Representative that the spirits watching over the city left after the destruction and, although the mausoleums were rebuilt, the harm persists as Timbuktu has not since found peace.
83. The issue now before the Chamber is how to rekindle the psychological and spiritual well-being of a community whose belief in ancestors and spirits gives them reason for living. The ensuing ancillary issue is one of determining how, purely material considerations aside, to set aright that harm.
84. The importance of the traditions, rites and customs of indigenous peoples has been recognised by the IACtHR, which has consistently regarded the severed transmission of non-material cultural heritage as harm amenable to reparation.⁷² The Legal Representative respectfully prays the Chamber not to depart from this significant advance in international precedent but rather to reaffirm the importance of respect for all belief systems and the ensuing right to reparation where that respect is violated.

⁷² IACtHR, *Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)*, Judgment of June 17, 2005, para. 154; IACtHR, *Plan de Sánchez Massacre v. Guatemala (Reparations)*, Judgment of November 19, 2004, para. 85.

VIII. Identification of a causal nexus between the crime committed and the harm suffered by the victims

A. Nature of the causal nexus

85. The Appeals Chamber has held: “Reparation is to be awarded based on the harm suffered as a result of the commission of any crime within the jurisdiction of the Court. The causal link between the crime and the harm for the purposes of reparations is to be determined in light of the specificities of a case.”⁷³
86. However, the statutory provisions of the Court are silent on the nature of the causal nexus between the crime and the harm amenable to reparation. Nor is there a settled view in international law on the approach to be taken to causation.⁷⁴
87. In municipal law, a range of concepts of causation is to be found, from *causalité adequate* [theory of a determining factor as cause] to *équivalence des causes* [theory of equivalent causes].
88. In its first “Decision establishing the principles and procedures to be applied to reparations” handed down in *Lubanga*, the Trial Chamber held that the Court should apply the “proximate cause” standard of causation. In that respect, the Court must at a minimum be satisfied that there exists a *sine qua non* relationship between the crime and the harm.⁷⁵ That common law standard of causation is known as the but-for test, which the Appeals Chamber has not dismissed.⁷⁶

⁷³ ICC-01/04-01/06-3129-AnxA, para. 11.

⁷⁴ In its first decision on reparation, Trial Chamber I noted the absence of a settled view (ICC-01/04-01/06-2904, para. 248).

⁷⁵ ICC-01/04-01/06-2904, paras. 247-250.

⁷⁶ ICC-01/04-01/06-3129, paras. 120-129.

89. Were the Chamber to endorse that standard of causation in the case at bar, then it should at a minimum be satisfied that the war crime of which Mr Al Mahdi was found guilty was the “proximate cause” of the harm in respect of which reparation is sought.
90. The Legal Representative submits that the destruction of protected monuments of which Mr Al Mahdi is guilty is the proximate cause of the material and mental harm suffered by the victims in the case. The destruction is stated as the cause in every single one of the applications.
91. The modus operandi of the armed group Ansar Dine, for instance as shown in the various propaganda videos, excerpts of which were adduced by the Prosecution, attests to sufficient nexus between the deliberate character of the attack on the historical and religious monuments and the harm suffered. Mr Al Mahdi, in person, took part together with others in the destruction of the mausoleums and at trial admitted to having had such a part. Mr Al Mahdi moreover acknowledged that the crime of which he was found guilty was the cause of the harm to the population of Timbuktu in general and the descendants of the Saints in particular.⁷⁷

B. Proof of the harm and the causal nexus

92. As aforementioned, in matters of reparation, the causal nexus between the crime committed and the harm suffered by the victims must be determined in the light of the particular circumstances of the case.⁷⁸ The Appeals Chamber has endorsed the following principle: “In the reparation proceedings, the

⁷⁷ ICC-01/12-01/15-T-4-CONF-FRA, p. 8, lines 1-12.

⁷⁸ ICC-01/04-01/06-3129, para. 80.

applicant shall provide sufficient proof of the causal link between the crime and the harm suffered, based on the specific circumstances of the case.”⁷⁹

93. Evidence brought by the victims to establish a causal nexus between the crime committed and the harm suffered must therefore be “sufficient” to meet the requisite standard of proof. Be that as it may, determination of the “sufficient” standard of proof can vary from case to case. In this regard, the Appeals Chamber has recalled “for purposes of determining what is sufficient, Trial Chambers should take into account any difficulties that are present from the circumstances of the case at hand”.⁸⁰ In determining the appropriate standard of proof in reparation proceedings, various factors specific to the case should be considered, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.⁸¹ That *modus operandi* is an innovation.

94. Furthermore, given the fundamentally different nature of reparation proceedings, a standard less exacting than that for trial should apply.⁸² It has been IACtHR practice to attach importance to considering any indicia and presumptions as evidence provided that they lead to conclusions consistent [with the facts].⁸³ Accordingly, the Legal Representative prays the Chamber to afford some flexibility in its identification of the standard of proof applicable at this phase of the proceedings. The Legal Representative argues that recourse to a flexible and accommodating standard of proof befits the particularities of the *Al Mahdi* case as here it is a question of proving by any means an occurrence having a legal effect.

⁷⁹ ICC-01/04-01/06-3129, para. 81; ICC-01/04-01/06-3129-AnxA, para. 22.

⁸⁰ ICC-01/04-01/06-3129, para. 81.

⁸¹ ICC-01/04-01/06-3129-AnxA, para. 22.

⁸² ICC-01/04-01/06-3129-AnxA, para. 22.

⁸³ See, for example IACtHR, *Velásquez Rodríguez v. Honduras* (Interpretation of the Judgment of Reparations and Costs), Judgment of July 21, 1989, paras. 128-130.

95. In the case at bar, the Legal Representative has in fact encountered the most considerable difficulty in gathering evidence of the harm suffered by the victims and of the causal nexus between the crime committed by Mr Al Mahdi and the harm. The difficulty lies in, amongst other factors, the manner in which the mausoleums are run, which, to a very great extent, is on a customary basis, and so there is nothing to prove a victim's tie with a particular mausoleum. Although the inhabitants of Timbuktu know [REDACTED], there is no official register which so attests.

a. Material harm

96. As regards material harm, the Legal Representative came up against other hurdles connected to the lack of a regular income and/or proof of the income which the victims earned from the mausoleums. Although some victims stated that “[TRANSLATION] many people lived off the mausoleums” or that “[TRANSLATION] the donations and offerings to the mausoleums were a source of income for [REDACTED]”, the Legal Representative has not succeeded in securing proof of that income or of how it was affected by the destruction.

97. Accordingly, the Legal Representative moves the Chamber to accept a causal nexus *sensu lato* extant between economic harm (victims' loss of income, profits or turnover) and the crime of which Mr Al Mahdi was found guilty. The particularities of the case so warrant.

98. Here, the regime, which is the offspring of continental law, of proof of occurrences which, whether or not intended, produce legal effects [*faits juridiques*] would be preferable to the views and concerns of victims who have applied for reparation. Close to 79% of applications which the Legal Representative has collected come from the group of displaced people

[REDACTED].⁸⁴ Their forcible and precipitous exodus did not allow them to take with them evidence of their property and of the fruit of their labour.

99. The Legal Representative would, therefore, point out that all of the supporting material provided by the victims reflects the entirely local manner of running the mausoleums and the difficulties in obtaining official figures, specifically economic data. The supporting documentation will, for that reason, often consist only of allegations or statements to be submitted to the Chamber by the persons concerned.

b. Mental harm

100. The Legal Representative is mindful that the wholly subjective nature of mental harm makes proof of its existence and causation difficult. Such difficulties have often prompted the IACtHR to seek the opinion of medical and psychological experts to appraise the harm suffered by victims.⁸⁵ The security situation in situ and the vulnerability of certain victims, in the view of the Legal Representative, mean that expert opinion is problematic in the circumstances. It is therefore nigh-on impossible to furnish any written corroboration of the victims' allegations and arguments.
101. Accordingly, the Legal Representative prays the Chamber to afford a degree of flexibility in determining the harm suffered by the victims and the causal nexus between the destruction of mausoleums and the harm suffered. The Legal Representative points out to the Chamber that it may accept

⁸⁴ Figures derived from the Legal Representative's interviews of 106 victims [REDACTED].

⁸⁵ See, for example IACtHR, *Velasquez Rodriguez v. Honduras* (Interpretation of the Judgment of Reparations and Costs), Judgment of July 21, 1989, paras. 50 *et seq.*

presumptions concerning this subject-matter, as the IACtHR has on many an occasion.⁸⁶

102. In the case at bar, there is no doubt that the victims suffered mentally as a result of the crime of which Mr Al Mahdi was found guilty. It is the Legal Representative's submission that the Chamber may accept a presumption that the destruction of a place of worship or reflection occasions mental harm to worshippers. The particularities of the case would appear to so warrant.

IX. Identification of the reparation envisaged by the victims

A. The Chamber's discretion in matters of reparation

103. Rule 97(1) of the Rules provides: "Taking into account the scope and extent of any damage, loss or injury, the Court may award reparation on an individualized basis or, where it deems it appropriate, on a collective basis or both."
104. Article 75 of the Statute foresees restitution, compensation and rehabilitation as forms of reparation to or in respect of victims. The Court has consistently ruled that other types of reparation are also fitting, for instance those with a symbolic, preventative or transformative value.⁸⁷ The Legal Representative would underline that the forms of reparation enumerated are not exhaustive and that the discretion of the Chamber is unfettered as regards the form(s) of reparation befitting the case.

⁸⁶ See, for example, IACtHR, *Mapiripán Massacre v. Colombia (Merits, Reparations, and Costs)*, Judgment of September 15, 2005, para. 283; IACtHR, *La Cantuta v. Peru (Merits, Reparations and Costs)*, Judgment of November 29, 2006; IACtHR, *Villagran-Morales et al v. Guatemala (Merits)*, Judgment of 19 November 1999, IACtHR, *Ituango Massacres v. Colombia*, Judgment of July 1, 2006; IACtHR, *Caracazo v. Venezuela (Reparations and Costs)*, Judgment of August 29, 2002; IACtHR, *Loayza Tamayo v. Peru (Reparations and Costs)*, Judgment of November 27, 1998.

⁸⁷ ICC-01/04-01/06-3129-AnxA, para. 34.

105. The Legal Representative underlines that whilst reparation may not wholly erase the damage sustained, it must at minimum mitigate the consequences thereof. Reparation must also be suited to the particularities of the case and accord with the victims' views and concerns.
106. The view of the Appeals Chamber on the matter is, therefore, that identification of the appropriate form(s) of reparation must take account of the characteristics of the case at bar and the particularities of the harm suffered by the victims. The Appeals Chamber has thus opined:
- identifying the harm caused to direct and indirect victims as a result of the crimes for which a person was convicted, which was addressed above, is inter-linked with identifying the appropriate modalities of reparations in that specific case. In this sense, the appropriateness of a modality of reparations can only be determined by reference to the harms that were caused and which the reparations seek to remedy.⁸⁸
107. The Legal Representative concurs with the position of the Appeals Chamber and would suggest that the Chamber take account of the particularities of the harm suffered by the victims in the *Al Mahdi* case.
108. This case presents the Chamber with the unique opportunity to determine the reparation which befits the destruction of historical and religious monuments protected by various national and international instruments. A number of factors complicate the task, including: (a) the character itself of the harm suffered; (b) the prevailing unrest in Timbuktu, where Ansar Dine and other armed groups are still present; (c) the fact that certain victims left Timbuktu in the aftermath of the events of 2012 and remain afar.
109. The conundrum of the identification of the form of reparation suited to the case is left to the discretion of the Chamber, aided in that matter by the reports and opinion of experts on the material and mental damage amenable

⁸⁸ ICC-01/04-01/06-3129, para. 200.

to reparation.⁸⁹ Having regard to the Calendar set by the Chamber, the Legal Representative reserves to himself the right to make submissions on the upcoming views of experts, since they have ramifications on the determination of the harm amenable to reparation. That goes to, *mutatis mutandis*, the legal import of expert opinion that is inconsistent with the victims' interests at the reparation phase.⁹⁰

B. Forms of suitable reparation

110. In the case at bar, pursuant to the Rules, the Chamber, taking into account the scope and extent of any damage, loss or injury, may award reparation on an individualized basis or, where it deems it appropriate, on a collective basis or both.
111. As aforementioned, the Appeals Chamber has acknowledged that certain crimes may affect a community as a whole. Where that is so and where there is a sufficient causal nexus between the harm suffered by the members of that community and the crime of which the convicted person was found guilty, it may be appropriate to award collective reparation to that community.⁹¹
112. The Legal Representative is of the view that collective reparation is warranted in the case at bar. As aforementioned, it is the case that where mental harm was suffered collectively by a community, dignity violated can be restored only in respect of the community as a whole.
113. From the Legal Representative's interviews of the victims [REDACTED], it emerges that their expectations vary depending on whether they remained in Timbuktu or were uprooted to [REDACTED].

⁸⁹ So the Chamber decided in ICC-01/12-01/15-172.

⁹⁰ These issues will be addressed in the submissions to be filed by the Legal Representative by 10 February 2017 pursuant to decision ICC-01/12-01/15-172.

⁹¹ ICC-01/04-01/06-3129, para. 212.

114. That said, at the reparation stage the victims are finalising their applications for reparation on an individual or collective basis, and at times both. That holds true for applications from [REDACTED] admitted at the trial stage, which preceded the reparation phase. That they apply for individual reparation does not preclude their also representing [REDACTED] in respect of which all of the victims are seeking collective reparation.
115. The exclusive preference for collective reparation is framed as a form of accepted reparation to assuage the unforgiveable pain which persists even after a conviction is returned. All of the victims seeking reparation expect an individual award but also, and, above all, a collective plan not only to alleviate the loss of material property but also to benefit the restored historical monument.
116. For that reason, the Legal Representative suggests the award of both collective and individual reparation.

a. Overview of the project or scheme for collective reparation

117. By definition, a scheme for reparation is not foreseen by the Court's statutory provisions; rather, it is the culmination of the victims' stated wishes, from which the content of the scheme, in the view of the Legal Representative, must not depart.
118. From the interviews of victims held *in situ*, the Legal Representative notes that many of them would like to see the award of collective reparation to restore, enhance and protect the monuments. Although the destroyed monuments have, to a very great extent, been rebuilt by UNESCO, the restoration and rehabilitation of the mausoleums are incomplete. As the victims explained to the Legal Representative, the upkeep of the mausoleums is a costly endeavour which must be performed on a regular basis before and after each rainy

season. But since the income of [REDACTED] has dwindled as a result of the destruction, the upkeep can no longer be properly performed.⁹²

119. The Legal Representative would suggest, therefore, that the Chamber adopt a collective reparation scheme aimed at the upkeep and seasonal restoration of the mausoleums. The Legal Representative would request not a single scheme but one that is split according to individual mausoleums. In fact, the mausoleums are run to a great extent on a customary basis and hence differently from one mausoleum to another. The collective reparation scheme must be tailored to each individual monument at issue in the Judgment. The Legal Representative therefore moves the Chamber to earmark an appropriate award for each monument which, amongst other considerations, factors in the number of victims with ties to the monument. A significant number of victims spoke in favour of the Sidi Yahia Mosque (31% of the victims whom he met); next came the Sidi El Mokhtar Mausoleum (17%), the Ahmed Fulane Mausoleum (14%), the Bahaber Babadié Mausoleum (11%), the Sidi Mahmoud Mausoleum (10%) and the Alpha Moya Mausoleum (7%); and then the Sheikh Abdoul Kassim Attouaty Mausoleum (3%), the Sheikh Ben Amar Arragadi Mausoleum (3%), the Sheikh Mouhamed el Mikki Mausoleum (2%) and the Sheikh Mahmoud El Arawani Mausoleum (1%).⁹³
120. Since in the vast majority of applications, no figures have been provided by the victims as individuals, not to mention [REDACTED], the Legal Representative submits to the Chamber an assessment in concrete terms, *viz.*, one that affords consideration to the relative importance of the relevant monuments to the victims and the estimated cost of their upkeep.

⁹² See, for example, a/35004/16's application form for reparation.

⁹³ Figures derived from the Legal Representative's interviews of 106 victims [REDACTED].

121. As to the content of the funding programme, the Legal Representative moves the Chamber to instruct the TFV to establish a budget for the funding and implementation of the collective reparation plan per monument.

b. Overview of the project or scheme for individual reparation

122. By definition, individual reparation may reflect a figure put forward as equal in value to the damage alleged. Here again, the Legal Representative points out to the Chamber that none of the applications for individual reparation advance a specific figure in that way. Other than one or two applications which give figures for individual purposes, almost all victims seek a financial award for relief. Awards are sought to alleviate the mental harm or the loss of property affecting those victims who fled Timbuktu at the time of the destruction or whose property was looted at the time. Such awards would also be conducive to helping the uprooted victims return.

123. In view of the scheme sought for individual reparation, the Legal Representative moves the Chamber to instruct the TFV to establish a budget for individual relief in respect of all of the victims.

124. In that respect, the innovation of the two schemes lies in the principles stated by the victims themselves in their applications for reparation – almost all of them have argued the application of the principle of equality based on shared suffering.

C. The principle of equality within the meaning of the victims' views and concerns

125. It is the express wish of all of the victims who were asked that the principle of equality apply to the collective and individual reparation plans. The question of said principle now arises.

126. Regarding the applicable law, the Legal Representative points out to the Chamber that the principle does not run counter to the terms of article 21 of the Statute on the applicable law or the general principles of international criminal law and international humanitarian law.
127. The Legal Representative submits to the Chamber that such equality is not arithmetical but denotes instead non-discrimination vis-à-vis all of the victims, almost all of whom belong to three ethnic groups and who perceive themselves as such.⁹⁴
128. The reparation regime in continental law vests all victims with locus standi to bring civil action for reparation, including before criminal courts. As regards the reparation at issue, the victims whom the Legal Representative represents are not vested with such standing and they will move the Chamber to appraise their claims on the basis of the account set down in the form provided by the Registry.
129. The Legal Representative underlines, however, that some victims have not submitted application forms for reparation to the Chamber. In fact, only 20 or so victims were able to make the journey [REDACTED] to meet with the Legal Representative and VPRS staff. However, the Legal Representative considers that, in all likelihood, other inhabitants of Timbuktu were mentally harmed by the destruction. The great hardship which besets these victims must not impede implementation of their right to reparation. In the words of some of the victims whom the Legal Representative met, the reparation must pertain to everyone because “[TRANSLATION] it is as if Timbuktu is one and the same

⁹⁴ Of the 106 victims whom the Legal Representative met [REDACTED], 84% are Sonrhai, 6% Peuhl, 2% Tamashek, 2% Arab, 1% Bambara and 1% Bozo.

person”⁹⁵ and “[TRANSLATION] we are all descended from the Saints. They are ancestors to us all”.⁹⁶

D. Involvement of the local authorities and outreach to communities

130. As the Appeals Chamber has noted, the Legal Representative is of the view that to be meaningful and to find the acceptance of the victims affected, the reparation must draw on the local culture and customs.⁹⁷
131. In the *Al Mahdi* case, the Legal Representative considers that the reparation must go through the traditional and religious authorities who embody the mana of the ancestors and are the custodians of custom. For the population of Timbuktu to be at peace again, the involvement of the local traditional and spiritual leaders in the reparation process is paramount, as they are “the eyes and ears” of the city.⁹⁸ In northern Mali, the *Kadi* (religious scholars) often act in lieu of the State’s judicial systems and communities place greater trust in the traditional institutions than in the national courts. Any reparation scheme which does not involve those local authorities would risk being perceived as extraneous and so slated for failure. As put by one of the victims whom the Legal Representative and his team met: “[TRANSLATION] the judges have to speak to the imams, the *maçons* and the descendants of the Saints to decide how to proceed. The judges must not take the decision in isolation. The people of Timbuktu alone know what needs to be done for Timbuktu”.⁹⁹ If the Court lays down a form of reparation extraneous to local conditions, the victims will at best be dissatisfied and at worse further harmed by the

⁹⁵ See a/35029/16’s application form for reparation.

⁹⁶ See a/35010/16’s application form for reparation.

⁹⁷ ICC-01/04-01/06-3129-AnxA, para. 47.

⁹⁸ The importance of involving spiritual leaders in the reparation process was advocated by the experts whom the Legal Representative met [REDACTED], specifically [REDACTED].

⁹⁹ See a/35010/16’s application form for reparation. See also a/35002/16’s application form for reparation.

disregard shown to them. To involve the victims would put them at the very heart of the reparation process.

132. As regards the possible involvement of the Malian Government and its officials in the reparation process, however, a number of victims have voiced reservations. To the Legal Representative, it seems that, on the whole, the population of Timbuktu doubts the State's willingness to punish the crimes committed during the 2012 crisis and to compensate the victims.
133. Furthermore, the [REDACTED] spoke of some traditional conflict resolution methods in Mali, which are a blend of Islamic law and local customs.¹⁰⁰ It is the Legal Representative's submission that the Chamber may seek an expert opinion on the matter. An opinion would enable the Chamber to better entertain the specific nature of the mental harm suffered by the community of Timbuktu who saw its learned, its scholars, its ancestors and its Saints defiled and desecrated. An opinion would also allow customary reparation to be of avail and possibly instituted to dispel the affront to the community. By so proceeding, the Chamber would pave the way for the victims to access a form of reparative justice which is accepted by all and a guarantor of lasting peace.
134. Aside the involvement of local authorities, the reparation measures will have a wide reach and be of real benefit only if outreach activities are held for the population of Timbuktu. Such activities would foster dialogue between the Court and the persons affected and their community.¹⁰¹ They would enable the population of Timbuktu as a whole, and the victims in particular, to take ownership of the reparation measures ordered by the Court and to embrace them more readily.

¹⁰⁰ Meeting with [REDACTED].

¹⁰¹ ICC-01/04-01/06-3129-AnxA, para. 31.

X. Order for reparations entered against a convicted person

135. The Appeals Chamber has ruled that a convicted person is liable to make reparation for the damage occasioned by the crimes for which he or she stands convicted, even where declared indigent by the Registry.¹⁰²
136. Indeed, orders for reparations are “intrinsicly linked to the individual whose criminal liability is established in a conviction and whose culpability for the criminal acts is determined in a sentence.”¹⁰³ In matters of reparation, “the convicted person’s liability for reparation 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”.¹⁰⁴
137. Hence, the order for reparations must determine individual liability and afford the convicted person notice thereof. Indigence of a convicted person at the time the order is made does not in any circumstances relieve the person of liability.
138. So although Mr Al Mahdi has been declared indigent,¹⁰⁵ the reparation order must determine his liability in respect of reparation. The Legal Representative further notes that Mr Al Mahdi has offered to pay for the cost of the door of the Sidi Yahia Mosque from his own pocket.¹⁰⁶ Payment by the convicted person for some or all reparation would be of great symbolic value to the victims and may foster peace in Timbuktu.

¹⁰² ICC-01/04-01/06-3129, paras. 102-105.

¹⁰³ ICC-01/04-01/06-3129-AnxA, para. 20.

¹⁰⁴ ICC-01/04-01/06-3129-AnxA, para. 21.

¹⁰⁵ ICC-01/12-01/15-134-Conf, paras. 5-7.

¹⁰⁶ ICC-01/12-01/15-141-Conf-Corr, para. 174.

XI. The Trust Fund for Victims

139. Rule 98 of the Rules and Part III of the Regulations of the TFV vest the Trust Fund with a dual mandate: implementation of orders for reparations entered against a convicted person; and the provision of general assistance to the victims of crimes within the jurisdiction of the Court and to their families, irrespective of the crimes of which an accused person was found guilty.
140. It is the Legal Representative's opinion that the TFV itself is not in a position to identify the victims eligible for the reparation ordered by the Chamber in the *Al Mahdi* case. To so mandate the TFV would be tantamount to conferring upon it a power of adjudication which it does not possess. In this respect, the Legal Representative submits that that it lies with the Chamber, in making its order for reparations, to identify the victims and to determine the form the reparation should take, as the Appeals Chamber has had occasion to recall.¹⁰⁷ Upon issuance of the order, the TFV may be tasked with its execution within the parameters delineated by the Chamber.
141. Accordingly, the TFV's Board of Directors must determine the availability of funds in the form of (a) fines and forfeitures transferred to the TFV or (b) resources collected through awards for reparations which may be supplemented with "other resources" of the TFV. Under regulation 56 of the Regulations of the TFV, the Board "shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards".¹⁰⁸

¹⁰⁷ ICC-01/04-01/06-3129, para. 200.

¹⁰⁸ ICC-ASP/4/Res.3, Regulations of the Trust Fund for Victims, para. 56.

142. Furthermore, the Appeals Chamber has ruled that in the event of indigence, the TFV may advance its “other resources”, which the convicted person would be liable for reimbursing.¹⁰⁹
143. Accordingly, and pursuant to that regulation, the Board of Directors should contemplate how best to supplement existing funds with “other resources” and duly advise the Chamber in that regard.
144. The Legal Representative takes the view that the TFV should undertake such an assessment forthwith. The Legal Representative considers that a precise figure as to the resources available would duly illuminate the Chamber and the parties.

XII. The Legal Representative’s suggestions regarding the implementation of the order for reparations

145. The implementation of decisions and orders for reparations is part and parcel of the right to a remedy and to reparation. To be effective remedies must be enforceable. The execution of the decisions, as the IACtHR explained in the case of *Baena-Ricardo et al. v. Panama*, “should be considered an integral part of the right to access to justice, understood in its broadest sense, as also encompassing full compliance with the respective decision”.¹¹⁰
146. The Legal Representative further draws attention to the need for effect to be given promptly and efficaciously to the Chamber’s order for reparations. The victims have been in a state of the utmost vulnerability since 2012. They remain at peril from the continued presence of Ansar Dine and its allies in the region and are hoping for a powerful gesture from the Court and for acknowledgement of their rights and the harm visited upon them.

¹⁰⁹ ICC-01/04-01/06-3129, para. 115.

¹¹⁰ IACtHR, *Baena-Ricardo et al. v. Panama* (Competence), Judgment of November 28, 2003, para. 82.

147. In sum, the Legal Representative suggests to the Chamber that it adopt: (1) collective reparation measures for the upkeep, restoration and rehabilitation of every monument at issue in the Judgment and which are earmarked for each individual monument; and (2) individual reparation measures aimed at monetary compensation for the material and mental harm suffered by the victims.
148. The Legal Representative further suggests that the Chamber engage in discussion with and involve to the extent possible the local authorities of Timbuktu, specifically the religious and customary authorities but also the custodians of the mausoleums, the *maçons* and the descendants of the Saints. By so proceeding, the Chamber will be able to adopt reparation measures which are suited to local conditions and reflect the victims' expectations.
149. The Legal Representative respectfully suggests to the Chamber that upon determining and adopting the measures, it include an attendant information and outreach programme to afford the victims a better understanding of the reparation process and the form of reparation decided.
150. That said, the Legal Representative would leave it to the discretion of the Chamber to determine the form of reparation which it sees fit given the particularities of the case. To award the victims reparation suited to their needs is to allow them to rebuild their lives and regain their dignity. It represents an opportunity but also sends a strong signal in the face of the unrelenting destruction of historical and religious monuments which, to this day, continues worldwide.

XIII. Confidentiality

151. A confidential version of the present submissions was filed on 2 December 2016, pursuant to regulation 23*bis*(1) of the Regulations of the Court, as they

contained information identifying the victims and the persons whom the Legal Representative met. This is a public redacted version of the submissions filed by the Legal Representative.

FOR THESE REASONS, *without prejudice*

The Legal Representative of Victims respectfully lays these submissions before the Chamber for consideration.

[signed]

The Legal Representative of Victims,
Mr Mayombo Kassongo

Dated this 3 January 2017

At The Hague, Netherlands