

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : **English**

No.: **ICC-01/12-01/15**
Date: **6 December 2016**

TRIAL CHAMBER VIII

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

SITUATION IN THE REPUBLIC OF MALI
IN THE CASE OF
THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI

Public

**Public redacted version of "Prosecution's Submissions on Reparations",
ICC-01/12-01/15-192, 2 December 2016**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Gilles Dutertre

Counsel for the Defence

Mr Mohamed Aouini

Legal Representatives of the Victims

Mr Mayombo Kassongo

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Ms Isabelle Guibal

Other

Trust Fund for Victims

Introduction

1. Mr Al Mahdi was found guilty of directing an attack against ten important and well known religious and historic monuments in Timbuktu.¹ His liability for reparations must be proportionate to the harm caused and to his participation in the commission of the crimes for which he was found guilty.² Mr Al Mahdi's contribution to the commission of the crime was deemed essential.³ Moreover, all the sites but one were UNESCO World Heritages sites and, as such, their attack not only affects the faithful and inhabitants of Timbuktu (who cherished them and used them as a place for prayer or pilgrimage), but also people throughout Mali (who considered Timbuktu as a source of pride) and the international community (since heritage is part of cultural life).⁴

2. The Prosecution notes the primary role of the Legal Representative of Victims in reparations proceedings⁵ and defers to the observations from the Victims, Trust Fund for Victims ("TFV"), experts⁶ and other authorised participants⁷ regarding the types and the extent of the harm caused and the appropriate modalities of reparation, bearing in mind that the restoration of most of the attacked sites has been completed with the assistance of UNESCO.⁸

¹ ICC-01/12-01/15-171 ("Judgment"), para. 38.

² ICC-01/04-01/06-3129 A A2 A3 ("*Lubanga* Reparations AJ"), paras. 6, 118; ICC-01/04-01/06-3129-AnxA A A2 A3 ("*Lubanga* Amended Reparations Order"), paras. 20-21.

³ Judgment, paras. 53, 84.

⁴ Judgment, paras. 34, 46, 78-80.

⁵ The Prosecution is not a party in reparations proceedings. *See* ICC-01/12-01/15-172, fn. 3. *See also* ICC-01/04-01/07-3532, para. 10 and ICC-01/04-01/06-3179, paras. 5-6.

⁶ ICC-01/12-01/15-172, para. 2 (i), ordering the Registry to "identify one or more experts with expertise in the following matters: (a) the importance of international cultural heritage generally and the harm to the international community caused by its destruction; (b) the scope of the damage caused, including monetary value, to the ten mausoleums and mosques at issue in the case and (c) the scope of the economic and moral harm suffered, including monetary value, to persons or organisations as a result of the crimes committed."

⁷ *See* ICC-01/12-01/15-178 and ICC-01/12-01/15-180, granting applications by Queen's University Belfast Human Rights Centre, the Redress Trust, the FIDH and AMDH, and UNESCO to submit *amicus curiae* observations.

⁸ UNESCO, "UNESCO welcomes restoration of sacred gate of Sidi Yahia in Timbuktu", 4 February 2016 (<http://whc.unesco.org/en/news/1430/>); and "UNESCO welcomes restoration of sacred gate of Sidi Yahia in

3. That being said, on the basis of information available and subject to any additional adduced information, the Prosecution submits that collective reparations involving modalities of reparation with preventive, transformative and symbolic value appear suitable to this case. The Trial Chamber may also consider the appropriateness and feasibility of awarding individual reparations to some victims.

Confidentiality

4. Pursuant to regulation 23*bis* of the Regulations of the Court, the present submissions are filed confidentially because they refer, *inter alia*, to the information subject to redactions in the decisions on victims' participation.⁹ A public redacted version will be filed simultaneously.

Submissions

5. The Trial Chamber should develop and supplement the principles established by the Appeals Chamber in the *Lubanga* case¹⁰ to adapt them to the characteristics of this case, in particular, with respect to the entitlement to reparations of communities as groups of victims, and to modalities of reparation with preventive, transformative and symbolic value.

(i) Victims eligible for reparations

Timbuktu", 20 September 2016 (<http://whc.unesco.org/en/news/1557/>). The Prosecution notes that unlike the sites designated as UNESCO World Heritage, the Sheikh Mohamed Mahmoud Al Arawani Mausoleum has not been restored.

⁹ ICC-01/12-01/15-97-Red and ICC-01/12-01/15-156-Red.

¹⁰ On 3 March 2015, the Appeals Chamber partially overturned Trial Chamber I's decision on reparations in the *Lubanga* case (ICC-01/04-01/06-2904: "*Lubanga* Reparations Decision") and amended its Reparations Order. See *Lubanga* Reparations AJ, and *Lubanga* Amended Reparations Order.

Types of victims

6. Victims eligible for reparations in this case are those who have suffered harm as a result of the war crime under article 8(2)(e)(iv) of attacking ten mausoleums and mosques which qualified as both religious buildings and historic monuments, for which Mr Al Mahdi stands convicted:¹¹

- the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum;
- the Sheikh Mohamed Mahmoud Al Arawani Mausoleum;
- the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum;
- the Alpha Moya Mausoleum;
- the Sheikh Mouhamad El Mikki Mausoleum;
- the Sheikh Abdoul Kassim Attouaty Mausoleum;
- the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum;
- the Sidi Yahia Mosque door;
- the Ahmed Fulane Mausoleum; and
- the Bahaber Babadié Mausoleum.

7. To the extent that victims of other crimes for which Mr Al Mahdi has not been convicted are not eligible for reparations from him (because there is no causal link between their harm and the crimes for which he has been convicted), they are not excluded from the benefits of any other assistance activities that the TFV may undertake according to its mandate under regulation 50(a) of the Regulations of the TFV.¹²

¹¹ Judgment, paras. 38, 45-52.

¹² *Lubanga* Reparations AJ, para. 199.

8. Victims can be direct victims (those whose harm was the result of the commission of the above mentioned crimes) and indirect victims (those who suffered harm as a result of the harm suffered by direct victims).¹³ Victims may include both natural and legal persons.¹⁴

9. Further, collective reparations may also be awarded to a community, understood as a group of victims, as long as there is a sufficient causal link between the harm suffered by members of that community and the crimes for which Mr Al Mahdi is found guilty.¹⁵ In this case, the Trial Chamber identified the faithful and inhabitants of Timbuktu as direct victims of the crimes, but also people throughout Mali (who considered Timbuktu as a source of pride) and the international community (since that heritage is part of cultural life) as being affected by the crimes.¹⁶ In order to be entitled to reparations, a causal link between the harm suffered by members of those communities and the crimes for which Mr Al-Mahdi is convicted must still be established.¹⁷

Identification of the victims

10. The Trial Chamber may either choose to identify in the Reparations Order the victims eligible to benefit from reparations, or if the Trial Chamber orders collective

¹³ *Lubanga* Amended Reparations Order, para. 6. *See also* para. 7 on the need to consider the applicable social and familial structures in defining “family”. On the definition of direct and indirect victims, *see* ICC-01/04-01/06-1813, para. 44.

¹⁴ *Lubanga* Amended Reparations Order, para. 8; Rule 85(b). In this case the Trial Chamber admitted as victims to participated in the proceedings three natural persons and six organisations. *See* ICC-01/12-01/15-97-Red and ICC-01/12-01/15-156-Red. Following decision ICC-01/12-01/15-156-Red, victim a/35008/16 withdrew. *See* ICC-01/12-01/15-T-4-Red-ENG, p. 3, lines 8-19.

¹⁵ *Lubanga* Reparations AJ, paras. 210-212, 214. The Appeals Chamber has noted that “[a] community does not need to be organised or have a representative. Rather, it is a group of people sharing a certain characteristic” (*See* para. 210).

¹⁶ Judgment, para. 80. *See also* paras. 34, 39, 46 and 78.

¹⁷ *Lubanga* Reparations AJ, para. 212. *See* however fn. 81. With respect to certain types of collective reparations, such as symbolic, there appears to be more flexibility in establishing the link.

reparations,¹⁸ only set out the criteria of eligibility for such victims in the Order and entrust the TFV to identify the beneficiaries at the implementation stage.¹⁹ If the Trial Chamber orders individual reparations (not deposited through the TFV under rule 98(2)), it will have to rule on the victims' rule 94 applications and accordingly identify the beneficiaries in the Reparations Order.²⁰

11. The informed consent of the recipient is necessary prior to any award of reparations.²¹ Victims should be consulted on issues relating to the identity of the recipients of reparations.²² These principles are particularly important in this case given the ongoing violence in Northern Mali and the direct risk that might be caused to the security of the recipients as a result of their interaction with the ICC.²³

Documentation to be provided by victims

12. With respect to the forms of identification required, the flexible approach adopted for assessing victims' applications for participation in the trial proceedings should be applied also at the reparation stage.²⁴ Victims should be allowed to use official or unofficial identification documents, or any other means of demonstrating their identities.²⁵ Minor discrepancies which do not call into question the overall

¹⁸ In *Lubanga*, the Appeals Chamber made this finding in the context of collective reparations. The Appeals Chamber found that the Trial Chamber was not required to rule on the individual applications for reparations because a collective award was made pursuant to rule 98(3): *Lubanga* Reparations AJ, paras. 148-157.

¹⁹ *Lubanga* Reparations AJ, para. 205. See also para. 32.

²⁰ In *Lubanga*, the Appeals Chamber found that Trial Chamber I did not err in not deciding on individual applications because collective reparations were awarded (*Lubanga* Reparations AJ, paras. 143, 156). It then clarified that this finding was without prejudice of whether a Trial Chamber would be required to rule on individual applications if it decides to award individual reparations pursuant to rule 98(2) or both individual and collective reparations (*Lubanga* Reparations AJ, para. 152). Hence, it appears that if the Trial Chamber decides to award individual reparations – but not through the TFV (rule 98(2)) – it would need to rule on the rule 94 applications (which are relevant to an “applications based process”: *Lubanga* Reparations AJ, para. 142) and identify the beneficiaries' identities in the reparations order. The TFV Regulations only refer to individual reparations pursuant to regulation 98(2). See TFV Regulations 59 to 68.

²¹ *Lubanga* Amended Reparations Order, para.30; *Lubanga* Reparations AJ, paras.159-160. Although the Appeals Chamber was referring to collective reparations, this principle equally applies to individual reparations.

²² *Lubanga* Amended Reparations Order, para.32.

²³ See, for example, United Nations Security Council Resolution 2295 (2016) on extension of the mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) until 30 June 2017 ([http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2295\(2016\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2295(2016))), p. 2.

²⁴ ICC-01/12-01/15-97-Red, para. 19, see footnote 13.

²⁵ *Lubanga* Amended Reparations Order, para. 57.

credibility of the information provided by the applicant should be accepted.²⁶

13. All victims should be treated fairly and equally as regards reparations, irrespective of whether they participated in the trial proceedings.²⁷

(ii) Harm

14. “Harm” may be understood as “hurt, injury or damage”.²⁸ In its nature, the harm may be “material, physical or psychological”.²⁹ Natural persons may suffer direct or indirect harm, and legal persons may suffer direct harm.³⁰ In all cases, the harm must have been “personal to the victim”.³¹

15. In the order for reparations, the Trial Chamber must clearly define the harms to direct and indirect victims that resulted from the relevant crimes.³² The Trial Chamber may choose to itself assess and determine the extent of the harms suffered (with or without the assistance of experts)³³ and to specify the size and nature of the reparations award in the Order³⁴ *or* instead, may defer such an assessment to the TFV and only set out the criteria to be applied by the TFV in making this assessment.³⁵ On the latter basis, the TFV would determine the size and nature of the reparations award in the Draft Implementation Plan³⁶ – which the Trial Chamber must then approve.³⁷

²⁶ ICC-01/12-01/15-97-Red, para. 19.

²⁷ *Lubanga* Amended Reparations Order, para. 12.

²⁸ *Lubanga* Amended Reparations Order, para.10.

²⁹ *Lubanga* Amended Reparations Order, para. 10. *See also* ICC-01/04-01/06-1432 OA9 OA10, para. 32.

³⁰ Rule 85(b) of the Rules; ICC-01/04-01/06-1432 OA9 OA10, para. 30.

³¹ *Lubanga* Amended Reparations Order, para.10.

³² *Lubanga* Reparations Appeals Judgement, paras. 181, 184.

³³ ICC Rule 97(2).

³⁴ *Lubanga* Reparations Appeals Judgement, fn. 231.

³⁵ *Lubanga* Reparations Appeals Judgement, paras. 183-184.

³⁶ *Lubanga* Reparations Appeals Judgement, para. 183.

³⁷ On the Trial Chamber’s approval of the Draft Implementation Plan, *see* TFV Regulations, regulations 54-57 and 69. Although in *Lubanga* the Trial Chamber only awarded collective reparations, the Appeals Chamber

16. The Prosecution defers to the observations from the Victims, the TFV, and experts³⁸ and other knowledgeable authorised participants³⁹ to assist the Trial Chamber in determining the specific types and the extent of the harms suffered in this case.⁴⁰ However, and although additional types of harm may be identified at the reparations stage,⁴¹ the decisions authorising victims to participate in the proceedings⁴² and the Judgment and Sentence⁴³ [REDACTED].

17. The Chamber noted the importance and the impact that the destruction of these sites had for the population of Timbuktu and Mali and the international community.⁴⁴ For the faithful inhabitants of Timbuktu, the mausoleums and mosques formed an integral part of their religious life (they were places of prayer and pilgrimage). These buildings also had a symbolic and emotional value and formed part of the identity of the inhabitants in Timbuktu, as they were closely linked to the city's past and rich history.⁴⁵ The mausoleums and the great mosques also played an important part in maintaining the social cohesion of Timbuktu,

indicated that this approach was also possible for individual reparations. *See Lubanga* Reparations AJ, para. 183. Although not expressly stated, the Appeals Chamber would have referred to individual reparations through the TFV pursuant to rule 98(2), which are regulated in regulations 59 to 68 of the TFV Regulations. Conversely, it would appear that the Trial Chamber cannot delegate to the TFV the determination of the extent and scope of the harm if individual reparations are not awarded through the TFV. TFV regulations do not refer to individual reparations pursuant to rule 94 applications. However and prior to issue the Order, the Trial Chamber should benefit from expert submissions on the extent of the harm, pursuant to rule 97(2).

³⁸ ICC-01/12-01/15-172, para. 2 (i).

³⁹ See ICC-01/12-01/15-178 and ICC-01/12-01/15-180.

⁴⁰ In *Lubanga*, the Appeals Chamber noted that a Trial Chamber need not limit to the harms identified in the Judgment and Sentencing Decision and could make findings of harms for which reparations may be awarded in the Reparations Order based on evidence under regulation 56 of the Regulations of the Court, evidence provided by experts, the parties and participants at a reparation hearing or in written submissions, or evidence contained in rule 94 applications. *See Lubanga* Reparations Appeals Judgement, para. 185.

⁴¹ In *Lubanga*, the Appeals Chamber noted that a Trial Chamber need not limit to the harms identified in the Judgment and Sentencing Decision and could make findings of harms for which reparations may be awarded in the Reparations Order based on evidence under regulation 56, evidence provided by experts, Parties and participants in a reparations hearing or written submissions, or evidence contained in rule 94 applications: *Lubanga* Reparations Appeals Judgement, para. 185.

⁴² ICC-01/12-01/15-97-Red, paras. 32, 34.

⁴³ Judgment, para. 108.

⁴⁴ Judgment, paras. 34, 46, 79-80.

⁴⁵ Judgment, para. 78.

whose inhabitants collectively participated in their preservation.⁴⁶ Thus, their destruction was, in many ways, an invaluable loss for the people of Timbuktu.

18. The Chamber further noted that all the sites but one were UNESCO World Heritage sites.⁴⁷ Thus, the population of Mali, in general, who considered Timbuktu as a source of pride, were indignant to see these acts take place.⁴⁸ The international community was also affronted, in the belief that heritage is part of cultural life.⁴⁹

(iii) Standard of proof and causation

19. The applicant victims have the burden of proving the link between the crime for which Mr Al Mahdi has been convicted and their harm. The “appropriate” standard—and also what is “sufficient” for an applicant to meet the burden of proof—will depend upon the circumstances of the specific case, including with reference to difficulties encountered by the victims in obtaining evidence in support of their claim.⁵⁰ Given the fundamentally different nature of reparations proceedings, the standard need not be the criminal standard of proof “beyond reasonable doubt”.⁵¹ It may generally be appropriate to require proof on the “balance of probabilities”, as in the *Lubanga* case.⁵²

20. The appropriate standard of causation must likewise be determined in light of

⁴⁶ Judgment, paras. 34, 78, 79. *See*, for example, P-0151’s testimony, ICC-01/12-01/15-T-5-Red-ENG, p. 38, line 4-23, to p. 49, line 5, explaining that the entire community, including women, the elderly and the young, is involved in the process called *crépissage*, which is the annual re-plastering of the mosque for their preservations.

⁴⁷ Judgment, paras. 46, 78.

⁴⁸ Judgment, para. 80.

⁴⁹ Judgment, para. 80. *See also* para. 46, noting that attacking these mausoleums and mosques was clearly an affront to the “the wide diffusion of culture, and the education of humanity for justice and liberty and peace”.

⁵⁰ *Lubanga* Reparations AJ, para. 81, confirming *Lubanga* Reparations Decision, paras. 251-252. *See also* *Lubanga* Amended Reparations Order, para. 22.

⁵¹ *Lubanga* Amended Reparations Order, para. 22.

⁵² *Lubanga* Reparations AJ, para. 83.

the particular circumstances of the case.⁵³ Thus, given that the attacks against religious buildings and historical monuments took place in the context of the presence of Ansar Dine and Al-Qaeda in the Islamic Maghreb (“AQIM”) in Timbuktu, consideration should be given to the possible difficulties in linking the harm suffered to the crime for which Mr Al Mahdi has been convicted. As in *Lubanga*, the Trial Chamber may also want to require a “but for” and “proximate cause” relationship.⁵⁴

(iv) The scope of Mr Al Mahdi’s liability

21. As found by the Appeals Chamber in the *Lubanga* case, the Trial Chamber must determine the scope – and the amount - of Mr Al Mahdi’s liability for reparations in the Reparations Order.⁵⁵ Mr Al Mahdi’s liability for reparations must be proportionate to the harm caused and, *inter alia*, his participation in the commission of the crimes for which he was found guilty, in the specific circumstances of the case.⁵⁶

22. First, and with respect to the harm caused, Mr Al Mahdi’s monetary obligations for collective reparations must be proportionate to the totality of the harm caused, which is up until now mainly reflected in the Judgment and Sentence⁵⁷ and decisions on victims participation at trial.⁵⁸ The Parties, participants and experts may provide additional relevant information.⁵⁹ If the Chamber awards individual reparations, it should also consider evidence contained in the rule 94 applications.⁶⁰

⁵³ *Lubanga* Reparations AJ, para. 80; *Lubanga* Amended Reparations Order, para. 22.

⁵⁴ *Lubanga* Reparations Decision, para. 250 upheld in *Lubanga* Reparations AJ, paras. 124-129 and *Lubanga* Amended Reparations Order, para. 59.

⁵⁵ *Lubanga* Reparations AJ, paras. 237.

⁵⁶ *Lubanga* Amended Reparations Order, para. 20. Mr Al Mahdi was convicted of a crime against property which, even if inherently grave, is generally of lesser gravity than crimes against persons. See Judgment, para. 77.

⁵⁷ Judgment, paras. 34, 46, 78-80, 108.

⁵⁸ ICC-01/12-01/15-97-Red and ICC-01/12-01/15-156-Red.

⁵⁹ *Lubanga* Reparations Appeals Judgement, paras. 185, 238.

⁶⁰ *Lubanga* Reparations Appeals Judgement, para. 185.

23. Second, and with respect to Mr Al Mahdi's participation in the commission of the crimes, the Chamber should consider that Mr Al Mahdi played an essential role in the execution of the attack.⁶¹ In particular, as head of the *Hesbah*: (i) he supervised the execution of the operations; (ii) he collected, bought and distributed the necessary tools/means in order to successfully carry out the attack; (iii) he was present at all of the attack sites, giving instructions and moral support; (iv) he personally participated in the attack that led to the destruction of at least five sites; (v) he was responsible for communicating with journalists to explain and justify the attack.⁶² Accordingly, his liability for reparations should reflect the gravity of his actions.

24. If Mr Al Mahdi is indigent, the Board of Directors of the TFV may decide whether to advance its resources in order to enable the implementation of reparation awards, following which the TFV may claim the advanced resources from Mr Al Mahdi.⁶³ His financial situation shall be carefully monitored pursuant to regulation 117 of the Regulations of the Court.⁶⁴

(v) Types and modalities of reparations

25. The Prosecution defers to the relevant submissions from the Victims, TFV, experts⁶⁵ and other authorised participants⁶⁶ to assist the Trial Chamber in determining the appropriate types and modalities of reparations in this case.⁶⁷

⁶¹ Judgment, paras. 53, 84.

⁶² Judgment, para. 40.

⁶³ *Lubanga* Amended Reparations Order, para. 62.

⁶⁴ *Lubanga* Amended Reparations Order, para. 61.

⁶⁵ ICC-01/12-01/15-172, para. 2 (i).

⁶⁶ See ICC-01/12-01/15-178 and ICC-01/12-01/15-180, granting applications by Queen's University Belfast Human Rights Centre, the Redress Truss, the FIDH and AMDH, and UNESCO to submit *amicus curiae* observations.

⁶⁷ In the Reparations Order, the Trial Chamber must at a minimum identify the modalities of reparations that are appropriate to the circumstances of this case. If the Trial Chamber chooses not to determine the nature and size of the award for reparations in the Order, the TFV will design the award at the implementation stage on the basis

However, and in light of the criteria set out in rules 97(1) and 98(3), the Trial Chamber should at least consider the following factors:

- the large number of victims who may be entitled to reparations;⁶⁸
- whether Mr Al Mahdi disposes of funds and properties;⁶⁹
- the harms suffered by the victims;⁷⁰ and
- the fact that the sites have been rebuilt,⁷¹ notwithstanding the impossibility of returning them to their original state.⁷²

26. In light of the above, collective reparations, including modalities of reparation of preventive, transformative and symbolic value, appear more suitable in this case.⁷³ The Trial Chamber may also consider the appropriateness of awarding individual reparations to some victims, [REDACTED].

27. Such collective measures may include, where appropriate, the wider dissemination of the Judgment and Sentence in order to raise awareness and to contribute to the deterrence of the crime of attacking cultural property.⁷⁴ Notably, not only Mr Al Mahdi expressed genuine remorse for his acts, but also he called on

of the modalities identified by the Chamber in the Order. *See Lubanga* Reparations AJ, para. 200. This would apply in the event of individual and collective reparations through the TFV pursuant to rule 98(2) and (3).

⁶⁸ *See* para. 9 above.

⁶⁹ *See* ICC-01/12-01/15-134-Conf. For the purposes of compensation, the Trial Chamber should consider, *inter alia*, its feasibility in view of the availability of funds. *See Lubanga* Amended Reparations Order, para. 37.

⁷⁰ *See* paras. 14-18 above. Judgment, paras. 34, 46, 78-80, 108.

⁷¹ Witness P-0431's testimony, ICC-01/12-01/15-T-5-Red-ENG, p. 93, line 3-18, stating that: "Thanks to the people of Timbuktu coming together and taking action, thanks to the international community which has also come together and taken action, and thanks to everything that the culture ministry has been able to undertake, the mausoleums have been rebuilt."

⁷² The ICTY Trial Chamber in *Jokić* emphasised that, while restoration is possible, the buildings can never return to their original state: the "inherent value of the buildings" is affected "because a certain amount of original, historically authentic, material will have been destroyed". *Prosecutor v. Jokić*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 52 (http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf).

⁷³ *Lubanga* Amended Reparations Order, para. 34. The Prosecution does not preclude the possibility that other types of reparations (for example compensation and rehabilitation) may also be appropriate and feasible in light of the submissions of the Parties and participants.

⁷⁴ *Lubanga* Amended Reparations Order, para. 43.

people not to become involved in the same acts that he was involved in “because they are not going to lead to any good” for humanity.⁷⁵

(vi) Implementation of reparations

28. The Prosecution refers to its observations on reparations in the *Bemba* case⁷⁶ as to the need to clearly set out the procedure to be followed at the implementation stage.⁷⁷ Consistent with the *Lubanga* Reparations Appeals Judgment,⁷⁸ the Trial Chamber is not required to decide on individual applications if it decides to award collective reparations. Rather, the TFV would identify the beneficiaries of reparations at the implementation stage.⁷⁹ The TFV (and the Trial Chamber in approving the screening process)⁸⁰ should, however, ensure that only those meeting the eligibility criteria (namely, those who have suffered harm as a result of the crime for which Mr Al Mahdi has been convicted) are entitled to reparations.⁸¹

29. Additionally, the Prosecution supports a gender-inclusive and child-sensitive approach to guide the design of the procedures to be applied to reparations, ensuring that all victims are consulted and that reparations are accessible to all victims in their implementation.⁸² It also supports consultation with the victims in

⁷⁵ Judgment, para. 103.

⁷⁶ ICC-01/05-01/08-3454.

⁷⁷ The implementation stage begins after the Trial Chamber issues the Reparations Order: ICC-01/04-01/06-2953 A A2 A3 OA21, paras. 53-57.

⁷⁸ See para. 8 and fn. 18.

⁷⁹ In *Lubanga*, Trial Chamber II appeared to understand the *Lubanga* Reparations AJ as requiring it to approve the potential victims eligible to benefit from reparations before it could decide on the amount for which Mr Lubanga was responsible (ICC-01/04-01/06-3198-tENG, para. 14). The TFV sought reconsideration of this approach and submitted that the TFV should identify the beneficiaries at the implementation stage (ICC-01/04-01/06-3208, paras. 85-201). See also ICC-01/04-01/06-3237, paras. 25-33, where the TFV has further explained its victim screening process.

⁸⁰ *Lubanga* Amended Reparations Order, para. 76.

⁸¹ *Lubanga* Reparations AJ, para. 214 and *Lubanga* Amended Reparations Order, para. 54. The Prosecution however notes that in *Lubanga*, the Trial Chamber approved the TFV’s proposed project on symbolic collective reparations without requiring any previous screening. ICC-01/04-01/06-3251. Hence, such screening may not be necessary for certain modalities of collective reparations.

⁸² *Lubanga* Amended Reparations Order, paras. 18, 23-32. See also OTP Policy Paper on Sexual and Gender-Based Crimes, June 2014, para. 102 (<https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes>).

order to determine the most effective and appropriate forms of reparation within the community of Timbuktu.⁸³

Conclusion

30. The Prosecution respectfully requests the Trial Chamber to consider these observations.



Fatou Bensouda, Prosecutor

Dated this 6th day of December 2016

At The Hague, The Netherlands

[Gender-Based-Crimes--June-2014.pdf](https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF)); OTP Policy on Children, November 2016, para. 106 (https://www.icc-cpi.int/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF). With respect to the impact on future generations, see, for example, the P-0431's testimony, ICC-01/12-01/15-T-5-Red-ENG, p. 77, line 8-10, explaining that: "If one were to talk about the social functions of Mali's cultural heritage, one would say that the cultural heritage, broadly speaking, is part of the education of the upcoming generations. It also contributes to providing social ethics and etiquette as well as educating the people on their history."

⁸³ OTP Policy on Children, November 2016, para. 106.