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# The ICC Judgment in *Al Mahdi*: Heritage Communities and Restorative Justice in the International Criminal Protection of Cultural Heritage

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Simona Pinton, Ph.D.

## 1. INTRODUCTION

In the last century, rules in multiple international treaties have prohibited attacks on cultural property, and politicians, journalists, and scholars have publicly condemned them. Since the Nuremberg trials,<sup>1</sup> however, the international protection of cultural heritage by means of judicial proceedings (both civil and criminal) intensified only in the last two decades, as explained below.

At the international criminal law level, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first to adopt international laws criminalizing direct attacks to destroy buildings dedicated to religion and historic monuments. In the cases *Prosecutor v.*

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<sup>1</sup> At the Nuremberg trials, Alfred Rosenberg, in addition to the commission of serious war crimes and crimes against humanity, was recognized

responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January 1940, to set up the "Hohe Schule," he organized and directed the "Einsatzstab Rosenberg," which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own reports show the extent of the confiscations. In "Action-M" (Moebel), instituted in December 1941 at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of July 14<sup>th</sup>, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the west.

OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 122-123 (1947).

*Kordić, Prosecutor v. Strugar, Prosecutor v. Jokić, and Prosecutor v. Prlić*, the charges were brought by the prosecution under art. 3(d) of the ICTY Statute which gave the *ad hoc* Tribunal jurisdiction over violations of the laws or customs of war, including: “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”<sup>2</sup> Those acts, however, have been treated by the *ad hoc* Tribunal as auxiliary to the crimes concerning attacks on people.

In 2016, the International Criminal Court (ICC) focused on the sole charge of crimes against cultural property in the *Prosecutor v. Al Mahdi*

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<sup>2</sup> In *Kordić*, the Trial Chamber (TC) recognized that “the destruction or willful damage done to institutions dedicated to religion” is a violation of the laws or customs of war enumerated under art. 3(d) of the ICTY Statute: “The IMT, the jurisprudence of this International Tribunal, and the 1991 ILC Report, *inter alia*, have all singled out the destruction of religious buildings as a clear case of persecution as a crime against humanity.” *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgement, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001). In addition: the act “when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity,’ for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.” *Id.* at ¶ 207. The Trial Chamber therefore found that “the destruction and willful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution.” *Id.* at ¶ 207. Yugoslav People’s Army (JNA), were both convicted, *inter alia*, of the war crime under art. 3(d) in connection with the shelling of the Old Town of Dubrovnik during the breakup of the former Yugoslavia. *See Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, ¶¶ 318–329 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); *See also Prosecutor v. Jokić*, Case No. IT-01-42/1-S, Judgement, ¶¶ 8, 21, 26 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004). Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Pterović, Valentin Čorić and Berislav Pušić, all members of the Croatian Defence Council (HVO), were convicted, *inter alia*, of the destruction or significant damage of ten mosques in East Mostar by the HVO’s shooting and shelling, and of the intentional destruction of the Stari Most (Old Bridge), a historic and culturally significant “international landmark” crossing the Neretva River between East and West Mostar in Bosnia. The TC recognized “the exceptional character and the historical and symbolic nature” of the Bridge, detailing its history and noting its importance “both for the inhabitants of the town of Mostar and to which it gave its name and for . . . the Balkan region.” *See Prosecutor v. Prlić*, Case No. IT-04-74-T, Judgement, ¶ 1282 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

case.<sup>3</sup> This judgment marks a first under several aspects, and scholars, such as Mark A. Drumbl and others, have published excellent studies regarding that case's decision and proceedings by extending the analytic lens into different places and varied spaces.<sup>4</sup>

In every scholarly publication, however, authors have failed to explore two components of the ICC judgment that are worth noting: first, the role played by the inhabitants of the Timbuktu area in preserving and safeguarding the buildings and institutions that have been then destroyed; and second, the elements of restorative justice traceable in the ICC Trial Chamber (TC)'s reasoning, in the behavior of those convicted, and in the kind of reparation the TC and the Trust Fund for Victims (TFV) awarded to victims.<sup>5</sup>

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<sup>3</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment (Sept. 27, 2016).

<sup>4</sup> Mark A. Drumbl, *From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property*, 17 J. INT'L CRIM. JUST. 77 (2019); Francesca Capone, *An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes Against Cultural Heritage*, 16 J. INT'L CRIM. JUST. 645 (2018); Paige Casaly, *Al Mahdi Before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. INT'L CRIM. JUST. 1199 (2016); Marina Lostal, *The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC*, 1 *Inter Gentes* 45 (2017); Sebastián A. Green Martínez, *Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?*, 13 J. INT'L CRIM. JUST. 1073 (2016); Tullio Scovazzi, *La prima sentenza della Corte penale internazionale in tema di distruzione di beni culturali [The First Judgment of the International Criminal Court on the Destruction of Cultural Property]*, 11 DIRITTI UMANI E DIRITTO INTERNAZIONALE 77 (2017) (It.).

<sup>5</sup> At the same time, even this case had not escaped criticism. For example, Al Mahdi was only prosecuted for destroying cultural heritage, even though he also allegedly committed murder and rape. Questions arise also on why the ICC spent its scarce resources prosecuting this mid-level militiaman rather than the leaders behind the violence in Mali. Similar questions are justified because the ICC does not explain why it makes the judicial choices it does. In recent years, scholars, activists, and politicians have accused the ICC of being anti-African, of failing to meet the needs of victims, and of being a "political" court, among other criticisms. See, e.g., Marieke de Hoon, *The ICC's Al Mahdi Case Is (Also) a Political Trial, and That's Fine!*, EJIL: TALK! (Aug. 31, 2016), <http://www.ejiltalk.org/the-iccs-al-mahdi-case-is-also-a-political-prial-and-thats-fine/#more-14533> [<https://perma.cc/35G8-2MZ6>].

This article will present (1) a summary of the Al Mahdi case and the ICC judgment; (2) an excursus on the crimes against culture at international level; (3) an analysis of the notion of ‘heritage community’ as applied to the Timbuktu community engaged in the protection of their cultural heritage; and (4) an analysis of the restorative justice measures taken by the ICC as part of the reparation awarded (5 and 6).

## 2. THE ICC JUDGMENT IN THE *AL MAHDI* CASE

On September 27, 2016, the ICC Chamber VIII convicted Ahmad Al Faqi Al Mahdi of the war crime of attacking protected objects as a co-perpetrator under art. 8(2)(e)(iv) and 25(3)(a) of the Rome Statute and sentenced him to nine years of imprisonment.<sup>6</sup>

In early April 2012, following the retreat of Malian armed forces, the groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) took control of the Timbuktu area of Northern Mali. From then until January 2013, Ansar Dine and AQIM imposed their religious and political control over the territory of Timbuktu and its people through the effective functioning of a local government, which included an Islamic tribunal, an Islamic police force, a media commission, and a morality brigade called the *Hesbah*.<sup>7</sup> The aim of these armed Islamist groups was to impose Sharia law throughout Mali.<sup>8</sup>

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<sup>6</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 49 (Sept. 27, 2016).

<sup>7</sup> See Prosecutor v. Al Mahdi, ICC-01/12-01/15, Agreement Regarding Admission of Guilt, 9–10 (Sept. 9, 2016), [https://www.icc-cpi.int/RelatedRecords/CR2016\\_06550.PDF](https://www.icc-cpi.int/RelatedRecords/CR2016_06550.PDF) [<https://perma.cc/66YX-7EX3>].

<sup>8</sup> INT’L CRIM. CT., SITUATION IN MALI: ART. 53(1) REPORT (Jan. 16, 2013), [https://www.google.com/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjVkanmqYPsAhWBvZ4KHYYvHBkkQFjAAegQIBBAB&url=https%3A%2F%2Fwww.icc-cpi.int%2FitemsDocuments%2FASAMaliArticle53\\_1PublicReportENG16Jan2013.pdf&usg=AOvVaw3Bf1G03Hq2ptPsb58yYp20](https://www.google.com/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjVkanmqYPsAhWBvZ4KHYYvHBkkQFjAAegQIBBAB&url=https%3A%2F%2Fwww.icc-cpi.int%2FitemsDocuments%2FASAMaliArticle53_1PublicReportENG16Jan2013.pdf&usg=AOvVaw3Bf1G03Hq2ptPsb58yYp20) [<https://perma.cc/L8JL-37SF>]; see also *Ahmad Al Faqi Al Mahdi at the ICC: Confirmation of Charges* (Open Soc’y Just. Initiative, Briefing Paper, 2016),

Al Mahdi joined the Ansar Dine armed group in April 2012 and, as an expert on matters of religion,<sup>9</sup> he was consulted in this capacity, including by the Islamic tribunal. In May 2012, he was appointed to lead the *Hesbah* with the goal to regulate the morality of the Timbuktu people's conduct and to prevent, suppress, and repress anything perceived by the occupiers to constitute "a visible vice." Indeed, for the Timbuktu population, the mausoleums of saints and mosques "constitute a common heritage for the community";<sup>10</sup> as places of prayer and, for some, places of pilgrimage, those structures were an integral part of their religious lives.

Al Mahdi was asked to monitor those sacred places visited by the residents with the goal to raise awareness among the population to stop engaging in "unlawful" religious practices and, eventually, to prohibit those practices. He performed this task for one month, taking notes on the inhabitants' behavior at the mausoleums, meeting with local religious leaders, and explaining on the radio what could and could not be done at the mausoleums. In June 2012, the leaders of Ansar Dine and AQIM decided to destroy the mausoleums. Al Mahdi was also consulted and, although he recognized "that all Islamic jurists agree on the prohibition of any construction over a tomb" (such as the mausoleums), he "recommended not destroying the mausoleums so as to *maintain relations between the population and the occupying groups*."<sup>11</sup>

Despite Al Mahdi's initial reservation, he agreed to conduct the attack, and he wrote a sermon dedicated to the destruction of the mausoleums, which was read at the Friday prayer before the attack's launch. Al Mahdi

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<https://www.opensocietyfoundations.org/sites/default/files/briefing-almahdi-icc-confirmation-charges%2020160225.pdf> [https://perma.cc/4F8Z-CHKS].

<sup>9</sup> Al Mahdi belongs to a family recognized in his community for having a particularly high knowledge of Islam, he received Koranic education since his childhood, expounded a thorough knowledge of the Koran, and gave lectures as an expert on religious matters. Prosecutor v. Al Mahdi, Summary of the Judgment and Sentence, ¶ 11, <https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf>, [https://perma.cc/34TJ-AN5J].

<sup>10</sup> See Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 34 (Sept. 27, 2016).

<sup>11</sup> *Id.* at ¶ 36 (emphasis added).

personally determined the sequence in which the buildings were to be attacked between June 30, 2012, and July 11, 2012. All ten sites were religious and historic monuments, not military targets; in addition, except for the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, all the buildings had the status of protected UNESCO World Heritage sites in accordance with the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.<sup>12</sup>

Regarding the modes of responsibility,<sup>13</sup> in light of the evidence, the Chamber found Al Mahdi a co-perpetrator in the commission of a war crime. Al Mahdi was involved in planning and preparing the attack, had overall responsibility for the execution of the attack, determined the

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<sup>12</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 6(1), Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

<sup>13</sup> The modes of responsibility are explained as follows:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) be made in the knowledge of the intention of the group to commit the crime; (e) in respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Rome Statute of the International Criminal Court, art. 25(3), July 17, 1998, 2187 U.N.T.S. 90.

sequence in which the buildings would be destroyed, made the necessary logistical arrangements, and justified the attack to the world through media interviews. Namely, Al Mahdi *personally and directly* participated in the destruction of five buildings. In a press interview during the attacks, Al Mahdi affirmed:

I don't know the truth about those saints. We just know that fools . . . come and take sand from those places to get blessed . . . That is why we consider this campaign as an effort that is exerted in collaboration with the imams . . . We only paid attention to the buildings constructed above the graves in the cemetery, and the tombs that are annexed to the mosques from the outside . . . As for demolishing these buildings, . . . we think that we have already introduced this matter gradually, as we've spent four months explaining to the people what's right and what's wrong, and now's the time for implementation.<sup>14</sup>

Al Mahdi was transferred to The Hague on September 26, 2015, in accordance with a warrant issued on September 18, 2015, by the Single Judge of Pre-Trial Chamber I, and his first appearance occurred on September 30, 2015.<sup>15</sup> The criminal proceedings ended less than one year later on September 27, 2016, expedited by a plea agreement reached on February 18, 2016.<sup>16</sup> On June 8, 2016, the Chamber appointed a Legal

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<sup>14</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 41 (Sept. 27, 2016).

<sup>15</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶¶ 1-7 (Sept. 27, 2016).

<sup>16</sup> The *Lubanga* case lasted nearly a decade, starting with Mr. Lubanga's arrest under a warrant issued by the ICC in March 2006 and concluding with the Appeals Chamber judgment in December 2014. See Prosecutor v. Dyilo, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (April 5, 2012); Prosecutor v. Dyilo, ICC-01/04-01/06-3121-Red, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against His Conviction (Dec. 1, 2014). Granted that one does not want to see fair trial guarantees sacrificed in favor of a quick resolution of the case, the *Al Mahdi* case demonstrates how international criminal law can strike a balance between pragmatic considerations of efficiency and principled demands of justice in practice. See Marina Aksenova, *The Al Mahdi Judgment and Sentence at the ICC: A Source of Cautious Optimism for International Criminal Justice*, EJIL: TALK! (Oct. 13, 2016), <https://www.ejiltalk.org/the-al-mahdi-judgment-and-sentence-at-the-icc-a-source-of-cautious-optimism-for-international-criminal-justice/> [<https://perma.cc/PZ4B-TJBL>].

Representative of Victims (LRV) and, in total, eight victims participated in the trial proceedings.<sup>17</sup>

During the trial, held from August 22 to 24, 2016, Al Mahdi made an admission of guilt, the Chamber heard three witnesses presented by the Prosecution and considered the hundreds of documentary evidence items also accepted by the accused. Al Mahdi was charged with intentionally directing attacks against ten buildings of a religious and historical character in Timbuktu, Mali, between June 30 and July 11, 2012.<sup>18</sup>

These aspects call for more analysis regarding the international legal framework for the protection of cultural property.

### 3. THE RECOGNITION OF CRIMES AGAINST CULTURE AT THE INTERNATIONAL LEVEL

The prosecution of Al Mahdi by the ICC and the decision rendered by the Chamber mark a solid stand in favor of the recognition of the worth of cultural heritage for people, the international community and humanity itself, and of the necessity to prosecute not just the destruction of protected objects, but also the intentional attacks against them.

Indeed, under art. 8(2)(e)(iv) of the Rome Statute dealing with war crimes, the criminal conduct required is an *intentional attack* against buildings that are dedicated to religion, education, art, science or charitable

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<sup>17</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15-97-Red, Decision on Victim Participation at Trial and Common Legal Representation of Victims (June 8, 2016), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-97-Red> [https://perma.cc/VQ75-HCAE].

<sup>18</sup> The buildings were: (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door and the two mausoleums adjoining the Djingareyber Mosque, namely (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 38 (Sept. 27, 2016).

purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not military objectives.<sup>19</sup> The Trial Chamber (TC) could not have looked at the ICTY jurisprudence for guidance because “in contrast to the [Rome] Statute, its [ICTY] applicable law does not govern ‘attacks’ against cultural objects but rather punishes their ‘destruction or willful damage.’ Thus, the legal contexts differ.”<sup>20</sup> This difference means that solely the *intentional attack* to buildings of religious, educational, social, or historical importance is recognized by the Rome Statute among the most serious criminal conducts that falls within the jurisdiction of the ICC.

The previously mentioned illegal conduct, as specified by the ICC Chamber, does not constitute a crime against persons but is a crime against property and, in the view of the Chamber, even if inherently dangerous, the latter is generally of lesser gravity than crimes against persons.<sup>21</sup> This distinction has legal consequences for the resultant type and length of punishment.<sup>22</sup>

Regarding the significance of the loss of cultural heritage stemming from Al Mahdi’s actions, the Chamber emphasized that “the wide diffusion of culture, and the education of humanity for justice and liberty and peace are

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<sup>19</sup> The article reads:

2. For the purpose of this Statute, ‘war crimes’ means: . . . (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . . (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

Rome Statute of the International Criminal Court, art. 25(3), July 17, 1998, 2187 U.N.T.S. 90.

<sup>20</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 16 (Sept. 27, 2016).

<sup>21</sup> *Id.* at ¶ 77.

<sup>22</sup> “[N]ot all crimes forming the grounds for a criminal conviction are necessarily of *equivalent gravity* and the Chamber has the duty to weigh each by distinguishing, for example, between those against persons and those targeting property.” *Id.* at ¶ 72 (emphasis added).

indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.”<sup>23</sup> The Chamber thus characterized the attack to those mausoleums and mosques as a clear “affront to [those] values.”<sup>24</sup>

Similarly, in bringing the case, ICC Prosecutor Fatou Bensouda focused on the importance of those buildings and monuments to both the community’s identity and the collective conscience of the entire international community. ICC Prosecutor Bensouda argued that “[s]uch an attack against buildings dedicated to religion and historic monuments . . . destroy[ed] the roots of an entire people and profoundly and irremediably affect[ed] its social practices and structures.”<sup>25</sup> She then described the importance of the mausoleums in the everyday lives of the citizens of Timbuktu, noting that after their destruction, “[i]t became impossible for the inhabitants of Timbuktu to devote themselves to their religious practices . . . [which] were deeply rooted in their lives . . . [and] signified the deepest and most intimate part of a human being: faith.”<sup>26</sup> Bensouda also clearly stated that the case was not about determining who was right or wrong from a religious point of view because to intentionally direct an attack against such monuments is a war crime under the Rome Statute “regardless of the

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<sup>23</sup> *Id.* at ¶ 46.

<sup>24</sup> *Id.* at ¶ 46. In the middle of the XVIII century, Emer de Vattel deplored the “willful destruction of public monuments, temples, tombs, statues, paintings, etc. because it is never conducive to the rightful object of war.” He declared that those who destroy cultural property during war are “sworn enemies of the human race to deprive it lightly of such monuments of the arts and models of taste.” Emer de Vattel, *Le droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* 168 (vol. 1, 1758), *translated by* Author.

<sup>25</sup> ICC Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case Against Mr Ahmad Al-Faqi Al Mahdi (Mar. 1, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> [<https://perma.cc/7ME3-AQKB>].

<sup>26</sup> *Id.*

judgement by other people on the religious practices by the inhabitants of Timbuktu.”<sup>27</sup>

In addition to the cultural consequences to Mali, the Prosecutor also noted that the mausoleums were of historical and cultural importance for all of Africa and the entire world because “cultural heritage is the mirror of humanity.”<sup>28</sup> Bensouda noticed that, “with one exception, all of [the] sites in Timbuktu had been designated by UNESCO as World Heritage sites” because they “constituted a chapter in the history of humanity,” and as a consequence humanity as a whole was affected by that loss.<sup>29</sup> She emphasized that, after the destruction of the mausoleums in historic Timbuktu, “humanity’s collective conscience was shocked by the senseless destruction of its common heritage” and humanity had “to stand firm in rejecting [those] crimes through concrete punitive action.”<sup>30</sup>

In an effort to reinforce the prosecutor’s analysis of this significant loss of cultural icons, the TC’s judgment reflected on the impact on the community.<sup>31</sup> In assessing the seriousness of *Al Mahdi*’s acts for the purpose of sentencing, the Chamber noted the testimony of an expert witness, who stated, “Timbuktu is at the heart of Mali’s cultural heritage” and the mausoleums in question “were of great importance to the people of Timbuktu . . . and played a psychological role . . . of being perceived as protecting the people of Timbuktu.”<sup>32</sup> The Chamber acknowledged that “the fact that the targeted buildings . . . [had] a symbolic and emotional value for the inhabitant of Timbuktu is relevant in assessing the gravity of the crime committed.”<sup>33</sup>

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> The sites “constitute a common heritage” for the local Timbuktu community and the TC’s judgment described them as “an integral part of the religious life of [Timbuktu’s] inhabitants.” *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Judgment, ¶ 34 (Sept. 27, 2016).

<sup>32</sup> *Id.* at ¶ 78.

<sup>33</sup> *Id.* at ¶ 79.

This sentiment, and its weight in determining the content of the sentence, appeared often throughout the testimonies of the witnesses. Witness P-431 emphasized that “when it came to the destruction of the Timbuktu mausoleums, this was indeed a matter of an activity of war to psychologically kill the people of Timbuktu, destroying the property or buildings for which they had an effective [sic] attachment . . . It consists of killing the enemy in that [people]’s soul.”<sup>34</sup>

Witness P-151, supporting the belief that heritage is part of cultural life, similarly described how the entire international community was suffering as a result of the destruction of the protected sites.<sup>35</sup> Art, architecture, and literature are anchors for humanity, reminding us of the values tying communities together. Their preservation is thus essential for the formation of collective consciousness on both local and global levels.

Accordingly, the Chamber reiterated that the attack to all sites appeared to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the “faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.”<sup>36</sup>

Indeed, the recognition of a multiplicity of victims, direct and indirect, and the range of victims involved has been used by the Chamber as one of the most relevant elements for assessing the gravity of the crime.<sup>37</sup>

Despite the positive outcome of Al Mahdi’s judgment, several critiques offer important perspectives on how judicial reasoning in criminal attacks against cultural heritage could develop in the future. Analyzing these perspectives could also strengthen the judicial culture to ensure that there is

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<sup>34</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Trial Hearing Transcript, ¶¶ 89–90 (Aug. 23, 2016), [https://www.icc-cpi.int/Transcripts/CR2016\\_05772.pdf](https://www.icc-cpi.int/Transcripts/CR2016_05772.pdf) [<https://perma.cc/9DKD-UALH>].

<sup>35</sup> *Id.* at ¶¶ 59–61.

<sup>36</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶¶ 39, 46 (Sept. 27, 2016); *See also* Prosecutor v. Al Mahdi, ICC-01/12-01/15, Prosecution’s Submissions on Sentencing, ¶¶ 17–29, 61 (July 22, 2016).

<sup>37</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Transcript (Aug. 24, 2016).

justice for populations whose heritage is targeted and subjected to destruction by extremist religious groups like Ansar Dine, AQIM, and ISIS.<sup>38</sup>

One critical argument considers how the debate between universalism and cultural relativism influences the decisions to prosecute attacks on cultural heritage, and also how the ICC should take a relativist approach to determining the merits and admissibility of charges for those attacks. That view supports having judges who do not limit recognizing the gravity of such crimes to cultural property that is qualified as a World Heritage Site.<sup>39</sup>

According to another argument, although the Al Mahdi decision was lauded for recognizing the link between the attacks and cultural destruction and for the precedential value of such recognition in international criminal law, the ICC did not invoke the crime of cultural genocide that focuses on the destruction of cultural identity of groups.<sup>40</sup>

#### 4. AN EXAMPLE OF A “HERITAGE COMMUNITY” INVOLVED IN THE PROTECTION OF CULTURAL HERITAGE

The local community of Northern Mali and its actions to take care of the mausoleums and other local buildings is a quintessential example of a “heritage community,” which is a community of people interested in preserving, valuing and transmitting to future generation some cultural heritage, aside from the fact that they did not personally create, or participate in the creation of, that cultural heritage.

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<sup>38</sup> On the reasons why the *Hisbah* in Mali destroyed cultural property, and the shortfalls in the TC’s consideration of the rationales for the protection and destruction of cultural property, see Mohamed Elewa Badar & Noelle Higgins, *Discussion Interrupted: The Destruction and Protection of Cultural Property Under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi*, 17 INT’L CRIM. L. REV. 486 (2107).

<sup>39</sup> Paige Casaly, *Al Mahdi Before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. INT’L CRIM. JUST. 1199 (2016).

<sup>40</sup> Leora Bilsky & Rachel Klagsbrun, *The Return of Cultural Genocide?*, 29 EUR. J. INT’L L. 373 (2018).

Some clarifications on the specific notion of “heritage community” help to better understand this assumption regarding the relationship between the people of Northern Mali and their local cultural heritage. The previously mentioned notion was introduced by the Council of Europe’s (CoE) Framework Convention on the role of cultural heritage in society (the Faro Convention).<sup>41</sup> The Convention describes heritage communities as “consist[ing] of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.”<sup>42</sup> This notion is very entwined with the enriched definition of cultural heritage, set forth in the same Convention: “cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time.”<sup>43</sup> Heritage is thus recognized as significant not just to those who, directly or indirectly, create it, but, as accurately emphasized by some authors, “the Faro perspective suggests that cultural heritage is not just ‘someone’s heritage[,]’ but involves strong symbolic constructs that also interest ‘others[,]’ and this touches you and me, not just its bearers or practitioners.”<sup>44</sup> The Faro Convention recognizes

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<sup>41</sup> Council of Europe Framework Convention on the Value of Cultural Heritage for Society art. 2, Oct. 27, 2005, C.E.T.S. No. 199 [hereinafter *The Faro Convention*], *The Faro Convention*, adopted by the CoE Committee of Ministers on October 13, 2005, has been in force since June 1, 2011. To date, twenty states have ratified it: Armenia, Austria, Bosnia and Herzegovina, Croatia, Finland, Georgia, Hungary, Italy, Latvia, Luxembourg, the Republic of Moldova, Montenegro, Norway, Portugal, Serbia, Slovakia, Slovenia, Switzerland, Ukraine, and “the former Yugoslav Republic of Macedonia.” Five States have signed the Convention without ratifying it: Albania, Belgium, Bulgaria, San Marino, and Spain. *Chart of Signatures and Ratifications of Treaty 199*, COUNCIL OF EUR., [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/199/signatures?p\\_auth=dg2WfyCT](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/199/signatures?p_auth=dg2WfyCT) [<https://perma.cc/JZC9-JQWB>].

<sup>42</sup> *The Faro Convention*, at art. 2(b).

<sup>43</sup> *Id.* at art. 2(a).

<sup>44</sup> Antonio Arantes, Universidade Estadual de Campinas, Brazil, Session 2 Keynote Address at Cultural Heritage. Scenarios 2016: Cultural Heritage Inspires (Nov. 26, 2015)

that “cultural heritage establishes a dialogue with cultural repertoires of ‘others,’ possibly inspiring and being inspired by them, both symbolically and practically, and is thus open to innovations.”<sup>45</sup>

The indistinctness, or apparent vagueness, of the notion of a heritage community does not represent a limitation.<sup>46</sup> Rather, the emphasis is on its dynamic aspects and its adaptability and flexibility to the community’s needs; it values the specific interactions between its members and other communities too.<sup>47</sup> Thus, this open definition of heritage community is not characterized by any geographical, ethnic, or socio-cultural unchanging criteria. Though some common elements may be shared (a religion, a geographical context, a behavior, a feeling, a language, or a specific historic and cultural background), there is no rigid list of communities generating determinants. The only requirement for giving substance to the notion at stake is represented by the capacity and intensity of the determinant(s) in connecting the individuals within the community, sharing the cultural values, participating in the cultural life of the community, and desiring to safeguard and transmit that heritage to future generations.<sup>48</sup>

The Faro Convention also refers to heritage communities in declaring that States Parties “undertake to take into consideration the value attached by each heritage community to the cultural heritage with which it

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(transcript available at <https://www.unive.it/media/allegato/centri/CESTUDIR/CulturalHeritage-April2016.pdf> [<https://perma.cc/U6WU-MMH2>] at 61).

<sup>45</sup> *Id.*; see also Antonio Arantes, *Cultural Heritage Misfits: Perspectives from Developing Worlds*, in CULTURAL HERITAGE. SCENARIOS 2015–2017 265 (Simona Pinton & Lauso Zagato eds., 2017), [https://edizionicafoscari.unive.it/media/pdf/books/978-88-6969-225-3/978-88-6969-225-3\\_MQpSP8B.pdf](https://edizionicafoscari.unive.it/media/pdf/books/978-88-6969-225-3/978-88-6969-225-3_MQpSP8B.pdf) [<https://perma.cc/UPC3-YSGC>].

<sup>46</sup> See Simona Pinton & Lauso Zagato, *Verso un regime giuridico ad hoc per le comunità patrimoniali?*, 37/39 ANTROPOLOGIA MUSEALE ETNOGRAFIA PATRIMONI CULTURE VISIVE 22 (2015-16) (It.).

<sup>47</sup> *Id.* at 24.

<sup>48</sup> *See id.*

identifies.”<sup>49</sup> The object of the obligation may appear undetermined but the legal existence and recognition of the obligation itself is not at stake.<sup>50</sup> The elusiveness stems rather from the expression “to take into consideration.”<sup>51</sup>

In any case the conduct of States Parties has to be in compliance with another obligation set for them in the Faro Convention, namely the Parties undertake to develop “through the Council of Europe, a monitoring function covering legislations, policies and practices concerning cultural heritage, consistent with the principles established by this Convention.”<sup>52</sup> Article 16 of the Faro Convention provides a mechanism for monitoring compliance.<sup>53</sup>

So conceptualized, the notion of a heritage community best defines what the “right to cultural heritage” means: not simply the right to benefit from the existing heritage, but the right to take part in the “selection,” “valorization,” and “recreation” of cultural expressions, both tangible and intangible.<sup>54</sup> The recognition of the right to cultural heritage<sup>55</sup> marks

<sup>49</sup> See The Faro Convention, *supra* note 41, at art. 12(b).

<sup>50</sup> Pinton & Zagato, *supra* note 46, at 25.

<sup>51</sup> *Id.*

<sup>52</sup> See The Faro Convention, *supra* note 41, at art. 15.

<sup>53</sup> Art. 16(a) states: “The Committee of Ministers, pursuant to Article 17 of the Statute of the Council of Europe, shall nominate an appropriate committee or specify an existing committee to monitor the application of the Convention, which will be authorized to make rules for the conduct of its business.” The Faro Convention, *supra* note 41, at art. 16(a).

<sup>54</sup> See Simona Pinton, *La Convenzione di Faro: Alcuni Profili di Diritto Internazionale, in IL VALORE DEL PATRIMONIO CULTURALE PER LA SOCIETÀ E LA COMUNITÀ: LA CONVENZIONE DEL CONSIGLIO D’EUROPA TRA TEORIA E PRASSI* 73, 81–89 (Luisella Pavan-Woolfe & Simona Pinton eds., 2019).

<sup>55</sup> Art. 4 states:

The Parties recognize that: (a) everyone, alone or collectively, has the right to benefit from the cultural heritage and to contribute towards its enrichment; (b) everyone, alone or collectively, has the responsibility to respect the cultural heritage of others as much as their own heritage, and consequently the common heritage of Europe; (c) exercise of the right to cultural heritage may be subject only to those restrictions which are necessary in a democratic society for the protection of the public interest and the rights and freedoms of others.

The Faro Convention, *supra* note 41, at art. 4.

another innovative element of the Faro Convention.<sup>56</sup> This legal instrument has so solemnly declared that the right to cultural heritage belongs to the realm of human rights and sets forth another clear obligation for States Parties “to undertake to ensure, in the specific context of each Party, that legislative provisions exist for exercising the right to cultural heritage.”<sup>57</sup>

As mentioned, the Faro Convention is a framework agreement. Thus, it addresses, in terms of principles and recommendations, the conduct of States Parties on one side, but focuses very much on the participation of heritage communities in the processes concerning the safeguarding and valorization of cultural heritage on the other. By adopting the notion of the heritage community, States Parties to the Faro Convention are indeed tracing an innovative paradigm in the international legal horizon connected to cultural heritage. This paradigm underscores the relationship among the social and environmental contexts, cultural heritage, and cultural policies to be adopted by both public and private institutions.

As a regional treaty, then, its legal milieu is evidently different from the African one. Nevertheless, the Faro Convention is an open agreement, and this means that it is also open to the accession of States which are non-members of the Council of Europe.<sup>58</sup>

The behavior and beliefs of Timbuktu’s residents indicated that the mausoleums of saints and mosques of Timbuktu were and are integral to their religious lives, and other subjects outside the areas of Northern Mali and Mali felt outrage themselves. Accordingly, based on the outlined notion of heritage community as a term of art, both categories of individuals may be considered victims, direct and indirect, of the crime under art.8(2)(e)(iv) of the Rome Statute, as members of a heritage community.

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<sup>56</sup> See Lauso Zagato, *(In-)tangible Cultural Heritage as a World of Rights?*, in CULTURAL HERITAGE. SCENARIOS 2015–2017, *supra* note 45, at 521, 531–533.

<sup>57</sup> See The Faro Convention, *supra* note 41, at art. 5(c).

<sup>58</sup> See The Faro Convention, *supra* note 41, at art. 19.

As previously stated, the manuscripts and the mausoleums of the saints are at the heart of Mali’s cultural heritage: they reflect parts of Timbuktu’s history and its role in the expansion of Islam; they reflect the commitment of the people of Timbuktu to Islam; and they play a psychological role to the extent that they are perceived as protecting the people of Timbuktu.

As described by witness P-151 during the trial’s hearings, the people of Timbuktu had collectively ensured that the mausoleums remained in good condition through symbolic maintenance events involving the entire community—women, the elderly, and young people alike.<sup>59</sup> The Chamber also valued the testimony of witness P-431, who reiterated that the people of Timbuktu protested against the destruction and refused to see the mausoleums razed to the ground:

... [D]estroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu. In general, the population of Mali, who considered Timbuktu as a source of pride, was indignant to see these acts take place.<sup>60</sup>

A resident of the city once expressed a similar sentiment on Radio France Internationale: “[t]he people are very, very angry today because the mausoleum is the symbol of Timbuktu.”<sup>61</sup>

The international reaction that followed the campaign of cultural destruction in Timbuktu also contributed to the idea that a heritage community may be constituted by people other than the country’s inhabitants. Algeria, for example, through its Foreign Ministry

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<sup>59</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶¶ 34, 78 (Sept. 27, 2016); *see also* Prosecutor v. Al Mahdi, ICC-01/12-01/15-135-Conf, LRV Sentencing Observations ¶¶ 26–31 (July 22, 2016).

<sup>60</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 80 (Sept. 27, 2016).

<sup>61</sup> ICC Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of Trial in the Case Against Mr Ahmad Al-Faqi Al Mahdi (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822> [<https://perma.cc/ZQY3-3UXU>].

Spokesperson, strongly condemned the attacks, stating that the mausoleums “are not only part of the Islamic cultural heritage belonging to the memory and the collective consciousness of Mali, but also as a common heritage shared by both Algeria and Mali.” The Chairperson of the African Group at the UNESCO moreover emphasised that “it [was] not only Mali which is affected by the destruction of heritage sites in that country. Mali’s heritage sites are Africa’s heritage sites, and they are also the world’s heritage sites.”<sup>62</sup>

## 5. GLINTS OF RESTORATIVE JUSTICE IN THE PROCEEDINGS

The Al Mahdi case gives an example of what restorative justice can look like in the context of a legal proceeding. Al Mahdi’s admission of guilt and his cooperation with the prosecution was the decisive factor in determining his sentence.

Al Mahdi showed repentance and called on the people not to replicate the same acts he was involved in “because they are not going to lead to any good for humanity.”<sup>63</sup> He insisted that the remorse he was feeling was for the damage caused to his family, his community in Timbuktu, his country, and the international community.<sup>64</sup> He also made the solemn promise that “this was the first and the last wrongful act [he] will ever commit.”<sup>65</sup>

Al-Mahdi’s remorse attested to the potential for rehabilitation. Article 10(3) of the International Covenant on Civil and Political Rights underlines reformation and social rehabilitation of the offender as one of the aims of the penitentiary system.<sup>66</sup> According to General Comment n. 21 of the

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<sup>62</sup> *Id.*

<sup>63</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶ 103 (Sept. 27, 2016).

<sup>64</sup> *Id.*

<sup>65</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15-T-4-Red-ENG, Trial Chamber VIII Transcript, 8 (Aug. 22, 2016).

<sup>66</sup> “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal

Human Rights Committee on that article 10, “no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner,” and “States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.”<sup>67</sup> States should adopt legislative provisions, administrative provisions, or practical measures to ensure the re-education of convicted persons. Namely, specific measures should be taken by States “to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.”<sup>68</sup>

International criminal law often overlooks the sentencing objective of rehabilitation of the convicted, but in the case of Al Mahdi, the judges were able to appraise that Al Mahdi’s admission of guilt and cooperation with the prosecution’s work showed that he would be likely to successfully reintegrate into society.<sup>69</sup>

Moreover, because the ICC has finally acknowledged the significance of the destruction done, the Tribunal recognized that the admission of guilt may have furthered peace and reconciliation in Northern Mali by alleviating the victims’ moral suffering.<sup>70</sup> Indeed, Al Mahdi also communicated sentiments of empathy towards the victims of the crime he committed and,

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status.” G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 10(3) (Dec. 16, 1966).

<sup>67</sup> Off. of the U.N. High Comm’r for Hum. Rts., Hum. Rts. Comm., *General Comment No. 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Art. 10)* ¶ 10 (Apr. 10, 1992).

<sup>68</sup> *Id.* at ¶ 11. The issue of rehabilitation for the victims of crimes as a form of reparation is a different issue. On rehabilitation as a form of reparation for victims of gross human rights violations from the point of view of health professionals, see Nora Sveaass, *Gross Human Rights Violations and Reparation Under International Law: Approaching Rehabilitation as a Form of Reparation*, 4 EUR. J. PSYCHOTRAUMATOLOGY 1 (2013).

<sup>69</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment, ¶¶ 97–99 (Sept. 27, 2016).

<sup>70</sup> *Id.* at ¶ 100.

as a tangible act, he offered to reimburse the imam of the Sidi Yahia Mosque for the cost of replacing the door.<sup>71</sup>

Al Mahdi's behavior and confession illustrated his recognition of the gravity of the destruction and the victims' suffering, but also his remorse for his acts. These outcomes are practical examples of what restorative justice can look like in a criminal legal proceeding.

Restorative justice is a paradigm proposed by a theory of justice that distances itself from retributive elements.<sup>72</sup> Restorative justice calls the focus upon the social implications of the crimes committed as a specific aspect of the relationship between victims and perpetrators. In doctrine, the concept of restorative justice is widely used to emphasize redress to or restoration of victims and the wider community, and the reintegration of the offender into the community.<sup>73</sup>

Some authors describe "restorative justice" in the following way:

[A] concept that aims to involve the offender, the victim and the community in a somehow equal basis in their search for repair, reconciliation and justice. Rather than punishing only the perpetrator for the crimes committed, this concept includes measures of mediation, community service, restitution and other

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<sup>71</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15-T-4-Red-ENG, Trial Chamber VIII Transcript, ¶ 104 (Aug. 22, 2016).

<sup>72</sup> Retributive justice is the theory that advances the importance of punishment and condemnation as an objective for achieving justice because "the offender has taken an unfair advantage in committing a crime, which can only be corrected by the administration of a punishment." See Declan Roche, *Retribution and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 75, 78 (Gerry Johnstone & Daniel W. Van Ness eds., Routledge 2007). A more comprehensive theory of retributive justice goes beyond the notion of punishment to be conceived as a "necessary means to achieving a society built on justice and the rule of law." Charles Villa-Vicencio, *Transitional Justice, Restoration, and Prosecution*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 387, 391 (Dennis Sullivan & Larry Tiffet eds., Routledge 2006).

<sup>73</sup> Andrew von Hirsch, Andrew Ashworth & Clifford Shearing, *Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS 21 (Andrew von Hirsch et al. eds., 2003).

forms of diversion aimed at providing redress to the victim and reconciliation between victim and offender.<sup>74</sup>

A more holistic perspective defines restorative justice as “an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of the victims, offenders and communities.”<sup>75</sup> As John Braithwaite writes, justice is restorative when it is “about restoring victims, restoring offenders, and restoring communities as the result of a plurality of stakeholders.”<sup>76</sup>

The active engagement of the affected parties in the justice process is indeed one key aspect of addressing the “relational and social harm” produced by the commission of international and national crimes. Moreover, restorative justice’s focus on rebuilding broken relationships resonates in cases of grave crimes which heavily damage interpersonal relations and the social fabric. This does not mean that the concept of restorative justice should be reduced to restorative practices relying on the voluntary deliberations of the parties directly affected by the specific crime, such as victim-offender mediation. Rather, at the international level, restorative justice may be chosen by the international community to address international crimes and take into consideration the circumstances of each case. For this reason, restorative justice works more as an approach, a “set of principles,”<sup>77</sup> rather than a cluster of specific mechanisms and measures; that is, restorative justice may inspire, to different degrees, a variety of initiatives, programs, and systems to redress criminal and civil offences.

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<sup>74</sup> Manfred Nowak, *The Right to Reparation of Victims of Gross Human Rights Violations*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 2001: REPARATIONS: REDRESSING PAST WRONGS 275 (George Ulrich & Louise Krabbe Boserup eds., 2001).

<sup>75</sup> Economic and Social Council Res. 2002/12, at 2 (Aug. 12, 2003).

<sup>76</sup> John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999).

<sup>77</sup> HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 3 (1st ed. 2002).

This also means that restorative justice implies an “active responsibility” concept, wherein offenders must take responsibility for their conduct by contributing actively to repairing the negative consequences of their offences.<sup>78</sup> Under this perspective, restorative justice is significant because it emphasizes the re-affirmation of the specific position of each party in relation to the crime committed. For example, for many victims of the 1994 Rwandan genocide, justice meant the establishment of who did wrong and who did right in the horrible three months during which the genocide occurred. For many Rwandan victims, justice had to establish a recognition of the “historical truth.”<sup>79</sup>

In the last decade, restorative justice has gained additional ground in the context of international criminal justice by “providing a different way in which offending and the consequence of offending are dealt with.”<sup>80</sup> According to the UN Handbook on Restorative Justice Programs, “restorative justice is a way of responding to criminal behavior by balancing the needs of the community, the victims and the offender.”<sup>81</sup> Under this perspective, restorative justice originates from the principle that criminal behavior is not only a violation of the law, but also “a violation of people and relationships.”<sup>82</sup>

At the same time, the theory of restorative justice helps to shed more light upon the importance of restoration of victims’ rights and prerogatives by focusing on the necessity of taking an appropriate action to redress the

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<sup>78</sup> See generally Lode Walgrave, *Restorative Justice: An Alternative for Responding to Crime?*, INTERNATIONAL HANDBOOK OF PENOLOGY AND CRIMINAL JUSTICE 613 (Shlomo Giora Shoham et al. eds., 2007).

<sup>79</sup> FRANÇOISE KANKINDI & DANIELE SCAGLIONE, RWANDA, LA CATTIVA MEMORIA: COSA RIMANE DEL GENOCIDIO CHE HA LASCIATO INDIFFERENTE IL MONDO 113 (1st ed. 2014).

<sup>80</sup> Simon Green, *The Victims’ Movement and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE 171, 185 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

<sup>81</sup> U.N. OFF. ON DRUGS & CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES, at 6, U.N. Sales No. E.06.V.15 (2006).

<sup>82</sup> HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 181 (1st ed. 1990).

resentment and legitimate claims of victims and survivors. However, as plausible as this approach sounds, when atrocity crimes have been committed, there are clear limits to what can be restored. The challenge is to have an institutional system that shapes the responses to atrocities in a way that includes the acknowledgement of the harm done to specific people, the preservation of the dignity of direct and indirect victims, and the opportunity for them to have their stories heard. This also ensures *adequate* reparation in the forms of financial compensation, restitution of goods, rehabilitation through social measures, and symbolic measures, pursued at both the individual and collective levels.

The Al Mahdi case marks the first instance in which an international criminal court had to consider *how* to compensate for damages while at the same time examining how cultural heritage is understood. Cultural heritage is “to be understood as encompassing the resources enabling cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations.”<sup>83</sup>

The next section will examine the reparation’s measures awarded by the Chamber, their calculation, their profiles of restorative justice, and the implementation plan proposed by the Trust Fund for Victims (TFV).

## 6. THE QUANTIFICATION OF CULTURAL DAMAGES AND THE IMPLEMENTATION OF AWARDED REPARATION MEASURES

Although only eight victims participated in the trial process, the ICC explored who the victims of the destruction of cultural heritage really were—individuals, local communities, the State of Mali, the international community—and what constituted adequate reparations for both tangible and intangible damage.

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<sup>83</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public Reparations Order, ¶ 15 (Aug. 17, 2017).

In the Al Mahdi case, the Reparations Order was issued by TC VIII on August 17, 2017.<sup>84</sup> The Order built upon the reparation principles established in the Lubanga<sup>85</sup> and Katanga<sup>86</sup> cases dealing with crimes against persons; however, it marked the first opportunity for judges to pronounce appropriate reparations for acts dealing solely with cultural heritage's destruction.

The TC determined that the crime committed by Al Mahdi caused physical damage to the protected buildings as well as economic and moral harm, and awarded individual, collective, and symbolic reparations.<sup>87</sup>

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<sup>84</sup> *Id.* Pursuant to Regulation 110(2) of the Regulations of the Registry and rule 97(2) of the Rules of Procedure and Evidence, the ICC Registry launched a call for experts to assist the Court with reparations. The experts had to present knowledge in the matters of:

- 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.

See ICC Registry, Call by the Registry of the ICC for Experts on Reparations for Victims Within the Framework of Reparations Proceedings in the Case of the Prosecutor v. Ahmad Al Faqi Al Mahdi (Oct. 20, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=161020callforexperts> [<https://perma.cc/B9FE-HEGH>]. The Trial Chamber appointed competent experts included on the list of experts that the Registry of the Court created and maintained pursuant to Regulation 44 of the Regulations of the Court.

<sup>85</sup> Prosecutor v. Dyilo, ICC-01/04-01/06-2842, Decision Establishing the Principles and Procedures to be Applied to Reparations, 64–93 (Aug. 7, 2012). Lubanga was found guilty, on March 14, 2012, of the war crimes of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities (as child soldiers). See ICC, Prosecutor v. Dyilo, ICC-01/04-01/06, Case Information Sheet (**Dec. 15, 2017**).

<sup>86</sup> Prosecutor v. Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Article 75 of the Statute, ¶¶ 29–34 (Mar. 24, 2017). Germain Katanga was found guilty on March 7, 2014, of one count of a crime against humanity and four counts of war crimes committed on February 24, 2003, during the attack on the village of Bogoro in the Democratic Republic of the Congo. He was sentenced on May 23, 2014, to a total of twelve years' imprisonment. See ICC, Prosecutor v. Katanga, ICC-01/04-01/07, Case Information Sheet (Mar. 20, 2018).

<sup>87</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public Reparations Order, ¶ 60 (Aug. 17, 2017).

Individual reparations were awarded to those who suffered “more acute and exceptional harm relative to the rest of the Timbuktu community.”<sup>88</sup> This included those who suffered consequential economic loss because their livelihoods exclusively depended upon the protected buildings. “For moral harm suffered, [individual] reparations were awarded to those whose ancestors’ burial sites were damaged in the attack.”<sup>89</sup>

The Chamber awarded collective reparations, including guarantees of non-repetition, to the Timbuktu community. The Chamber defined the eligible recipients of the reparations as “organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack.”<sup>90</sup> Those ineligible for individual reparations have the opportunity to participate in collective reparations programs, which may include financial support to individual businesses and families, in light of the moral harm inflicted by the sites’ destruction.<sup>91</sup>

The Chamber identified three precise groups of relevant victims: the inhabitants of Timbuktu as the direct victims of the crime; the population of Mali; and, notably, the international community. The latter subject is a new facet in the reparation jurisprudence of the ICC and its inclusion in the Order has been explained by some scholars as the consequence of the specific qualification given to the crime for which Al Mahdi has been convicted.<sup>92</sup> That is: “the destruction of cultural heritage erase[d] part of the

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<sup>88</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Decision on TFV Request for Clarification Regarding Individual Reparations for Economic Harm, at ¶ 1 (Aug. 31, 2018).

<sup>89</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public Reparations Order, at ¶ 104(ii)–(iii).

<sup>90</sup> *Id.* at ¶¶ 82–83, 145.

<sup>91</sup> *Id.* at ¶ 104. On the Reparations Order, see Francesca Capone, *An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes Against Cultural Heritage*, 16 J. INT’L CRIM. JUST. 645, 651 (2018).

<sup>92</sup> Sophie Starrenburg, *Who Is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, EJIL:

heritage of all humankind,” as such causing harm to the international community.<sup>93</sup> Nonetheless, the TC limited the analysis and calculation of reparation for damages primarily to the first category of victims and granted “one symbolic euro . . . to the international community, which is best represented by UNESCO”; and one symbolic euro to the Malian State.<sup>94</sup>

As to the latter circumstances, some criticisms explain the TC’s choice to keep the reparations symbolic “by reason of the continued ICC’s fear to get backlash for conducting a trial focusing solely upon the destruction of heritage.”<sup>95</sup>

To strictly apply the distinction between crimes against people and crimes against property to the destruction of cultural heritage does not correctly mirror the nature and extent of crimes against cultural heritage. In the latter crimes, people and property are interconnected. In the Reparations Order, the TC gave account of this bond: “cultural heritage is to be understood as encompassing the resources enabling cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations.”<sup>96</sup> Cultural heritage thus sets a connection between present and future generations. In addition, “Cultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future.”<sup>97</sup> According to UNESCO, “the loss of heritage during times of conflict can deprive a community of its identity and memory, as well as the physical testimony of its past. Those destroying

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TALK! (Aug. 25, 2017), <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/> [<https://perma.cc/9TSE-AMJ2>].

<sup>93</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public Reparations Order, ¶ 53 (Aug. 17, 2017).

<sup>94</sup> *Id.* at ¶ 107.

<sup>95</sup> Starrenburg, *supra* note 92.

<sup>96</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public Reparations Order, ¶ 15 (Aug. 17, 2017).

<sup>97</sup> *Id.* at ¶ 14.

cultural heritage seek to disrupt the social fabric of societies.”<sup>98</sup> Plus, “cultural heritage is important not only in itself, but also in relation to its human dimension. Cultural property also allows a group to distinguish and identify itself before the world community.”<sup>99</sup> Indeed, “the attack against the Protected Buildings not only destroyed and damaged physical structures. Its impact ‘rippled out into the community and diminished the link and identity the local community had’ with such valuable cultural heritage.”<sup>100</sup>

In the Reparation Order, the TC reiterated that the majority of the destroyed sites were World Heritage sites, and the “greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern.”<sup>101</sup> Regrettably, the listing process at UNESCO has been viewed as exceedingly politicized and biased towards particular forms of heritage, so that the existing world heritage lists do not accurately represent each culture across the globe fairly.<sup>102</sup> A World Heritage label should not be the only method of showing the gravity of heritage destruction. The destroyed cultural heritage may not always have the “luck” to be listed in the World Heritage List at the time of targeting.<sup>103</sup>

Focusing on the quantification of the damages generated by the crime, the TC affirmed that Al Mahdi’s indigence did not have any impact on the reparations award, and set Al Mahdi’s total liability at 2.7 million euros.<sup>104</sup>

The people of Timbuktu were awarded, individually, nearly the full amount of compensation for the damage to protected buildings as well as

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at ¶ 16.

<sup>100</sup> *Id.* at ¶ 19.

<sup>101</sup> *Id.* at ¶ 17.

<sup>102</sup> *See* Starrenburg, *supra* note 92.

<sup>103</sup> *Id.*

<sup>104</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Public Reparations Order, ¶114 (Aug. 17, 2017).

for consequential economic loss and moral harm.<sup>105</sup> Given that the mausoleums and the Mosque were restored by UNESCO in partnership with the European Union and other donors, the TC focused on collective measures to ensure the non-repetition of the attacks. The TC then focused on the redress of the moral harm via symbolic forms of satisfaction—such as apologies, memorials, commemoration, or forgiveness ceremonies—to give public recognition of the moral harm suffered by the Timbuktu community and those within it. The quantification of the moral harm is of particular interest for the following reasons.

The TC highlighted the “inherent difficulty in addressing and measuring monetary values for moral harm. As submitted by the Legal Representatives of Victims (LRV), ‘a price cannot be put on dignity, as it cannot be put on faith, and so both are that much more difficult to restore.’”<sup>106</sup> Nevertheless, in the initial Reparation Order the TC, under the advice of nominated experts, estimated in monetary terms “the mental pain and anguish suffered . . . at approximately 437,000 USD.”<sup>107</sup> The experts derived the amount

[F]rom an award identified in a similar case, whereby in 2009 the Eritrea Ethiopia Claims Commission reflected the unique cultural significance of the damaged Stela of Matara with a 23,000 USD award. The expert then revised this number upwards to reflect the fact that 10 Protected Buildings were destroyed and nine of them held world heritage status.<sup>108</sup>

Pursuant to Regulation 56 of the Regulations of the Trust Fund, the TFV stepped in to execute the TC Reparations Order as follows: a draft implementation plan was submitted on May 18, 2018,<sup>109</sup> the Updated

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<sup>105</sup> Corrected version of Draft Implementation Plan for Reparations, Executive Summary, ICC-01/12-01/15-265-Conf-Corr, at 5–7.

<sup>106</sup> Prosecutor v. *Al Mahdi*, ICC-01/12-01/15, Public Reparations Order, ¶ 129 (Aug. 17, 2017).

<sup>107</sup> *Id.* at ¶ 131.

<sup>108</sup> *Id.*

<sup>109</sup> Prosecutor v. *Al Mahdi*, ICC-01/12-01/15, Public Redacted Version of “Corrected version of *Draft Implementation Plan for Reparations*” (May 18, 2018).

Implementation Plan was presented on March 4, 2019,<sup>110</sup> and a lesser public redacted version was submitted on October 14, 2019.<sup>111</sup>

The TC recognized the TFV’s discretion to complement any individual or collective reparations, which encouraged the TFV “to complement the individual and collective awards to the extent possible, and to engage in fundraising efforts to the extent necessary to complement the totality of the award.”<sup>112</sup> The TC further noted that the TFV is not limited to the Chamber’s intermediate liability calculations set out when designing an implementation plan, but only to its final determination on Al Mahdi’s total liability.<sup>113</sup>

In the 2019 Lesser Public Updated Implementation Plan, the TFV provided “detailed information concerning security and mitigation strategies, outreach strategy, individual awards for moral and economic harm, including method of payment, and all required details for projects – both approved and new proposals – to respond to the collective moral and economic harm of the case.”<sup>114</sup> In the Plan, the TFV identified nine projects that have been subsequently approved by the Trial Chamber.<sup>115</sup>

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<sup>110</sup>Prosecutor v. Al Mahdi, ICC-01/12-01/15, Decision on the Updated Implementation Plan from the Trust Fund for Victims (Mar. 4, 2019).

<sup>111</sup>Prosecutor v. Al Mahdi, ICC-01/12-01/15, Lesser Public Redacted Version of “Updated Implementation Plan” Submitted on 2 November 2018 (Oct. 14, 2019).

<sup>112</sup>Prosecutor v. Al Mahdi, ICC-01/12-01/15, Decision on the Updated Implementation Plan from the Trust Fund for Victims, ¶ 138 (Mar. 4, 2019).

<sup>113</sup>*Id.* at ¶ 139.

<sup>114</sup>Prosecutor v. Al Mahdi, ICC-01/12-01/15, Lesser Public Redacted Version of “Updated Implementation Plan” Submitted on 2 November 2018, ¶ 1 (Oct. 14, 2019).

<sup>115</sup>Namely, the TFV proposed to award: (a) 905,000 euro as individual reparations for the moral harm to those whose ancestors’ burial sites were damaged in the attack; (b) 356,000 euro for the damage occasioned to the Protected Buildings to be addressed “through the rehabilitation of their enclosures, the planting of trees and living hedge, improved lighting, surveillance, logistical assistance, training for the masons, a support fund for the annual maintenance of the Protected Buildings, and the reconstruction of the Al Arawani mausoleum”; (c) 1.3 million euro as collective economic reparations in favour of the displaced population upon arrival to the Timbuktu area: “The TFV proposed to set up an Economic Resilience Facility in Timbuktu and Bamako to support economic initiatives proposed by members of the respective communities. This measure

In consideration of a “restorative justice framework,” it is interesting to note that regarding symbolic reparations as a form of collective reparations for moral harm, the TFV mentioned a joint ceremony with the Government of Mali and UNESCO—hosted by the former—that would have to take place at a later stage.<sup>116</sup>

The TFV then decided, after extensive consultation, to anchor memorialization measures on the principle of “restorative agency” whereby the local community will be empowered to steer the process and decide for themselves whether and how their perception of the events in 2012 linked to Al Mahdi’s crime should be memorialized.<sup>117</sup> To achieve this goal, “it is essential to develop a format that is in accordance with the customs, rules and practices.”<sup>118</sup>

In fact, Al Mahdi’s crime affected the city’s heritage “in a manner that was tangible, immediate and visual but, most of all, it affected the intangible meanings and associations linked to such heritage.”<sup>119</sup> A memorial is of a very delicate nature because it would similarly affect both dimensions of cultural heritage and would offer a narrative of how the community perceived and reacted to the event. This is why the TFV decided to let the community decide how to channel grief and/or

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would involve both financial support and related advisory services to members of the community, tailored to their needs and capacities”; (d) 62,000 euro as collective moral harm reparations,

namely to arrange psychological support both in Timbuktu and Bamako to be delivered by psychologists in order to allow victims to choose the method of support that best fits their needs. In order to address the pre-existing discriminatory situation of women, the Trust Fund intends to enable safe spaces in the form of *of groupe de parole pour les femmes* in Timbuktu and Bamako, which will serve as a platform for women to express their views and emotions regarding Mr. Al Mahdi’s crime.

*Id.* at ¶¶ 3–6.

<sup>116</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Lesser Public Redacted Version of “Updated Implementation Plan” Submitted on 2 November 2018, ¶ 157 (Oct. 14, 2019).

<sup>117</sup> *Id.* at ¶¶ 7, 162.

<sup>118</sup> *Id.* at ¶¶ 161–162.

<sup>119</sup> *Id.* at ¶ 160.

resilience.<sup>120</sup> In contrast, the TFV decided that it was not advisable to make further use of the apology Al Mahdi already provided during the trial.<sup>121</sup>

Also, in the spirit of a principle of restorative justice, the TFV underlined that the proposals put forward in the Updated Implementation Plan were the result of extensive research, careful consultations with Court's sections, and experts in pertinent areas— in addition to an in depth examination of *victims' views and preferences* expressed in their applications, in communications to the LRV, and stated to the TFV itself.

## 7. CONCLUSION

Interests and rights of international crimes' victims started to take center stage in the international legal realm thanks to increased attention of the international community for the achievement of two goals: the respect of universal human rights and the implementation of transitional justice changes.<sup>122</sup> Within a few decades, international criminal law-based institutions have reflected this development in their efforts to recognize and implement victims' rights, including their right to reparation.<sup>123</sup>

The most significant normative culmination of the judicial recognition of victims' rights in criminal trials took place with the adoption of the Rome Statute. Indeed, this Statute incorporates a comprehensive set of rights for victims, encompassing both procedural rights of participation and a right to

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<sup>120</sup> *Id.* at ¶ 160.

<sup>121</sup> The sum total of 129,500 euro for symbolic reparations is to be divided as follows: 9,500 euro is to be spent for costs associated to the joint ceremony for the symbolic awards to the Government of Mali and UNESCO, hosted by the former. The remaining 120,000 euro are to be reserved for the memorialization measure and any remnant of that sum will be reinvested in collective moral harm programs. *Id.* at ¶¶ 159–165.

<sup>122</sup> Rianne Letschert & Stephan Parmentier, *Repairing the Impossible: Victimological Approaches to International Crimes*, in *JUSTICE FOR VICTIMS: PERSPECTIVES ON RIGHTS, TRANSITION AND RECONCILIATION* 210–228 (Inge Vanfaechem et al. eds., 2016).

<sup>123</sup> RUTI G. TEITEL, *GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS* (1st ed. 2014).

reparation, grounded in the ICC's mandate for both retributive and restorative justice.

In addition, to respond to the real possibility that convicted perpetrators may declare their own insolvency as in *Al Mahdi*, the establishment of the TFV with its double mandate establishes an international criminal justice system in charge of ensuring the punishment of perpetrators, the redress for victims, and some forms of restorative justice. However, in view of the gravity of injuries and consequences caused by the crimes falling under the ICC's jurisdiction, the reintegration of offenders is challenging. Another major challenge is the reconciliation between victims and perpetrators, by means, for instance, of in person meetings.<sup>124</sup> An experience of restorative justice is instead offered to victims through their participation in proceedings, and reparations are paid out if funds are available. Indeed, these two types of "presence" in criminal trials could empower victims and potentially achieve effects at both the individual and collective levels: to compensate or to reduce harm; to restore the dignity of individual victims; and to reintegrate them into society, as well as to trigger or support a broader process of societal reconciliation. For the perpetrator, the possibility remains to apologize and show regret for the crimes committed. Under this perspective, the reparation and assistance programs implemented by the TFV could be qualified as a peculiar measure of restorative justice.<sup>125</sup>

Nevertheless, the critical voices about the ICC's victims regime are several. Among them, one criticism focuses on the Court facing conceptual challenges related to an apparent misunderstanding of the different measures at stake: reparations as such and the various modalities and

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<sup>124</sup> SIMONA PINTON, REDRESS IN POST-GENOCIDE RWANDA. AN INTERNATIONAL-LAW PERSPECTIVE 232 (2019).

<sup>125</sup> See, e.g., Claire Garbett, *The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice*, 5 RESTORATIVE JUST. 198 (2017).

channels of enforcing them.<sup>126</sup> As mentioned, the ICC delegates the implementation of reparations' measures to the TFV, although the Court retains judicial powers over the process, retaining the ability to block actions in relation to the implementation of reparations if the TFV does not abide by the rules required by the Court. This fact gives rise to a convoluted process, which creates further barriers to the design and enforcement of reparations on the ground.

If attention is paid to the practice of the ICC cases at the reparation stage, in addition to Al Mahdi (i.e. Lubanga, Katanga), the victims grow dissatisfied with the ICC reparations processes. Not only do they need to wait for many years for a conviction to be rendered in order to benefit from reparations, but also, when victims are finally entitled to them, they need to wait yet again for the implementation plan to be approved by the ICC chambers and to count upon enough financial resources.<sup>127</sup>

Realistically speaking, the current reparations process at the ICC, from adjudication to implementation, is hardly providing justice to victims.<sup>128</sup> One of the most challenging tasks is securing the needed funds: in fact, deficits persist in the TFV's voluntary fundraising from governments to

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<sup>126</sup> See, e.g., Alina Balta, Manon Bax & Rianne Letschert, *Between Idealism and Realism: A Comparative Analysis of the Reparations Regimes of the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia*, INT'L J. COMPAR. & APPLIED CRIM. JUST. 1, 5–14 (2019), <https://www.tandfonline.com/doi/full/10.1080/01924036.2019.1695640> [<https://perma.cc/GY8X-YVLD>].

<sup>127</sup> As a Redress report puts it, "In the Lubanga case, 15 years after the commission of the crimes in 2003, victims are yet to receive the reparations they have been waiting for, even though the first reparations decision was handed down in 2012." REDRESS, NO TIME TO WAIT: REALISING REPARATIONS FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT 10 (Jan. 2019), <https://redress.org/wp-content/uploads/2019/02/20190221-Reparations-Report-English.pdf> [<https://perma.cc/6MXL-7PLY>].

<sup>128</sup> See generally PINTON, *supra* note 124; Alina Balta et al., *Trial and (Potential) Error: Conflicting Visions on Reparations Within the ICC System*, 29 INT'L CRIM. JUST. REV. 221 (2019).

cover the current and increasing cost of both reparations' awards ordered by the judges and the assistance mandate programs.<sup>129</sup>

Reparations awarded in any specific case cannot be dependent solely on funding from the contributions of one or two well-intentioned donor governments.<sup>130</sup> And, "if the TFV continues to experience severe underfunding each year, not only will the surviving victims unjustifiably suffer, but the credibility of the ICC will be undermined, perhaps fatally."<sup>131</sup>

Apart from raising awareness on these critical aspects, this article is not the place to offer possible explanations for why the ICC has not yet managed to make victims' rights and reparations expectations a full reality in practice. The interest of this article has rather been to highlight the aspects in the Al Mahdi Reparations Order and Implementation Plan that support the paradigm of restorative justice and the relevance of a collective dimension in reparations that expresses the cultural identity of the people damaged by the crime.

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<sup>129</sup> See *Financial Information*, TRUST FUND FOR VICTIMS, <https://www.trustfundforvictims.org/en/financial-information> [https://perma.cc/Y8KX-XLFA].

<sup>130</sup> PINTON, *supra* note 124, at 231–233.

<sup>131</sup> David Scheffer, *The Rising Challenge of Funding Victims' Needs at the International Criminal Court*, JUST SECURITY (Dec. 3, 2018), <https://www.justsecurity.org/61701/risingchallenge-funding-victims-international-criminal-court/> [https://perma.cc/Y4DR-LMQW]. The most recent proposal is

to offer pre-qualified investors an opportunity to invest in a social bond that would be guaranteed by several States Parties of the ICC that would be discounted, as is common with social bonds, and the principal of the bond would be invested by a supervised management team to achieve an annual rate of return sufficient to cover the interest obligation payable to the investors, the fixed percentage management fee, and, importantly, the victim needs that must be met by the TFV (estimated currently at about €10 million per year).

David Scheffer, *New Financial Vehicles for Assisting Victims of Atrocity Crimes: A Bold Move for International Justice*, JUST SECURITY (Feb. 21, 2019), <https://www.justsecurity.org/62655/financial-vehicles-assisting-victims-atrocity-crimes-social-bond-international-justice/> [https://perma.cc/F5RB-R6RV]. This first-ever social bond for international justice could thus overtake "the increasingly antiquated model of relying solely or largely on voluntary fundraising from governments for the critical need of victims of atrocity crimes." *Id.*

Furthermore, an interesting reflection is whether the reparation measures to be adopted by the ICC should pursue a further function in combination with, or even better, to be included in the restorative aims; that is, whether the ICC and TFV should be engaged with *transformative justice* as well.<sup>132</sup>

The ICC can demonstrate transformative justice by adopting measures that aim to transform the entire society, namely the Malian society, rather than simply to repair and restore conditions for individuals. This issue of providing transformative justice generates the wider theoretical question of whether the ICC should also be engaged in promoting changes in societies it deals with on par with the types of reparative measures adopted by international tribunals with civil jurisdiction, such as the regional courts on human rights.

The 2009 *Cotton Field* decision of the Inter-American Court on Human Rights (IACHR) asserted that, bearing in mind an underlying structural discrimination, reparations must be designed to change the situation so that the effect is not only restitution, but “rectification.”<sup>133</sup>

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<sup>132</sup> This reflection could be rebuked by those scholars affirming that while it is recognized that the ICC has ambitiously sketched out a broader restorative mandate for itself than initially envisaged, the Court remains primarily a judicial body of retribution against individual perpetrators and only secondarily is it a court designed to address the interests and needs of the victims. Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT’L CRIM. L. REV. 345, 346–347 (2003); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 363–366 (2001).

<sup>133</sup> González et al. “Cotton Field” v. Mexico, 2009 Inter-Am. Ct. H.R. (ser. C.) No. 205, ¶ 450 (Nov. 16, 2009). The judgment stated,

The Court recalls that the concept of ‘integral reparation’ (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State . . . , the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.

*Id.*

Indeed, the objective of reparation in the classical term—to repair harm and to return to the status existing before the unlawful acts were committed and harms occurred—could not be enough.<sup>134</sup> In situations of international crimes and armed conflicts, the *status quo ante* is usually already marked by violence and unjust structures and societal relations.<sup>135</sup> Thus, a return to that state is not desirable. Instead, comprehensive reparations processes should seek to change structures of unjust hierarchy and social inequality.<sup>136</sup> Scholars argue that such reparations processes should encompass three dimensions: political representation, economic redistribution, and social recognition.<sup>137</sup>

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<sup>134</sup> The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.” *Factory at Chorzów* (Germ. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, ¶ 55 (July 26). In another judgment in the case, the Permanent Court stated,

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

*Factory at Chorzów* (Germ. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, ¶ 125.

<sup>135</sup> Franziska Brachthäuser & Anton Haffner, *Transformative Reparation: Should Reparation Change Societies?*, 78 *ZaöRV* 587, 587 (2018).

<sup>136</sup> *Id.*

<sup>137</sup> See, e.g., Sarah Williams & Emma Palmer, *Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia*, 10 *INT’L J. TRANSITIONAL JUST.* 311 (2016); Rodrigo Uprimny Yepes, *Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice*, 27 *NETH. Q. HUM. RTS.* 625 (2009); Brianne McGonigle Leyh & Julie Fraser, *Transformative Reparations: Changing the Game or More of the Same?*, 8 *CAMBRIDGE INT’L L. J.* 39 (2019).

Other scholars underline that the pledges of transformation remain mere recommendations instead of measures in practice. Most of the time, not only “does the highly ambitious promise of structural transformation encounter limits of practical and political feasibility,” but it risks underestimating and distracting from the individual need for redress.<sup>138</sup>

A different set of problems concerns the legitimate authority of international courts, especially international criminal courts, to enact far-reaching social change and involve genuinely political questions of just social norms on one side, and to risk that their court-ordered reparations may be intrusive and paternalistic on the other.<sup>139</sup>

While these critical aspects merit further research, this article aims to illuminate the fact that the types of reparations projects proposed by the TFV and approved by the ICC judges incorporate both a restorative and transformative dimension.

For instance, the memorialization project approved as a symbolic reparation has a role to play in the construction of national historical narratives, and for this reason, it is of a very delicate nature. Given that the feeling of humiliation, shock, and shattered faith of the Timbuktu community was widespread, a memorialization project would and should similarly affect both the tangible feeling connected to the destruction of the city’s heritage and the intangible meanings and associations linked to such heritage. The memorialization project should offer a narrative of how the

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<sup>138</sup> Margaret Urban Walker, *Transformative Reparations? A Critical Look at a Current Trend in Thinking About Gender-Just Reparations*, 10 INT’L J. TRANSITIONAL JUST. 108, 110 (2016).

<sup>139</sup> Brachthäuser & Haffner, *supra* note 135, at 589; *see also* Leila Ullrich, Presentation at Oxford Transitional Justice Research Seminar: *Can Reparations Transform Societies? The Practice of ‘Transformative Justice’ at the International Criminal Court (ICC)* (Sept. 3, 2016), <http://podcasts.ox.ac.uk/can-reparations-transform-societies-practice-transformative-justice-international-criminal> [<https://perma.cc/F9NV-YP6U>].

community perceived and reacted to the event, in accordance with its customs, rules, and practices.<sup>140</sup>

Yet, the provision of specific collective measures such as assistance for the return of victims to Timbuktu; an Economic Resilience Facility to support economic initiatives proposed by members of the Timbuktu community; the implementation of a program for psychological support; and the creation of safe spaces for women and girls are all measures which respond to the need to infuse some changes at the societal level. Such changes are necessary due to structural inequalities already present in society prior to the commission of the crimes.

In truth, these collective measures represent specific forms of guarantees of non-repetition that in international law are themselves measures to redress the consequences of unlawful acts.<sup>141</sup> What has to be underlined is the goal the above measures pursue: not only to try to avoid repetition of the crimes themselves, but also to rectify and adjust the contextual inequities, abuses, and violence that allowed the perpetration of crimes

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<sup>140</sup>Prosecutor v. Al Mahdi, ICC-01/12-01/15, Lesser Public Redacted Version of “Updated Implementation Plan” Submitted on 2 November 2018, ¶ 162 (Oct. 14, 2019). For instance, in Timbuktu,

the community is organised along the lines of age and gender and since their assigned roles in society and, particularly, in relation to the Protected Buildings are different, they may have experienced Mr[.] Al Mahdi’s crime in diverse fashions. For this reason, the Trust Fund considers that, in Timbuktu, discrete committees should be constituted around (i) young adult m[e]n; (ii) young adult women; (iii) elderly m[e]n; (iv) elderly women; and (v) children. These committees would discuss and make a proposal on whether to memorialise, what to memorialise and how to do it. Then, a representative from each one of the groups would examine together in a supra-committee whether any of their proposals can be joined. If not, they would be implemented independently.

*Id.*

<sup>141</sup>See art. 30: “The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require,” *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Int’l L. Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 88–91 (2001).

against people and property. Guarantees of non-repetition offer the greatest potential for transforming social relations and structures. In promising to ensure the non-recurrence of unlawful acts, they trigger a discussion about the underlying structural causes of violence and their manifestations and about the broader institutional or legal reforms that might be called for to ensure non-repetition.<sup>142</sup>

If the TFV projects (collective and symbolic) will be effectively implemented, they would represent an important step in redressing the failure of a system of international justice too often considered not able or equipped to address the several root causes of international and internal conflicts and of crimes perpetrated within those conflicts.

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<sup>142</sup>For an example of this concept as it relates to violence against women, see Rashida Manjoo (Special Rapporteur on Violence Against Women, its Causes and Consequences), *Thematic Rep. to the Hum. Rts. Council*, U.N. Doc. A/HRC/14/22, ¶ 62 (Apr. 23, 2010).