

Annex II

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Expert Report – Reparations Phase
The Prosecutor v. Ahmad Al Faqi Al Mahdi
ICC-01/12-01/15

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Executive Summary

1. This expert report follows from the Decision of Trial Chamber VIII of 19 January 2017 Appointing Reparations Experts and Partly Amending Reparations Calendar in the reparations phase in the case Prosecutor v. Ahmad Al Faqi Al Mahdi (ICC-01/12-01/15). It responds to three of the questions posed:
 - a. the importance of international cultural heritage generally and the harm to the international community caused by its destruction;
 - b. the scope of the economic and moral harm suffered, including monetary value, to persons or organisations as a result of the crimes committed; and,
 - c. the traditional mechanisms of conflict resolutions and reparations in Timbuktu
2. Part One tackles the Trial Chamber's question concerning the importance of international cultural heritage generally and the harm to the international community caused by its destruction. It notes the elevated value ascribed to cultural items throughout history and examines how this has manifested in an enhanced legal recognition and status under international law. It sets out the major legal instruments and provisions in this respect, beginning primarily with The Hague Regulations of the start of the 20th century, and tracks the development of a distinct branch of international law concerned with cultural items, known as international cultural heritage law. The analysis explains the basis of the concept common cultural heritage of humankind and argues that, as far as tangible cultural heritage is concerned, world heritage sites are the most important category of heritage from the perspective of the international community. It observes that cultural heritage is assigned a heightened importance due to its inherent artistic and scientific value; the financial resources that radical and/or terrorist organisations exact by trafficking cultural heritage; and the fundamental connection between cultural heritage and peace and stability at the national and international level. It submits that the intentional destruction of cultural heritage results in "moral damage" through the generalised sense of impotence, injustice and shock it causes and that such destruction may result in the loss of part of humanity's collective memory and shared consciousness, jeopardizing its transmission to future generations.
3. Part Two deals with the Trial Chamber's question concerning the economic and moral harm suffered, including monetary value, of persons and organisations, as a result of the acts for which Al Mahdi was convicted. It identifies that five types of moral harm (deprivation of human rights; mental pain and anguish; loss of education and opportunity; moral harm resulting from death; and damage to relationships and loss of consortium); and two types of economic harm (actualised economic loss and consequential economic loss) were caused by the crime for which Al Mahdi was convicted. Whenever possible, it suggests the monetary value of each harm that was caused and the eligibility criteria to identify the victims of such harm.
4. Part Three addresses the question concerning the traditional mechanisms of conflict resolution and reparation in Timbuktu. It notes that these traditional mechanisms, which are particularly prominent in the north of the country, comprise a parallel justice system to that of the state, and that the mechanisms are generally consensus-oriented and closer

to mediation than to adversarial or inquisitorial procedures. It observes that *cadis* seem to be the most relevant customary leaders in Timbuktu. In light of their legitimacy, they should be incorporated into the means and modalities of the reparation phase of the Al Mahdi case. At the same time, the role of these traditional leaders should be well-defined, context-bound and involve a capacity-building facet with a training component. This is because traditional mechanisms reproduce established power dynamics in which the interests of women, children and other vulnerable groups are sidelined. Therefore, women's and children's associations – as appropriate- with a local presence should be also included in the reparation and consultation process.

5. Part Four offers some recommendations on the modalities of reparations that the Court could adopt.
6. The methodology applied to compile this report involved [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The collected materials were analysed in light of the Trial Chamber's questions and in light of relevant jurisprudence, primarily from the International Criminal Court, concerning the applicable standards to reparations proceedings, where relevant. The author regrets that [REDACTED]
[REDACTED]
[REDACTED].
7. Citations and quotations were kept to a minimum in order to ensure brevity and enhance the clarity and focus of the report. The conclusions presented in this report are those of the author acting in a personal capacity.

PART ONE

The importance of international cultural heritage and the harm its destruction causes the international community

8. The following part of this report is divided into four sub-sections.
 - a. Section A ("Brief historical overview of the importance ascribed to cultural heritage by the international community") recounts how, since the earliest records of organised human societies, cultural items have been regarded as having a higher value than that of general civilian property. The heightened value of cultural items is reflected in the legal recognition and status they received at the beginning of the 20th century. Today, cultural items constitute a distinct international concern, governed by a discrete branch of law (international cultural heritage law).
 - b. Section B ("The importance of cultural heritage to the international community") explains the conceptual basis of the notion of a common cultural heritage which needs to be preserved for the benefit of all humanity. It shows how this concept has become an empirical fact, exemplified by the spread of museums and art collections across the globe, the creation of UNESCO in 1945, the adoption of six binding cultural heritage conventions, and the statements and involvement of key international actors such as the United Nations Security Council and the United Nations General Assembly. The section then sets out three reasons why the international community assigns cultural heritage such importance: its inherent artistic and scientific value; the financial resources that radical and/or terrorist organisations exact by trafficking cultural heritage; and the fundamental connection between cultural heritage and peace and stability at the national and international level.
 - c. Section C ("The special importance of world cultural heritage sites") discusses why, within the domain of international cultural heritage law, the most relevant category of objects for the international community is that of world cultural heritage sites insofar as tangible cultural heritage is concerned. The section explains that world cultural heritage is distinguished from other types of property due to its "outstanding universal value", and explains what this term means.
 - d. Section D ("The harm to the international community caused by the destruction of cultural heritage") argues that the consequences for the international community of the intentional destruction of cultural heritage embody the concept of "moral damage" by causing a generalised sense of impotence, injustice and shock. Such destruction erodes and/or erases the timeless message contained in each cultural site, depriving humanity of a manifestation of its past and its future, and replacing it with a message of terror and helplessness. In this respect, the destruction may result in the loss of part of humanity's collective memory and shared consciousness, and renders humanity unable to transmit precious values and knowledge to future generations.

A. Brief historical overview of the importance ascribed to cultural heritage by the international community

9. Cultural items have been regarded as precious objects that differ from ordinary civilian property since the earliest organized human societies emerged. Due to its distinct value, cultural heritage has occupied a special place in world history and, at the beginning of the 20th century, it also gained a discrete space and special status in international law. The Roman Empire used cultural property as a symbol of might and domination in its international relations. When military conquerors returned from their campaigns, they would celebrate the glory of Rome with a triumphal parade, displaying the artworks they had plundered in Egypt, Asia Minor or Greece. This culture of plunder continued for many centuries (notably with the Goths and the Crusaders, for example), but under Napoleon a minor but significant shift in mentality occurred in this respect.
10. Napoleon engaged in the same systematic appropriation of the cultural property of his defeated enemies as had previously occurred through history. However, “the publicly espoused inspiration for this was the vision of a pan-European artistic culture, of which France, as a republic among tyrannies, was best placed to act as custodian”.¹ The 18th century thus saw the rise of the notion of a “*république des lettres*”, physically reflected in books, architecture, antiquities and artworks. This represented a sort of transnational cultural value, to be transmitted and preserved.² Although the concept of a *république des lettres* was misused for aggrandising purposes, it also represents an early formulation of the current idea of a “common heritage of humankind”. Quatremère de Quincy, a French archaeologist, developed the notion in this respect. He protested against Napoleon’s policy, writing a series of letters addressed to one of Napoleon’s generals, in which he declared for example:

“[I]n Europe the arts and sciences form a republic whose members, joined by the love of and quest for truth and beauty, tend less to isolate themselves in their respective nations than to pursue their interests from the point of view of a universal fraternity. [T]he arts and sciences belong to all of Europe and are no longer the exclusive property of any nation.

“[I]t is as a member of that general republic of arts and sciences, and not as an inhabitant of this or that nation, that I will discuss the interest that all parties have in the conservation of all. What is that interest? It is that of civilization, of perfection of the means of welfare and pleasure, of the advancement and progress of education and thought, of amelioration of the human condition. Everything that could contribute to this end belongs to all peoples; no one has the right to dispose arbitrarily of it.”³

11. A shift in attitude towards cultural property also took place in the legal sphere, where artistic monuments, temples and all works of remarkable beauty began to be considered

¹ O’Keefe, Roger *The Protection of Cultural Property in Armed Conflict* (New York: Cambridge University Press, 2006) p. 15.

² Ibid., p. 9; see also, Edelstein, Eden, *The Enlightenment: A Genealogy* (Chicago: The University of Chicago Press, 2010) p. 168.

³ Quatremère de Quincy, *Lettres au general Miranda sur le déplacement des monuments de l’art de l’Italie*, pp. 88-9, cited in Merryman, John Henry, “Cultural Property Internationalism”, *International Journal of Cultural Property* 12 (2005): 11–39, p. 15.

of value to the whole of mankind. Emerich de Vattel, an 18th-century Swiss jurist and diplomat, began codifying the laws of war in his major work, *Les Droits des Gens* (1758). He identified an emerging norm: the prohibition of the pillage and wanton destruction of cultural property:

“What things are to be spared:

For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength — such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an *enemy to mankind*, thus wantonly to deprive them of these monuments of art and models of taste; and in that light Belisarius represented the matter to Tittila, king of the Goths. We still detest those barbarians who destroyed so many wonders of art, when they overran the Roman Empire.”⁴

12. As early as 1813, the concept of cultural heritage being the property of humanity as a whole was articulated in the case of *The Marquis de Somerueles*. This case concerned a dispute between the United States and England, which were then at war. An English ship seized a freight of Italian artworks being transported in an American vessel to Philadelphia, where they were due to be exhibited at the Pennsylvania Academy of the Fine Arts. The Academy filed a petition in the English Courts to recover the paintings and the English judge, Dr. Croke, agreed with its suit:

“The arts and sciences are admitted amongst all civilized nations as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the *peculium* of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.”⁵

13. The prohibition against looting cultural property turned into binding instructions for the Union Forces of the United States during the American Civil War when Abraham Lincoln sanctioned the so-called “Lieber Code” of 1863. Article 35 stated that “classical works of art, libraries, scientific collections, or precious instruments [...] must be secured against all avoidable injury”. Just over 40 years later, the protection of cultural heritage was reflected in international law instruments when in 1907 The Hague Convention of Laws and Customs on Land and Annexed Regulations (1907 IV Hague Regulations) were adopted, with two articles (27 and 56) devoted to the protection of cultural property.⁶ Article 8(2)(e)(iv) of the ICC Statute was adopted based on the wording of Article 27 of the 1907 IV Hague Regulations. The importance of protecting cultural property has been reiterated in other treaties to the extent that today there is a discrete branch of international law dedicated to cultural heritage.

⁴ Vattel, Emer de, *Le droit des gens* (London: Apud Liberos Tutor, 1758) Book 3, Chapter IX, para. 168 (emphasis added).

⁵ *The Marquis de Somerueles*, Stewart's Rep. 482 (Court of Vice-Admiralty, Nova Scotia, 1813) cited in Merryman, John Henry, Albert E. Elsen and Stephen K. Urice, *Laws, Ethics and the Visual Arts* (The Netherlands: Kluwer Law International, 2007) 5th ed., p. 12.

⁶ The first set of binding international rules on the protection of cultural heritage were enshrined in the 1899 Annex to The Hague Convention (II) with Respect to the Laws and Customs of War on Land, but these were superseded by the 1907 instrument.

B. The importance of cultural heritage to the international community

14. The importance of cultural heritage to the international community was articulated in the philosophical current of thought known as “cultural internationalism”:

“Cultural property internationalism is shorthand for the proposition that everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives.”⁷

15. The notion of cultural internationalism has sometimes been pitted against that of “cultural nationalism”, which favours policies of national retention in the context of the trade in cultural property. This debate, however, concerns *how* cultural heritage should be regulated and does not alter the underlying premise that cultural heritage ought to be preserved for the benefit of humanity, which remains unchallenged.
16. That cultural heritage is of international importance, regardless of its origin and location, is an empirical fact reflected in the existence of museums and art collections across the globe, the creation of UNESCO in 1945, the adoption of six binding cultural heritage conventions, and the statements and involvement of key international actors such as the Security Council and the General Assembly. As noted by Professor Craig Forrest, “the creation of UNESCO as an international organisation with the mandate to preserve cultural heritage is itself an embodiment of this universalism.”⁸ UNESCO was established to ensure “the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science”.⁹ However, it was not an artificial construct; rather, it was the crystallisation of a universal concern for cultural property that, empirically, predated 1945 (the year in which it was founded) and continues to exist today:

“The empirical evidence that people care about cultural objects is imposing: The existence of thousands of museums, tens of thousands of dealers, hundreds of thousands of collectors, millions of museum visitors; brisk markets in art and antiquities; university departments of art, archaeology, and ethnology; historic preservation laws.”¹⁰

17. The premise that cultural heritage needs to be preserved for the benefit of humanity is mainly expressed in the concept of the “common cultural heritage of humankind”¹¹ found in every single UNESCO instrument dealing with cultural heritage, from the first to the last.

⁷ Merryman, “Cultural Property Internationalism”, p. 11.

⁸ Forrest, Craig, “Cultural heritage as the common heritage of humankind: a critical re-evaluation”, *The Comparative and International Law Journal of Southern Africa* 40:1 (2007): 124-51, p. 129

⁹ Article I(2)(c) UNESCO Constitution.

¹⁰ Merryman, John Henry, “The Public Interest in Cultural Property”, *California Law Review* 77 (1989): 339-364, p. 343.

¹¹ It is important to refer to the common *cultural* heritage of humankind to distinguish this concept from that of “common heritage of mankind”. The latter concept, developed by Arvid Pardo, has particular conditions, whose application is appropriate for the deep seabed or outer space, but not to cultural heritage; see, for example, Baslar, Kemal, *The Concept of the Common Heritage of Mankind in International Law* (The Hague: Martinus Nijhoff, 1998) p. 302.

- a. The preamble to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) was the first to affirm that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind since each people makes its contribution to the culture of the world”.¹²
 - b. The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention) considers that “cultural property constitutes one of the basic elements of civilization and national culture”.¹³
 - c. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) rests on the idea that “parts of the cultural and natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole”,¹⁴ and that the destruction or damage of such heritage “constitutes a harmful impoverishment of the heritage of all the nations of the world”.¹⁵
 - d. The 2001 Convention on the Protection of the Underwater Cultural Heritage (2001 UNESCO Underwater Convention) begins by acknowledging “the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage”.¹⁶
 - e. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (2003 UNESCO Convention on Intangible Heritage) recognises the existence of “the universal will and the common concern to safeguard the intangible cultural heritage of humanity” and states that “the international community should contribute, together with the States Parties to this Convention, to the safeguarding of such heritage”.¹⁷
 - f. The most recent major instrument to be adopted, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 UNESCO Cultural Diversity Convention), declares that “cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all”.¹⁸
18. Outside the realm of binding instruments, it is relevant to recall the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, which begins by citing “the tragic destruction of the Buddhas of Bamiyan that affected the international

¹² Second recital.

¹³ Preamble, third recital.

¹⁴ Preamble, sixth recital.

¹⁵ Ibid., second recital.

¹⁶ Preamble, first recital; the third recital also notes the “growing public interest in and public appreciation of underwater cultural heritage”.

¹⁷ Preamble, fifth and eleventh recitals.

¹⁸ Preamble, second recital.

community as a whole”.¹⁹ It also states that “[t]he international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations”.²⁰

19. Concern with the preservation of cultural heritage is not exclusive to UNESCO *qua* a specialised agency. The growing involvement of the Security Council and the General Assembly testifies to the fact that this is considered an issue of relevance for the international community as a whole.
20. As a response to the widespread plunder and destruction of cultural objects in current armed conflicts, the Security Council has also reaffirmed the importance of the preservation of cultural heritage, particularly world heritage, on numerous occasions. For example, in Resolution 2056 (2012), it condemned “the desecration, damage and destruction of sites of holy, historic and cultural significance [in Mali], especially but not exclusively those designated UNESCO World Heritage sites, including in the city of Timbuktu”.²¹ Additionally, when the Security Council established the peacekeeping mission of MINUSMA to ensure security and political stability in Mali, for the first time in its history it included a cultural heritage-related obligation in the peacekeepers’ mandate set out in the Resolution, whereby they must assist the country’s transitional authorities “as [is] necessary and feasible, in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO”.²²
21. In a similar vein, Security Council Resolution 2139 (2014) called on all parties to the Syrian conflict to “save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s World Heritage Sites”.²³ Then, in Resolution 2199 (2015), the Security Council introduced a ban on the trade of Iraqi and Syrian cultural property to be respected by all UN member states, and condemned the “destruction of cultural heritage in Iraq and Syria particularly by ISIL [Islamic State] and ANF [Al-Nusra Front], whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects”.²⁴ Most recently, on 24 March 2017, the Security Council passed Resolution 2347 (2017) which, for the first time, is dedicated entirely to cultural heritage. The resolution “[d]eplores and condemns the unlawful destruction of cultural heritage, inter alia destruction of religious sites and artefacts [...] notably by terrorist groups”.²⁵ It also emphasises that the unlawful destruction of cultural heritage can fuel the causes of conflict, notes the link between illicit trafficking of cultural artefacts and the

¹⁹ First recital.

²⁰ Article I.

²¹ Security Council Resolution 2056 (2012) of 5 July, para. 14.

²² Security Council Resolution 2100 (2013) of 25 April, para. 16(f); see also Security Council Resolution 2347 (2017) of 24 March, para. 19, where the Council affirms that peacekeeping operations “may encompass, as appropriate, assisting relevant authorities, upon their request, in the protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts”.

²³ Security Council Resolution 2139 (2014) of 22 of February, para. 8.

²⁴ Security Council Resolution 2199 (2015) of 12 February, para. 15. This document builds on Security Council Resolution 1483 (2003) of 22 May which, for the first time, addressed the issue of cultural heritage by obliging all member states to “take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property”. See also Security Council Resolution 2322 (2016) of 12 December reaffirming the ban and specifying measures to combat the illicit trade of cultural property.

²⁵ Resolution 2347 (2017), 24 of March, para. 1.

funding of terrorist organisations, and requests UN member states to take appropriate measures within their domestic jurisdiction and in cooperation with each other and international organisations to protect cultural heritage.

22. The General Assembly has issued several resolutions concerning cultural heritage. One such, which Irina Bokova, UNESCO's Director-General, has said will mark "a turning point in the mobilization of the international community",²⁶ is the 2015 resolution entitled "Saving the cultural heritage in Iraq".²⁷ In this resolution, the General Assembly made several references to the need to preserve cultural heritage for humanity as a whole. For example, it pledged to be "resolved to stand up against attacks on the cultural heritage of any country as attacks on the common heritage of humanity as a whole" and called upon "community leaders to stand up and reaffirm unambiguously that there is no justification for the destruction of humanity's cultural heritage".²⁸
23. It is an established fact that the preservation of cultural heritage is a growing international concern. The reason for this can be explained by three observations or arguments: the artistic and scientific value of cultural heritage; the fact that its plunder and illicit trade provides radical or terrorist organisations with financial resources; and its fundamental connection to peace and stability at both a national and international level. The instruments and resolutions referred to above convey these concerns and frequently rely on them as justifying international intervention to protect cultural heritage.
24. Visual art, monuments, archaeological sites, and suchlike, are works of beauty and/or testimonies to human creativity and genius. Cultural items may include "the sorts of things that dealers deal in, collectors collect, and museums acquire and display".²⁹ Although diverse, they always possess an exceptional quality that ensures they stand out, capturing attention. From a scientific point of view, cultural objects represent time capsules containing information from the past that can, with the help of specialists, be deciphered for current and future generations. Items of cultural property are unique messages from antiquity; they are irreplaceable. If the cultural property world is analogised to an ecosystem, then the destruction or loss of a cultural object is comparable to the disappearance of a species. This is particularly the case with world heritage sites, given that this category is reserved for immovable objects (groups of buildings, monuments and sites) with unique qualities that bestow outstanding universal value. As such, no replicas or two-of-a-kind exist to replace those world heritage sites that are destroyed.
25. The protection of cultural heritage has become a question of international security. This is because its looting has undergone a sinister new development: the Security Council has recognised that it is now being used as a source of revenue by terrorist organisations in non-international armed conflicts.³⁰ The so-called Islamic State (hereafter IS), for example, possesses a highly organised system of illicit trafficking. An operation carried out by US

²⁶ UNESCO – World Heritage Centre News, "'Saving the cultural heritage of Iraq' – Director-General welcomes Adoption of the UN General Assembly Resolution" (28 May 2015). Available at <http://whc.unesco.org/en/news/1287/> (last accessed on 19 April 2017).

²⁷ Resolution adopted by the General Assembly on 28 May of 2015, UN Doc. A/RES/69/281.

²⁸ Ibid., eleventh recital and para. 8, respectively. The full list of General Assembly resolutions about return and restitution of cultural property can be consulted at <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/resolutions-adopted-by-the-united-nations-general-assembly-about-return-and-restitution-of-cultural-property/> (last accessed on 18 April 2017).

²⁹ Merryman, "Cultural Property Internationalism", p. 12.

³⁰ See, for example, Security Council Resolution 2199 (2015), 12 February, paras. 15-17.

Special Forces in May 2015 revealed the existence of an “Antiquities Division” in IS whose annual revenue is estimated in tens of millions of dollars.³¹ Although there is no official or reliable record confirming the amount generated by the looting and illicit trade of cultural property, IS has increasingly turned to the sale of antiquities to fund its operations as airstrikes continue to reduce its capacity to retrieve income from the oil and gas fields in the regions where it operates.³²

26. Cultural heritage has a deep link with peace and stability, as the Security Council affirms:

“[T]he unlawful destruction of cultural heritage [...] and the attempt to deny historical roots and cultural diversity in this context can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States.”³³

27. Cultural heritage is a mirror of a nation’s identity, its past and future. It represents society’s thread of continuity.³⁴ As stated by Irina Bokova, “[w]arlords know this, they target culture because it strikes to the heart.”³⁵ The destruction of cultural heritage has thus become a method of warfare intended to demoralise the civilian population and present them with a choice between abiding by a new, ruthlessly imposed order or fleeing. This is applicable to the present case: the Trial Chamber observed that the destruction of the mausoleums in Timbuktu had been driven by discriminatory religious motives.³⁶ This is not without consequences: “[w]hen a well-known building or work of art is destroyed by violence, the injury done is usually to a community’s sense of continuity.”³⁷ For example, following the Spanish Civil War and, later, the Balkan wars, “refugees and displaced people did not return to their former towns and villages until rebuilding of significant heritage sites occurred, even if this was many years later”.³⁸ Even if the population decides to stay, the loss of a familiar object in the town’s landscape may instil a sense of insecurity and alarm³⁹ and affect the daily routines that occur around the building (such as social gatherings, commerce or festivals). As the next section argues, this has been the case in Timbuktu. The loss of cultural heritage can therefore play a key role in the destabilisation of a population’s social fabric and damage its chances of recovery. As the current refugee crisis shows, the destabilisation of whole regions carries global consequences.

³¹ Fanusie, Yaya J. and Alexander Joffe, “Monumental Fight Countering the Islamic State’s Antiquities Trafficking”, *Center on Sanctions and Illicit Finance* (November 2015), p. 5.

³² United States Government Accountability Office, “Report to Congressional Requesters: Cultural Property – Protection of Iraqi and Syrian Antiquities” (August 2016) p.9; see also, Fanusie and Joffe, “Monumental Fight”, p. 5.

³³ Security Council Resolution 2347 (2017) 24 March, fourth paragraph.

³⁴ For more on this concept, see Stanley-Price, Nicholas, “The thread of continuity: cultural heritage in post-war recovery” pp. 1-16, in *Cultural Heritage in Postwar Recovery*. Papers from the ICCROM FORUM held on October 4-6, 2005, edited by Nicholas Stanley-Price. ICCROM Conservation Studies 6, ICCROM, Rome.

³⁵ Irina Bokova cited in Brammertz, Serge, Kevin C. Hughes, Alison Kipp and William B. Tomljanovich, “Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY”, *Journal of International Criminal Justice* (2016): 1-32, p. 2.

³⁶ ICC, Al Mahdi Judgment and Sentence (27 September 2016), para. 81.

³⁷ Queen’s University Belfast Human Rights Centre and the Redress Trust observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules of Evidence and Procedure (2 December 2016), para. 11.

³⁸ Lostal, Marina and Emma Cunliffe, “Cultural heritage that heals: factoring in cultural heritage discourses in the Syrian peacebuilding process”, *The Historic Environment: Policy & Practice* (2016): 1-11, p. 3.

³⁹ Ascherson, Neal, “Cultural destruction by war and its impact on group identities”, pp. 17-25 in *Cultural Heritage in Postwar Recovery*. Papers from the ICCROM FORUM held on October 4-6, 2005, edited by Nicholas Stanley-Price. ICCROM Conservation Studies 6, ICCROM, Rome, p. 23.

28. The deliberate destruction of cultural heritage and the way it is carried out (for example, sharing the attack on social media) also carries a special message of defiance to the international community. For example, it was reported that a spokesperson of the Ansar Dine stated on the occasion of the destruction of the mausoleums: "There is no world heritage. It does not exist. Infidels must not get involved in our business."⁴⁰ This type of behaviour represents a blatant attempt to deny humanity one of its common denominators: its universal heritage. It allows radical movements to "make noise" and instil a "sense of shame at being powerless to stop the destruction of [in this case] the mausoleums".⁴¹
29. The radicalisation of individuals is often the result of impoverishment and lack of options. Given that the preservation of cultural heritage is connected to the proper functioning of society and the integrity of the social fabric, its disappearance and destruction is at the same time a source and a symptom of radical movements.

C. The special importance of world cultural heritage sites

30. The set of cultural heritage conventions mentioned above form a discrete branch of international law known as international cultural heritage law (ICHL). Within this branch of law, as far as tangible cultural heritage is concerned, world cultural heritage is the most relevant category from the point of view of the international community. The reason lies in the fact that ICHL works according to the principle of relative interest. It is presumed that the preservation of cultural items is always in the general interest of the international community and in the particular interest of the state the property is associated with. However, the degree of interest vested in an object by the international community varies according to the lower or higher cultural significance of the object in question: the higher its cultural significance, the higher the degree of international attention and concern.⁴²

⁴⁰ Cited in Irina Bokova, "Culture in the Cross Hairs," *New York Times* (2 December 2012).

⁴¹ Queen's University Belfast Human Rights Centre and the Redress Trust observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules of Evidence and Procedure (2 December 2016), para. 36.

⁴² Lostal, Marina, *International Cultural Heritage Law in Armed Conflict: case-studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (New York: Cambridge University Press, 2017), p. 58.

31. The principle of relative interest becomes apparent in the distinctive use that ICHL makes of the notion of “cultural property” as opposed to that of “cultural heritage”, as explained in the box below:

As instruments [of ICHL] continued to be adopted, a correspondence arose between “relative significance” to the international community and to the concerned state and the way in which these instruments refer to “cultural heritage” as something different from “cultural property.” The expression “cultural property” has been used when the objects at stake are of cultural, historical, scientific, or archaeological relevance mainly to one state. For instance, the 1954 Hague Convention deals with movables or immovables of great importance to the cultural heritage of “every people,” which is understood to mean every nation. This is consistent with the fact that, under the convention, each party is free to designate the property it wants to fall under its scope of protection.

[...]

At the other end of the spectrum, the term “cultural heritage” has been used when the cultural item is of particular interest to the international community. Indeed, the World Heritage Convention refers to cultural heritage of outstanding *universal* value, which its operational guidelines define as a property that possesses a quality so exceptional that it transcends national boundaries. Accordingly, the nomination of a cultural site to the World Heritage List is subject to a strict international procedure, involving the World Heritage Committee and the International Council of Monuments and Sites (ICOMOS).

[Excerpt from Lostal, Marina, *International Cultural Heritage Law in Armed Conflict: case-studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (New York: Cambridge University Press, 2017), pp. 60-1 (footnotes omitted)]

32. The degree of interest that the international community vests in world heritage sites is the highest possible under the current legal framework. This can be evinced, *inter alia*, from the history of the drafting of the World Heritage Convention and its near universal acceptance; its central undertakings; the subsequent procedures of protection adopted *ad hoc* by its monitoring body, the World Heritage Committee; and the special focus that other international actors, such as the ICTY, the Security Council, the UN Secretary-General and other states, have paid to the world heritage status of targeted sites.
33. The World Heritage Convention of 1972 was drafted in response to the escalating threats posed to the integrity of the world’s most outstanding examples of cultural heritage by both natural and man-made disasters. Two episodes in particular prompted its adoption: the construction of the Aswan High Dam on the Nile in 1954, which threatened to submerge the ancient Nubian monuments in the rock temples of Abu Simbel in Egypt; and the floods in Venice and Florence in 1966, which swept away frescoes, paintings and sculptures. On both occasions, voluntary donations from various states allowed UNESCO to coordinate the rescue of these cultural treasures. In 1971, the organisation decided to replace this kind of spontaneous charitable action with a more stable system of formal cooperation. This eventually led to the adoption of the World Heritage Convention in 1972, which states in its preamble, “it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal

value, by the granting of collective assistance”.⁴³ Its adoption did not arise from an artificial or abstract idea, but reflected and channelled the pre-existing international will to preserve the most important monuments for humanity. The World Heritage Convention is considered the most successful ICHL treaty because 193 states are party to it – virtually every state in the world.

34. Article 4 declares that states have a primary duty to ensure the transmission of the cultural heritage situated on their territory to future generations. This is an obligation *erga omnes contractantes*, owed to the rest of the parties which, as mentioned above, amounts to virtually every state in the world. In turn, the rest of the state parties have a concomitant duty to cooperate as and when needed. Article 6(1) of the World Heritage Convention reads:

“Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage [...] is situated, and without prejudice to property right provided by national legislation, the State Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.”

This is accomplished through the World Heritage Fund, for example, which consists (among other things) of “compulsory and voluntary contributions made by State Parties to this Convention”.⁴⁴

35. In 1996 the World Heritage Committee (the monitoring body of the World Heritage Convention, composed of 21 rotating state parties) further increased the level of control for listed world heritage sites by introducing two new monitoring procedures: periodic reporting, where state parties are required to submit a report on the application of the Convention every six years; and the reactive monitoring process, designed to examine the state of conservation of specific world heritage sites under threat.⁴⁵ The absence of objections to these new procedures, and the fact that nominations to the World Heritage List continue year on year, shows the consistent commitment of states to identifying and preserving world heritage sites.
36. Beyond the realm of UNESCO and the state parties to the World Heritage Convention, important international actors have also noted the special significance of world heritage sites. The ICTY highlighted, in the case of *Strugar*, that a property inscribed on the World Heritage List had special status: “The Old Town [of Dubrovnik] is also legally distinct from the rest of the wider city because the Old Town [...] enjoys a World Heritage listing and the protections and immunities that are consequent on that listing”.⁴⁶
37. The Security Council has specifically remarked on the damage caused to world heritage sites in different contexts. In Resolution 2056 (2012), it condemned “the desecration, damage and destruction of sites of holy, historic and cultural significance [in Mali], *especially* but not exclusively those designated UNESCO World Heritage sites, including in the city of Timbuktu”.⁴⁷ In Resolution 2139 (2014), it called on all parties to the Syrian

⁴³ Preamble, seventh recital.

⁴⁴ Article 15(3)(a).

⁴⁵ UNESCO-World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention* (26 October 2016) UNESCO Doc. WHC 16/01, paras. 169-176 and 199-210.

⁴⁶ ICTY, *Strugar* Trial Judgment (31 January 2005) para. 279.

⁴⁷ Security Council Resolution 2056 (2012) 5 of July, para. 14 (emphasis added).

conflict to “save Syria’s rich societal mosaic and cultural heritage, and take appropriate steps to ensure the protection of Syria’s *World Heritage Sites*”.⁴⁸

38. Former UN Secretary-General Ban Ki- Moon, UNESCO’s Director-General Irina Bokova and the Joint Special Representative for Syria Lakhdar Brahimi issued a joint statement on Syria’s cultural heritage that draws attention first and foremost to the fact that “world heritage sites have suffered considerable and sometimes irreversible damage”.⁴⁹
39. Outside the framework of the World Heritage Convention, several countries have provided emergency funds to UNESCO to support the rehabilitation of the mausoleums in Timbuktu: “around US \$3 million was raised to support heritage rehabilitation in Mali, with contributions from Switzerland (\$1.1 million); the EU (\$670,000); Norway (\$170,000); and the Netherlands (\$75,000)”.⁵⁰
40. The main reason for awarding world heritage sites this exceptional importance lies in the notion of “outstanding universal value”.⁵¹ This is the essential characteristic that any monument, group of buildings or site needs to possess in order to be awarded the status of world cultural heritage.⁵² The Operational Guidelines for the Implementation of the World Heritage Convention (a set of guidelines adopted by the World Heritage Committee that state parties accept as binding) defines outstanding universal value as follows:

“Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole.”⁵³

41. A property is considered to have outstanding universal value if it meets one or more of ten criteria defined by the World Heritage Committee. Timbuktu was inscribed on the World Heritage List in 1988 and meets criteria (ii), (iv) and (v). According to paragraph 77 of the Operational Guidelines for the Implementation of the World Heritage Convention, these require that the property or site must:

“(ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;

As applied to Timbuktu, criterion (ii) was fulfilled because “the mosques and holy places of Timbuktu have played an essential role in the spread of Islam in Africa at an early period”

⁴⁸ Security Council Resolution 2139 (2014) 22 of February, para. 8 (emphasis added).

⁴⁹ UN and UNESCO, “Statement by Mr. Ban Ki- Moon, United Nations Secretary- General; Ms. Irina Bokova, UNESCO Director- General; and Mr. Lakhdar Brahimi, Joint Special Representative for Syria: The Destruction of the Cultural Heritage of Syria Must Stop” (12 March 2014) para. 2.

⁵⁰ UNESCO, *Strategy on the reinforcement of UNESCO’s Actions for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, adopted by the 38th General Conference in November 2015 (38C/49), para. 42.

⁵¹ World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention* (26 October 2016) UNESCO Doc. WHC 16/01, para. 4.

⁵² See Article 1, World Heritage Convention.

⁵³ World Heritage Committee, *Operational Guidelines*, para. 49.

“(iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;

As applied to Timbuktu, criterion (iv) was fulfilled because “the three great mosques of Timbuktu, restored by the Qadi Al Aqib in the 16th century, bear witness to the golden age of the intellectual and spiritual capital at the end of the Askia dynasty”

“(v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change.”⁵⁴

As applied to Timbuktu, criterion (v) was fulfilled because “the three great mosques of Timbuktu, restored by the Qadi Al Aqib in the 16th century, bear witness to the golden age of the intellectual and spiritual capital at the end of the Askia dynasty”

42. In addition to meeting the criteria for outstanding universal value, a property must fulfil the requirement of “authenticity”⁵⁵ and “integrity”. In the conservation report that the Malian *Direction Nationale du Patrimoine Culturel* submitted to the World Heritage Centre regarding Timbuktu in 2014, it noted that “[i]l est difficile d’apprécier voire de parler d’intégrité et d’authenticité pour un site dont les éléments ont été détruits à moins 75%”.⁵⁶
43. In sum, although the legal protection of cultural heritage became a reality due to the shift in perception that occurred between the 19th and 20th centuries, ever since antiquity there has been a sense of the distinctive nature of cultural objects. Cultural heritage is generally acknowledged as a common good whose preservation is in the interests of all humanity, including future generations. The adoption of the World Heritage Convention concretised the idea that all states should cooperate in the protection of sites of outstanding universal value. Under the existing ICHL framework, world heritage sites are awarded the highest degree of interest and attention. In the case of Mali, all the mausoleums (but one) destroyed in Timbuktu had been designated world cultural heritage.

D. The harm to the international community caused by the destruction of cultural heritage

44. The consequences for the international community of the intentional destruction of cultural heritage embody the concept of moral damage: it causes a generalised sense of

⁵⁴ Ibid., para. 77. The information in the boxes concerning Timbuktu can be found at UNESCO-World Heritage Centre, World Heritage List: Timbuktu (description), available at <http://whc.unesco.org/en/list/119> (last accessed on 19 April 2017).

⁵⁵ Authenticity is only required if the site in question has been nominated under criteria (i) to (vi), which is the case with Timbuktu.

⁵⁶ Ministère de la Culture – Direction Nationale du Patrimoine Culturel, “Rapport: Etat Actuel de Conservation du Bien Tombouctou” (February 2014), p. 4.

frustration, injustice and shock. This is because such destruction erases the timeless message integral to each cultural site and deprives humanity of its past and its future;⁵⁷ it carries a message of terror and helplessness; it destroys part of humanity's shared memory and collective consciousness; and it renders humanity unable to transmit its values and knowledge to future generations.

45. Cultural heritage is an important part of the non-biological memory of human beings. It is what we know of our present and, above all, our past – not through our own effort, merit or ability, but through that of many other individuals similar to us: those who, consciously or unconsciously, have been building that common home we call “humanity”. Outside its shelter, there is no future for us. The destruction of cultural heritage represents an irreplaceable loss that denies humanity not only its past but also its future.
46. Moreover, when this destruction is intentional and grounded in discriminatory motives, as in the present case, it carries an additional purpose: it is a new expression of terror, aimed at intimidating society by demonstrating what radical groups are capable of and generating a sense of helplessness and frustration in the rest of the world, which feels powerless before such attacks.
47. The shared external memory we acquire through cultural heritage is essential to the life of the human being. It allows us to cross the limits of our biological essence and reminds us of our shared capacity to think and act freely. In other words, cultural heritage enables us to identify ourselves as “humankind”, and its gratuitous destruction cannot but engender a common sense of shock.
48. Damage inflicted on cultural heritage directly erases the memory of humanity's collective consciousness in the way that degenerative diseases attack the physical structure of the brain. It threatens us with the loss of our connection to that which makes us men and women, above and beyond our personal limitations – that is, to that which makes us human. It severs our connections with an immense treasure that has been zealously preserved, sometimes since time immemorial, and inhibits our capacity to pass this legacy on to future generations.

⁵⁷ Report of Special Rapporteur in the field of Cultural Rights (3 February 2016) UN Doc. A/HRC/31/59, para. 47.

PART TWO

The scope of the economic and moral harm suffered, including monetary value, to persons or organisations as a result of the crimes committed

49. This section identifies five types of moral harm (deprivation of human rights; mental pain and anguish; loss of education and opportunity; moral harm resulting from death; and damage to relationships and loss of consortium); and two types of economic harm (actualised pecuniary loss and consequential pecuniary loss). When possible, the explanation of each harm provides monetary estimations of the monetary value of the harm suffered. Throughout the section references are made to the eligibility criteria for victims.
50. This section has been developed according to the following parameters. First, the harm must be connected to the crime for which Al Mahdi was convicted, namely, that of 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, according to Article 8(2)(e)(iv) of the ICC Statute. Second, the identified harm must have been suffered *as a result* of the crime, in line with the but/for and proximate cause standards set out in the case-law of this Court.⁵⁸

A. Moral harm suffered, including monetary value

51. Moral harm, also known as non-pecuniary loss, is a recognised form of harm under international law.⁵⁹ It encompasses various forms of harm, which generally fall under three main categories, death, personal injury, and loss of liberty. In cases of death, the family members may claim for their own emotional suffering arising from the death, and potentially for the emotional suffering of the deceased, though this latter category is not firmly established under international law.⁶⁰ Personal injury may be divided into two main forms, pain and suffering, and loss of amenities.⁶¹ Whereas pain refers to actual hurt and discomfort, suffering refers to mental and emotional distress.⁶² Pain and suffering can be further divided into three sub-categories - physical pain and discomfort, psychiatric injury, and mental pain and anguish.⁶³ While the first two sub-categories are self-explanatory, the third is more difficult to comprehensively define. Nonetheless, forms of mental pain and anguish that have been recognised include distress, humiliation, anxiety, frustration, a sense of injustice, and shock.⁶⁴ Loss of amenities refers to the physical and emotional limitations arising from the injury itself. Loss of amenities can be further divided into three sub-categories - loss of faculty, damage to relationships and loss of consortium, and loss of non-pecuniary opportunity.⁶⁵

⁵⁸ ICC, Lubanga - Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" (7 August 2012) para. 59; and ICC, Katanga - Ordonnance de réparation (24 March 2017), para. 162.

⁵⁹ McCarthy, Conor, *Reparations and Victim Support in the International Criminal Court* (New York: Cambridge University Press, 2012), p.110.

⁶⁰ Ibid., p. 110.

⁶¹ Ibid.

⁶² Ibid, p. 112.

⁶³ Ibid.

⁶⁴ Ibid., pp. 116-7.

⁶⁵ Ibid, p. 112.

52. As confirmed by the Trial Chamber in *Katanga*, the estimation of the monetary value deriving from moral harm must obey to international standards and it is “*not pertinent de prendre en compte la situation économique de l'Ituri* [i.e. the region] *pour déterminer le montant des réparations octroyées*”.⁶⁶
53. In the following analysis five types of non-pecuniary harm are identified, namely, (i) deprivation of human rights, (ii) mental pain and anguish that has taken different forms such as fear, shock, distress or humiliation, (iii) loss of childhood and opportunity, (iv) moral harm resulting from death, and (v) damage to relationships and loss of consortium.

(i) Deprivation of human rights

54. As to deprivation of human rights, the Inter-American Court of Human Rights has applied an evidentiary criterion according to which there is a “rebuttable presumption that the violation of the [Inter-American Convention of Human Rights] convention right engendered non-pecuniary damage”.⁶⁷ In the *Al Mahdi* case there have been four types of human rights violations, namely the violation of the right to access to culture, along with three that derive from this lack of access, those being freedom of expression, the right to freedom of religion, and the right to education.

55. Looking first to access to culture, this right is recognised in Article 15(a) of the International Covenant on Economic, Social and Cultural Rights 1996 to which Mali is a party. Cultural rights were defined by the former Special Rapporteur in the field of cultural rights as follows:

“Cultural rights protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They may also be considered as protecting access to cultural heritage and resources that allow such identification and development processes to take place.”⁶⁸

56. This right and the obligations it entails according to this definition appears to have been violated because, as recognised by the Trial Chamber in its judgement, “the Community in Timbuktu was involved in their [mausoleums] maintenance and used them for their religious practices.”⁶⁹ They were a sacred area used for prayers and to receive blessings and offerings, routinely, and “at every event in life, including birth, death, illness, and journey mercies, and [the faithful inhabitants] saw this as a treasured tradition.”⁷⁰ In the Judgement *Masacre de Plan Sánchez*, the Inter-American Court of Human Rights listed as

⁶⁶ ICC, *Katanga* - Ordonnance de réparation (24 March 2017), para. 189.

⁶⁷ Altwickier-Hàmori, Szilvia, Tilmann Altwicker, Anne Peters, “Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights”, p. 12 citing *7 Apicella v. Italy*, App. No. 64890/01, (Eur. Ct. H.R. March 29, 2006), para. 93.

⁶⁸ Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed (22 March 2010) UN Doc. A/HRC/14/36, para. 9.

⁶⁹ ICC, *Al Mahdi* Judgment and Sentence (27 September 2016), para. 136.

⁷⁰ Registry's observations in the *Al Mahdi* case pursuant to Trial Chamber VIII's Decision ICC-01/12-01/15-172 of 29 September 2016, para. 35.

relevant to moral damage the impossibility of reproducing and re-transmitting culture by, for example, impeding the celebration of ceremonies and rites.⁷¹ The fact that, as found by the Trial Chamber, Al Mahdi warned faithful inhabitants not to follow their practices is a strong indication of the intent to curtail the right to access to culture, which was subsequently confirmed by the actual destruction of the mausoleums.⁷² After the destruction, this impairment of access continued for several months, forcing the population to renounce their cultural practices.⁷³ [REDACTED] "all these years, we had gathered [around the mausoleums] and [REDACTED]. [REDACTED] made sacrifices (in the form of money or nourishment) [...] but after the destruction [REDACTED] could no longer observe our tradition."⁷⁴

57. Significantly, the celebration of several festivals had to cease due to the destruction. For example, this included the "*Festival au Désert*" that was celebrated once a year, which was an expression of the culture of Timbuktu, an opportunity for artists to perform, and for the inhabitants of Timbuktu to conduct business. People would rent rooms for the festival and it would attract visitors from around the country, allowing Malians to gather and access their broader culture.⁷⁵ The festival of Mawlid suffered the same fate. This festival celebrates the birth date of Prophet Mohammed, and was held once a year near Sankoré Mosque, which also provided the opportunity for Maliennes to recreate the "atmosphere when the city was at the height of its glory".⁷⁶
58. As indicated by UNESCO, this deprivation of cultural rights and access to cultural heritage may particularly affect "refugees and internally displaced people" on a continuing basis.⁷⁷ This form of impact affects those in Mali who fled due to the destruction of the mausoleums.⁷⁸ Accordingly, "in the longer term, this might cause irreversible loss of cultural diversity".⁷⁹
59. Concomitant rights that were also violated due to the event at issue include the right to freedom of expression, the right to freedom of thought and religion and the right to education. These are connected with the right to access to culture, as recognised by the Special Rapporteur in the field of cultural rights.⁸⁰ The nature of the event and the way it

⁷¹ Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, Reparations judgment (19 November 2004), para. 87.

⁷² ICC, Al Mahdi Judgment and Sentence (27 September 2016), para. 48. A [REDACTED] indicated that before the events, there had been a warning to the population which involved destroying the doors and windows of the Sidi Mahmoud mausoleum, [REDACTED].

⁷³ Tounkara, Sokona et Ben Essayouti, "Mémoires et identité culturelle de Tombouctou, un défi pour la construction de la paix", *International Preservation News* 61 (December 2013) : 28-34, p. 28.

⁷⁴ ICC-01/12-01/15-200-Conf-Anx20-Red (22-12-2016). [REDACTED]

⁷⁵ [REDACTED]

⁷⁶ UNESCO, "An African El Dorado Legend: Timbuktu", Multimedia Archives (1988), available at http://www.unesco.org/archives/multimedia/?pg=33&s=films_details&id=1161 (last accessed on 24 March 2017).

⁷⁷ "UNESCO Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict", para. 7.

⁷⁸ [REDACTED]

⁷⁹ UNESCO Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict", para. 7.

⁸⁰ Report of the independent expert in the field of cultural rights, Farida Shaheed, A/HRC/17/38 (21 March 2011), paras. 47 and 48.

was conducted necessarily prevented inhabitants from freely expressing their beliefs and accessing their sacred sites. A special mention must be made of the right to education under Article 29(c) of the Convention on the Rights of the Child, to which Mali is a party. [REDACTED] the disruption to children's schooling arising in connection with the destruction of the mausoleums.⁸¹ This violation may also constitute a loss of opportunity, which is a distinct form of harm, as discussed in more detail below.

60. In terms of who has suffered this harm, it is first and foremost the population of Timbuktu that the Trial Chamber has referred to as the "faithful and inhabitants of Timbuktu".⁸² This seems to be in line with the statement of the [REDACTED] [REDACTED] according to who everyone in the city was affected except the Wahabist (i.e. the fundamentalists).⁸³ Within the population of Timbuktu, [REDACTED] [REDACTED] [REDACTED] [REDACTED] However, for the purposes of harm suffered due to deprivation of human rights there is no need to treat [REDACTED] differently than other Timbuktu inhabitants who suffered harm. Violations of the right to access to culture and the concomitant rights discussed above were suffered in an equivalent manner by the affected members of Timbuktu's population, especially the children whose schooling was impaired. To the extent certain members, such as [REDACTED], suffered disparately from other forms of harm such as distress and pecuniary loss, these distinctions are set out below.

61. The remaining Malian population who were not inhabitants of Timbuktu could be deemed indirect victims, particularly in light of the cancellation of festivals. [REDACTED] [REDACTED] "*Tombouctou est da voir*".⁸⁴ [REDACTED] [REDACTED] Timbuktu was important for the rest of the country because it constitutes heritage integrated in the fabric of Mali, people from all over the country would travel to Timbuktu to demand from the saints "*le intercession necessaire*".⁸⁵ From a technical perspective, [REDACTED] "one cannot understand the history of Mali without Timbuktu".⁸⁶

62. As to the monetary value assessment, the *Masacre Plan de Sánchez* reparations decision of the Inter-American Court of Human Rights provides a reference point. The court found that the victims of the case had suffered five forms of moral harm, those being: the permanent anguish of witnessing the massacre, the harm of having to flee their village and remain absent from it for years, the anguish of losing family members and being prevented from burying them according to their customs, the absence of access to justice for a prolonged period, *and the disruption of their culture*. The latter one manifested itself in the fragmentation of the community, the destruction of family roles, the loss of the community's cultural identity, a cultural vacuum owing to the death of the women and the elderly, impairment of the memory and dignity of women as the group's transmitters and

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82 ICC, Al Mahdi Judgment and Sentence (27 September 2016), para. 80.

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procreators, changes in the community mourning patterns, alteration of the traditional community and social fabric etc.⁸⁷ T [REDACTED]

[REDACTED] The moral harm deriving from the disruption of their culture was thus only an unknown fraction of this amount. In fact, in making comparisons with this case, the statement of the Court in the Al Mahdi judgment must be borne in mind: "even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons".⁸⁸

63. Another point of reference ■ the 307,307 USD that Mali was granted in 2013 by the UNESCO Intangible Heritage Fund to compile an inventory of intangible cultural heritage practices affected by the conflict in the country. The background of the request is that:

"Cultural practices and expressions ranging from rituals, traditional music, festive events and craftsmanship were curtailed by the prohibitions imposed by the occupants. People had fear of being stigmatized or targeted of retributive attacks. The damage caused to the intangible heritage in a climate of fear and uncertainty has had a multiplier effect, profoundly affecting the feelings of identity of local communities across the country."⁸⁹

While Timbuktu was the most affected area, it must be borne in mind that the funds provided covers the entire Malian national territory.⁹⁰ [REDACTED]

64. Given the collective nature of the deprivation of human rights in this case, it is recommended that this harm is repaired through collective measures. In fact, as stated above, it was the whole of the population of Timbuktu that underwent these violations.

(ii) Mental pain and anguish

65. Another type of moral harm that can be generally referred to as mental pain and anguish

[REDACTED]
[REDACTED] The sub-types of moral harm under this category [REDACTED] included fear [REDACTED],⁹¹ shock [REDACTED],⁹² some form of distress like feeling devastated or [REDACTED]

⁸⁷ Inter-American Court of Human Rights, *Plan de Sánchez Massacre v. Guatemala*, Reparations judgment (19 November 2004), paras. 77 and 88. The massacre was committed in 1982 in Guatemala. It reportedly involved the killing of over 200 people of a Mayan ethnic group. After the massacre, the village was abandoned and the survivors were threatened not to return to their land or reprisals would follow.

⁸⁸ ICC, Al Mahdi Judgment and Sentence (27 September 2016), para.77.

⁸⁹ UNESCO –Intangible Heritage: Safeguarding Projects, "Inventory of intangible cultural heritage in Mali with a view to its urgent safeguarding" (2013) available at <http://www.unesco.org/culture/ich/en/assurances/inventory-of-intangible-cultural-heritage-in-mali-with-a-view-to-its-urgent-safeguarding-01026> (last accessed on 26 April 2017).

⁹⁰ UNESCO – Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, "Mali's Request for International Assistance from the Intangible Cultural Heritage Fund," File n. 01026.

⁹¹ [REDACTED]
[REDACTED] what happened to the Sidi Yahia door was a symbol of destruction; [REDACTED]

⁹² [REDACTED]

a big sorrow [REDACTED]⁹³ humiliation [REDACTED]
[REDACTED]⁹⁴ and sadness or shock [REDACTED]⁹⁵ [REDACTED] disruption of belief
(*croyance est brisée*), [REDACTED] how their faith had been
shattered, and that this had deprived them of their source of psychological well-being. [REDACTED]
[REDACTED]
[REDACTED] the saints were gone and that they took longer than before to
respond [REDACTED]⁹⁶ [REDACTED] [REDACTED] when the
mausoleums were destroyed, desperation followed; the psychological impact was very
strong.⁹⁷

66. As to the eligibility criteria, [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]. As to the monetary value of this type
of moral harm, apposite guidance can be gleaned from the Ethiopian-Eritrean Claims
Commission arbitral award of 2009. In 2000, during the Ethiopian occupation of Eritrea,
the Stela of Matara (an obelisk inscribed with most ancient example of the "old Ethiopic"
script in existence) was damaged. The Claims Commission awarded to Eritrea
[REDACTED] to repair the Stela as well as an additional amount to
reflect its unique cultural significance. [REDACTED]
[REDACTED]

67. Taking this information and applying it to the Al Mahdi circumstances, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

93 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

94 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

95 [REDACTED]
[REDACTED]

96 [REDACTED]
[REDACTED]

97 [REDACTED]
[REDACTED]

98 The total sum awarded was approximately [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	\$46,000 USD
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

(iii) Loss of childhood and opportunity

68. Addressing the harm suffered under the label loss of childhood, [REDACTED] [REDACTED] childhoods had been lost as a result of the destruction. However, [REDACTED] the connection between the destruction and this form of loss. On a similar note, other applicants complained that their opportunity to receive an education had been impaired. However, again no further details were provided.⁹⁹ In the *Katanga* reparations decision, the Trial Chamber understood that this type of harm ("*perte de chance*") were encompassed in the general recognition of moral harm arising from the attack against Bogoro.¹⁰⁰ In this case, the loss of childhood and opportunity could be subsumed in the first type of moral harm, that is, the deprivation of human rights.

(iv) Moral harm resulting from death

69. Turning to harm connected with death, [REDACTED] [REDACTED] died in connection with the destruction of the mausoleums. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]¹⁰¹ [REDACTED] [REDACTED] would also give rise to "loss of profit" as a form of pecuniary loss, and [REDACTED]

70. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]¹⁰² The same comment concerning "loss of profit" applies in this case for t [REDACTED] [REDACTED]

⁹⁹ [REDACTED]

¹⁰⁰ ICC, *Katanga* - Ordonnance de réparation (24 March 2017), para. 139.

¹⁰¹ [REDACTED]

¹⁰² [REDACTED]

71. In accordance with the *Katanga* reparations decision, [REDACTED] must establish three factors to receive [REDACTED] due to the death of a family member. First, the connection between the harm suffered [REDACTED] with the crime(s) for which the accused has been convicted. Second, that [REDACTED] of the crimes for which the accused was convicted. Third, that [REDACTED] had a close personal link with the direct victim.¹⁰³

72. The two deaths described above in the context of the Al Mahdi case were closely connected to the destruction of the mausoleums. [REDACTED] which were the immediate contexts in which the victims, directly concerned the destruction of the mausoleums and would not have occurred without Al Mahdi's decision to destroy the mausoleums. In both cases, [REDACTED] [REDACTED] may be able to claim [REDACTED] [REDACTED]

73. The *Katanga* reparations decisions offers a table with the amounts to be awarded to victims of moral harm stemming from the death of a relative. T [REDACTED] [REDACTED] [REDACTED] [REDACTED]

(v) Damage to relationships and loss of consortium

74. Loss of consortium and damage to relationships is well established in international law. International human rights law cases have established that it is not necessary to show complete deprivation of a relationship to justify [REDACTED]. Significant disruption to a person's familial relationships and to the social structures in which they lived are recoverable.¹⁰⁵

75. [REDACTED]¹⁰⁶ [REDACTED] [REDACTED] [REDACTED] due to the destruction of the mausoleums. This is the case of [REDACTED]. [REDACTED] [REDACTED] if they could destroy the mausoleums, they could do the same to the inhabitants of Timbuktu.¹⁰⁷

76. F [REDACTED] [REDACTED] [REDACTED] For example, [REDACTED] [REDACTED]

¹⁰³ ICC, *Katanga* - Ordonnance de réparation (24 March 2017), para.114.

¹⁰⁴ Ibid., para. 230.

¹⁰⁵ McCarthy, *Reparations*, p.120.

¹⁰⁶ Note that [REDACTED] [REDACTED] [REDACTED] [REDACTED]

¹⁰⁷ [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]
[REDACTED]¹⁰⁸ However, if the damage to relationships and loss of consortium is already compensated under the category of psychological harm, then care should be taken to avoid double-counting this harm.¹⁰⁹

B. Economic harm suffered, including monetary value

(i) Actualised economic loss

77. Several burial places were destroyed during the events. Even though Al Mahdi has not been convicted for the destruction of these places, the physical proximity between the mausoleums and the adjacent burial places leads to the conclusion that they “were damaged because they [were] near the scene of the crime”.¹¹⁰ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹¹¹

78. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

79. Other acts of pillage and destruction [REDACTED]
[REDACTED] For example, [REDACTED]
herd of animals had been stolen.¹¹² However, the acts of vandalism and pillage were not part of the specific acts of destruction against the mausoleums and cannot be ascribed to Mr. Al Mahdi pursuant to the principle of individual criminal responsibility.

(ii) Consequential economic loss

80. The destruction of the mausoleums had a broad and far-reaching impact on the earning potential of Timbuktu’s population. Th [REDACTED]
[REDACTED] Even though one amicus curiae report did not find that loss of tourism warranted reparations, and supported this claim with the fact that the “Eritrea-Ethiopia Claims Commission denied compensation for lost of tourism as being too speculative”,¹¹³ the loss of revenue in Timbuktu due to the decline of visitors after the destruction is not unfounded: tourists, including from America, who visited the sites were also a source of revenue for part of the

¹⁰⁸ [REDACTED]

¹⁰⁹ See ICC, Katanga - Ordonnance de réparation (24 March 2017), para. 139.

¹¹⁰ Joint observations of FIDH and AMDH on the reparations proceedings of the Al Mahdi case (2 December 2016), para. 17.

¹¹¹ [REDACTED]

¹¹² [REDACTED]

¹¹³ Queen’s University Belfast Human Rights Centre and the Redress Trust observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules of Evidence and Procedure (2 December 2016), para. 66.

rest of the population that earned their living around the pilgrimage and touristic activities of the town.¹¹⁴ [REDACTED]

“There is pilgrimage particularly on Mondays and Fridays where people from Timbuktu, other regions of Mali and foreign countries go to pray around Mausoleums. This tradition dates back to the 14th Century and possibly earlier.”¹¹⁵

[REDACTED] “the destruction of the mausoleums seriously impacted in turn on the town’s social fabric”.¹¹⁶ As such, the targeting of the mausoleums constituted, even if unintentionally, the “targeting of an industry”.¹¹⁷

81. The pilgrimage and tourism “industry” of Timbuktu was a central piece of the living tissue of the town. According to the *Réseau du Patrimoine Mondial*, there was an average of 25,000 visitors a year before the armed conflict which would [REDACTED]¹¹⁸ Although it was observed that the amount received from tourism “was a not large amount of money, but a meagre income”,¹¹⁹ in the particular economic context of Timbuktu, this quantity of money, albeit limited, could represent the difference between earning a sustainable living and not obtaining the means of subsistence.

82. The number of visitors has not yet reached its past levels¹²⁰ probably due to the security situation in the north of the country. However, even if Timbuktu was safe, pilgrims and tourists would not have visited the town while the mausoleums were in ruins, that is, until July 2015 when UNESCO completed the reconstruction works. [REDACTED]

[REDACTED] Using the values provided by the *Réseau du Patrimoine Mondial* ([REDACTED])

83. Presumably, not all mausoleums attracted the same number of visitors and generated equal levels of income. [REDACTED]

[REDACTED]¹²¹ For this reason, [REDACTED] e. imams).

¹¹⁴ [REDACTED]
¹¹⁵ [REDACTED] see also, UNESCO, “An African El Dorado Legend: Timbuktu”, *Multimedia Archives* (1988), available at http://www.unesco.org/archives/multimedia/?pg=33&s=films_details&id=1161 (last accessed on 24 March 2017).

¹¹⁶ [REDACTED]
¹¹⁷ [REDACTED]
¹¹⁸ Réseau du Patrimoine Mondial, *Évaluation de la Conservation du Site Rapport: Tombouctou* (17 August 2010).
¹¹⁹ Queen’s University Belfast Human Rights Centre and the Redress Trust observations in the Al Mahdi case pursuant to Article 75(3) of the Statute and Rule 103 of the Rules (2 December 2016), para. 66.

¹²⁰ [REDACTED]
¹²¹ Observations du Représentant Légal des victimes sur les principes et modalités du droit à réparation – Al Mahdi case (2 décembre 2016), para. 119.

84. Even though the [REDACTED] the destruction of the sites entailed an overall decline in the earning capacity and living standards of the whole of Timbuktu [REDACTED].¹²² The loss of this source of revenue had a major and direct impact for the social fabric of Timbuktu. Because of the dramatic decline in the arrival of pilgrims and tourists, a significant source of revenue essentially disappeared for the local inhabitants.¹²³ The scope of the harm in monetary terms is not easily quantifiable, but could be addressed through collective measures aimed at revamping the economic life of the town, as suggested in the recommendations for reparations.

(iii) Other observations

85. In analysing the information set out in the section, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
86. There was no significant gender pattern among [REDACTED] specific forms of harm. For example, there was no significant disparity in the number of males or females reporting distress, or fear, or disruption of belief, relative to the gender proportions [REDACTED]. However, it must be borne in mind that the traditional roles assigned to children, women and men may have an impact on how the harm was felt and thus on how it should be repaired. For example, it seems that women are not allowed into the mausoleums unless they are above certain age. They nevertheless play an essential role as transmitters of culture to children.¹²⁴

¹²² This was the case of [REDACTED]
[REDACTED]

¹²³ [REDACTED]
[REDACTED]
[REDACTED]

¹²⁴ [REDACTED]
[REDACTED]

PART THREE

The traditional mechanisms of conflict resolution and reparation in Timbuktu

87. This section of the report examines five aspects of the traditional justice mechanisms in Timbuktu: the reason behind their existence and current popularity; their perceived role in post-conflict Mali; their standard procedures, including the people who serve as traditional leaders and how their decisions are made; the advantages and disadvantages of these mechanisms; and observations on the appropriateness of utilising these mechanisms in the reparations phase of the Al Mahdi case.
88. As an overarching point, it should be noted that the traditional mechanisms of conflict resolution and reparation in Mali, which are particularly prominent in the north of the country, comprise a parallel system of justice to that of the state. Its customary leaders may be either secular or religious, and range from family elders, “*chefs de ville*” and *griots* to *cadis* and imams. For the most part, they deliver verbal decisions on land or family disputes brought to them by interested parties. This system is referred to as “informal justice”; its mechanisms are consensus-oriented and closer to mediation than to adversarial or inquisitorial procedures.
89. It should be also noted that, as will become apparent in the following analysis, the resort to traditional mechanisms of conflict resolution in the north of Mali is a widespread reality and cannot be ignored. In view of this, the terms of use for the reparation phase of the Al Mahdi case should be well-defined, context-bound and implemented through a model of improved justice, with clear guidelines for training. *Cadis* are the most common customary leaders in Timbuktu, but [REDACTED]
[REDACTED]
[REDACTED] for reparation purposes.¹²⁵ [REDACTED]
[REDACTED]. This is because traditional mechanisms reproduce established power dynamics in which the interests of women, children and particularly vulnerable sectors of the society such as slaves are sidelined.

A. Why do traditional justice mechanisms persist in Mali?

90. During the 19th century, Mali possessed a range of customary legal orders, reflecting the differing degrees of Islamisation in the country. Timbuktu was renowned as an urban centre in which Islamic law predominated because, as a centre of religious learning, the city played a crucial role in the expansion of Islam. In line with its colonial policy of dual administration, France imposed its rule on the central and northern regions using different methods; for example, lineages associated with the Sufi orders in Timbuktu received the active support of the French colonial administrators. As a result, different legal orders continued to co-exist in Mali throughout the colonial period.¹²⁶

¹²⁵ [REDACTED]

¹²⁶ Schulz, Dorothea, “Sharia and National Law in Mali” in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, edited by Jan Michiel Otto (Leiden: Leiden University Press, 2010), pp. 531-3.

91. When Mali gained independence in 1960, the central government focused on administering the major cities, such as Bamako in central Mali, and largely neglected the semi-arid north where Timbuktu is situated.¹²⁷ This estrangement from the nation-building process gave rise to a popular feeling of disenfranchisement and alienation from the state and its officials, including the judiciary. The mechanisms of traditional justice offered an alternative to the central administration, establishing a divide between “informal” and “formal” justice in modern Mali.
92. The existence of parallel mechanisms of customary justice in the north was reinforced on two occasions: after the second Tuareg uprising (1990-1996), when the approach of the central administration changed “from military suppression to administrative neglect”;¹²⁸ and following the armed conflict in 2012, when most of the judicial infrastructure was destroyed.¹²⁹ For example, there are more than 200 outstanding lawsuits concerning crimes that occurred in the north during the conflict. Some of these, although initially filed in Bamako, have been moved to northern regions such as Mopti, but justice there appears ineffective and slow because the security situation hampers investigations.¹³⁰ Likewise [REDACTED]
[REDACTED]
[REDACTED] 113 lawsuits concerning sexual violence occurred in the north remained largely unaddressed by state authorities.¹³¹
93. Surveys of 1,000 Malian citizens conducted in 2009 and 2010 revealed that only 10% would resort to the police if they were a victim of a crime, and 66% were dissatisfied with the justice system.¹³² In a survey conducted in 2013 in the north, 163 out of the 168 groups interviewed declared that they would first contact their traditional leaders, and only 11 mentioned “formal judicial institutions, the police and the gendarmerie, as mechanisms for managing conflicts”.¹³³ This is explained by the fact that in the north of Mali “state-provided justice is experienced as the expression and extension of state power”.¹³⁴
94. Apart from its perceived lack of legitimacy, there are other reasons why the population does not resort to state mechanisms to resolve disputes: namely, the foreign nature of the process, including its language and adversarial nature; the geographical and economic barriers to accessing the system; and widespread corruption.
95. The state judicial system was imported by the French colonial rulers. Its formalistic procedures, the result of France’s specific political and philosophical history, were transplanted to Mali without regard to the country’s own “history, capabilities and

¹²⁷ Zounmenou, David, “The National Movement for the Liberation of Azawad Factor in the Mali Crisis”, 22 *African Security Review* 3 (2013): 167-174, p. 168.

¹²⁸ Veen, Erwin van, Diana Goff, Thibault Van Damme, “Beyond dichotomy: recognising and reconciling legal pluralism in Mali” (The Hague: Netherlands Institute of International Relations Clingendael, 2015), p. 13.

¹²⁹ Ibid.

¹³⁰ American Bar Association Rule of Law Initiative, “A Transitional Justice Strategy for Mali: Analysis Based on Input from Civil Society and Local Communities – Executive Summary and Recommendations” (Washington DC: 2015), p. 5.

¹³¹ [REDACTED]
¹³² Veen, Goff and Van Damme, “Beyond dichotomy”, p. 29.

¹³³ Allegrozzi, Ilaria and Elise Ford, “Reconstruire la Mosaïque: Perspectives pour de meilleures relations sociales après le conflit armé au Nord du Mali” (Octobre 2013: Rapports de Recherche OXFAM), p. 20.

¹³⁴ Veen, Goff and Van Damme, “Beyond dichotomy, p. 3.

resources".¹³⁵ The state judiciary is thus regarded as overly complex and alien to Mali's legal culture. Its processes are conducted in French and written documents are presumably part of its normal working procedures; however, only one-third of the population is fluent in French,¹³⁶ and the current literacy rate is 38.7%.¹³⁷

96. In order to reach a state court, a litigant would need to travel tens or even hundreds of kilometres, a distance that could increase to more than 250 kilometres in the case of an appeal. The cost of filing a legal claim is prohibitive for a population whose average daily income falls below \$2 USD per day, and the legal aid system appears to be ineffectual.¹³⁸ This indicates that "the state justice system is financially out of reach for two-thirds or more of the Malian population".¹³⁹
97. If an individual has resort to the state judicial system, it is perceived as a declaration of war; local customs, on the other hand, are more geared towards social harmony and consensus. This is a fundamental trait of Malian society, which has historically practised a tolerant version of Islam, with diverse ethnic groups living together since the time of the Songhai Empire. In a recent study carried out in the north of Mali, the majority of the groups interviewed showed a strong preference for resolving conflicts at the community level through dialogue: "to 'sensitize', 'communicate', 'agree' are the words most frequently mentioned".¹⁴⁰ By turning to the state judiciary, a claimant runs the risk of being stigmatised as anti-social.
98. Lastly, the state judiciary is regarded with a significant level of distrust; it is perceived to be one of the most corrupt branches of the central administration.¹⁴¹ [REDACTED]
[REDACTED] the inability of the state to even provide the population with the basic necessities, due in part to the high levels of corruption entrenched in the local and national administrations. More specifically, many perceive the judicial system "as acting only in the interest of the strongest and the richest".¹⁴²

B. The role of traditional justice mechanisms in post-conflict Mali

99. Mali's central administration, increasingly aware of these challenges, launched the Programme Décennal de Développement de la Justice (Ten-Year Programme for the Development of Justice) in 2000. However, this seems to have yielded few results. During the period 2010-2014, the programme was still focusing on improving access to justice.¹⁴³ The armed conflict in 2012 largely cut off access to the judicial infrastructure in Timbuktu, and its state courts continue to appear beyond the reach of the majority.¹⁴⁴

¹³⁵ Ibid., p. 56.

¹³⁶ Ibid., p. 27.

¹³⁷ Central Intelligence Agency, "The World Factbook: Mali" (last updated on 12 January 2017). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ml.html> (last accessed on 15 April 2017).

¹³⁸ American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali" (Washington DC: January 2012), p. 3.

¹³⁹ Veen, Goff and Van Damme, "Beyond dichotomy", p. 27.

¹⁴⁰ Allegrozzi and Ford, "Reconstruire la Mosaïque", p. 17.

¹⁴¹ Veen, Goff and Van Damme, "Beyond dichotomy", pp. 28-9, 40-2; American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali", p. 3.

¹⁴² Allegrozzi and Ford, "Reconstruire la Mosaïque", p. 16.

¹⁴³ American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali", p. 1.

¹⁴⁴ [REDACTED]

100. The state judiciary is therefore only one alternative, and “by no means the most relevant”.¹⁴⁵ The failure of the state mechanisms to assimilate the legal system of the northern regions has shaped its legal culture, including in Timbuktu, where “the behaviour of the population reflects a visceral attachment to ancient beliefs and values and a voluntary submission to customary rules”.¹⁴⁶ Traditional judges are regarded as the only source of truth,¹⁴⁷ as well as the only realistic alternative.

101. Traditional mechanisms are not, for the most part, officially recognised.¹⁴⁸ Officials involved in the administration of formal justice tend to regard customary leaders with a level of contempt. The feeling appears mutual: the state regards customary leaders as lacking any legal standing, while customary leaders see the state apparatus as corrupt.¹⁴⁹

102. This situation is bound to change with the Accord d’Alger (the Mali peace and reconciliation agreement) signed in February 2015. Article 46 on reconciliation and justice includes the:

- “[p]romotion d’une formation de qualité à tous les actuels et auxiliaires de la justice, y compris les Cadis;
- revalorisation du rôle des Cadis dans l’administration de la justice, notamment en ce qui concerne la médiation civile de manière à tenir compte des spécificités culturelles, religieuses et coutumières;
- valorisation du statut des autorités traditionnelles à travers leur prise en charge et la prise en compte dans les règles de protocole et de préséance.”¹⁵⁰

103. Traditional justice mechanisms exist because they provide effective access to justice that otherwise would be non-existent for the majority, particularly in the northern areas affected by the conflict. There is a general consensus that in post-war Mali traditional justice mechanisms cannot be ignored as they are “a fundamental aspect of Malian society”.¹⁵¹ What is needed instead is an innovative approach that can provide an improved model of justice to replace the one currently offered by customary institutions anchored in tradition.

C. The standard procedure of traditional justice mechanisms

104. This part examines who may serve as a customary leader; how they are elected; the rules they follow; the common traits of their procedures, with particular emphasis on the role of the *cadi*, the most prominent traditional figure in Timbuktu; and the value of their decisions.

¹⁴⁵ Veen, Goff and Van Damme, “Beyond dichotomy”, p. 35.

¹⁴⁶ Bengaly, Abraham, *La Protection Juridictionnelle des Droits de l’Homme au Mali* (Paris: L’Harmattan Mali, 2015), p. 250.

¹⁴⁷ Ibid., p. 256.

¹⁴⁸ Ibid.

¹⁴⁹ [REDACTED]

¹⁵⁰ Art. 46, *Accord pour la paix et la réconciliation au Mali, issu du processus d’Alger* (Projet d’Accord version 25 Février 2015 à 19h30).

¹⁵¹ American Bar Association Rule of Law Initiative, “Access to Justice Assessment for Mali”, p. 41; see also, Veen, Goff and Van Damme, “Beyond dichotomy”, pp. 9 and 51.

105. Malians in the north resort to traditional leaders to resolve issues such as marital, inheritance and neighbourhood disputes, including issues concerning “land, commercial matters and small-scale crime”.¹⁵² Many types of customary leaders are called upon to judge these disputes. They could be a family member, usually the eldest male; a local actor, such as the neighbourhood, village or fraction head;¹⁵³ a religious authority, such as the *cadi* (Islamic judge) or imam (religious leader); or a person, such as a *griot*, who has inherited the role of mediator through his caste.¹⁵⁴ The way in which they become leaders varies: the quality of *griot* is passed down through the family, local actors are elected, and the *cadi* “emerges” spontaneously as a respected figure of authority. A woman cannot be a *cadi* and, in a recent study, out of the 107 customary leaders of every sort who were interviewed, only one was female.¹⁵⁵

106. The choice of customary leader is context-specific. In the case of Timbuktu, the *cadi* is the person most frequently called upon to deal with disputes, whereas the *griot* appears less relevant.¹⁵⁶ This is reflected in the attention the peace and reconciliation process pays to the figure of the *cadi*. As mentioned earlier, although they were not officially recognised in the past, the Accord d’Alger is now seeking to reinvigorate and legitimise the role of the *cadi*, establishing a system of legal training. However, as of August 2016, [REDACTED]

[REDACTED]
[REDACTED]¹⁵⁷ As noted above,
[REDACTED]
[REDACTED]¹⁵⁸

107. The source and content of the rules customary leaders use are not necessarily predictable.

A *cadi* may apply *Sharia* law or rely on what God has revealed to him. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹⁵⁹ A *cadi* does not need to “strictly adhere to any procedural or evidential rules. It is considered enough if both parties are heard in each other’s presence and the reasoning on which the award is based is provided to them.”¹⁶⁰

108. Despite this, traditional justice procedures have certain traits in common. The leader asks “the parties to present the facts of the dispute and their arguments in support of their case. Witnesses to key facts may also be heard.”¹⁶¹ He then retires to reflect for an indeterminate period. This is normally a short amount of time (measured in days),

¹⁵² Veen, Goff and Van Damme, “Beyond dichotomy”, p. 15; interview with [REDACTED]

¹⁵³ American Bar Association Rule of Law Initiative, “Access to Justice Assessment for Mali”, p. 2: although the rest of the traditional figures operate outside state law, “the legal framework grants certain local government actors (neighbourhood, village and fraction heads) the right to mediate civil and commercial cases”.

¹⁵⁴ Veen, Goff and Van Damme, “Beyond dichotomy”, pp. 67-8; Bengaly, *La Protection Jurisdictionnelle des Droits de l’Homme au Mali*, p. 255

¹⁵⁵ [REDACTED]

¹⁵⁶ [REDACTED]

¹⁵⁷ [REDACTED]

¹⁵⁸ [REDACTED]

¹⁵⁹ [REDACTED]

¹⁶⁰ [REDACTED]

¹⁶⁰ Keshavjee, Mohamed M., *Islam, Sharia and Alternative Dispute Resolution: Mechanisms for Legal Redress in the Muslim Community* (London: I.B. Tauris, 2013), p. 68.

¹⁶¹ American Bar Association Rule of Law Initiative, “Access to Justice Assessment for Mali”, p. 39.

although there is no formal time limit. During this period of reflection, he may consult with others. The emphasis of the final decision is invariably placed on maintaining the integrity of the unit at stake, be it the family or the community. Social cohesion is the goal and mediation is the means used to achieve it. When the leader is “ready to resolve the conflict, he conducts a mediation with the parties, seeking to identify and build upon areas of agreement and synergy”.¹⁶² He also refers to traditional principles whose content will vary, depending on whether the traditional figure is secular or religious. Since the priority of these processes is not to punish wrongdoers but to restore social relationships, it is common for the leader to ask the “winning” party what recompense they can offer to the “losing” party, so that both can walk away content at the outcome.¹⁶³

109. The choice of reparations is very context-specific. The payment of large sums of money is uncommon in rural areas; reconciliation is more often “sealed by sacrifices of animals (expiatory victims) made by the eldest descendant of the founding family of the village”¹⁶⁴ or some other relevant actor. For example, one case which involved a violent crime was resolved by a confession and an animal sacrifice. To defuse conflict, people are sometimes awarded cattle.¹⁶⁵

110. Decisions are rendered verbally. The lack of written reasoning means there is no room for precedent in the mechanisms of traditional justice, which further reduces the predictability of the outcome. This is one of the aspects noted by the Accord d’Alger, which seeks to incorporate the rules of precedent in the functioning of the role of the *cadi*.¹⁶⁶

111. With the possible exception of conflict resolution within the family setting, there is no hierarchical relationship among the different types of customary leaders. There is no formal appeal against their decisions. Nor do they possess any mechanism of enforcement: whether the decision of the leader is observed depends entirely on the willingness of the parties involved. There is a certain amount of social pressure on the parties; however, aside from incurring the censure of the community, there are no other consequences for non-compliance.¹⁶⁷

D. Advantages and disadvantages of traditional justice mechanisms

112. Traditional forms of justice possess a considerable number of advantages, which explains their popularity in the north. Malian society places trust in these mechanisms because, unlike state institutions, the chances of abuse and corruption are reduced by the visibility and cultural proximity of the leader called upon to judge the dispute. The processes take place in the village or town in question, meaning no travel arrangements are necessary, and they are carried out in the language spoken by the parties concerned. Although

¹⁶² Ibid., p. 40.

¹⁶³ [REDACTED]

¹⁶⁴ Konate, Douyale, “Les fondements endogènes d’une culture de paix au Mali: les mécanismes traditionnels de prévention et de résolution des conflits”, in *Les fondements endogènes d’une culture de la paix en Afrique*, edited by Edouard Matoko and Oumar Kane (Paris: UNESCO, 1999), p. 33.

¹⁶⁵ [REDACTED]

¹⁶⁶ Art. 46, *Accord pour la paix et la réconciliation au Mali, issu du processus d’Alger* (Projet d’Accord version 25 Février 2015 à 19h30).

¹⁶⁷ Veen, Goff and Van Damme, “Beyond dichotomy”, p. 37.

French remains Mali's official language, Mali is the least Francophone country in West Africa; only the educated elite speaks French. By contrast, there are 13 other national languages. Access to customary justice is also cheap and involves no cost to the parties, except in the case of the *griots* who normally expect some sort of monetary reward after their performance.¹⁶⁸

113. One of the most relevant strengths of customary forms of justice is that, with the exception of those concerned with vulnerable groups such as women, they are widely accepted by Malian society as a legitimate means of reaching solutions and reconciliation. As there is competition between the formal and informal mechanisms of justice, some imams have "agreed to be trained and educated in the universal instruments regarding gender violence and for the promotion of women's rights"¹⁶⁹ in order to improve their "marketability" and popularity. This indicates that there could be a certain degree of openness towards the adoption of an improved model of traditional justice in the near future.
114. Traditional forms of justice in the north also have a series of disadvantages that need to be taken into account if they are to be used for purposes of reconciliation and reparation. Customary justice reflects conservative social values: that is, it upholds the rural and patriarchal dynamics that systematically reproduce power relationships in which the interests of women, children and other vulnerable groups such as slaves are neglected.¹⁷⁰ [REDACTED] customary forms of justice, particularly religious ones, would be wholly inappropriate tools with which to redress women's lack of rights.¹⁷¹ This is because women occupy a submissive position in society, so their ability to negotiate or stand up for themselves in this type of process is curtailed *ab initio*. The emphasis on social cohesion and maintaining the integrity of the family impinges negatively on women: for example, in some cases, a victim may be "asked to tolerate violence [by her husband] in order to stay in her home and with her children".¹⁷² They are also at a disadvantage when it comes to property rights: for instance, male descendants receive twice as much as female ones and widows are only entitled to one-eighth of the property of their deceased husband.¹⁷³ This must be borne in mind if traditional leaders are to be used to distribute monetary compensation or other types of reparation.
115. Those who disagree with the view that traditional forms of justice discriminate against women tend to argue that the Koran provides for everything a woman needs, that women are obviously an important part of the process as they frequently partake in it as victims or witnesses, or that their opinions are factored into the process because the men who

¹⁶⁸ Veen, Goff and Van Damme, "Beyond dichotomy", pp. 3, 26; see also Central Intelligence Agency, "The World Factbook: Mali" (last updated on 12 January 2017). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ml.html> (last accessed on 15 April 2017).

¹⁶⁹ Ibid., p. 33.

¹⁷⁰ Erwin van Veen, Diana Goff, Thibault Van Damme, "Beyond dichotomy: recognising and reconciling legal pluralism in Mali" (The Hague: Netherlands Institute of International Relations Clingendael, 2015), pp. 3, 35.

¹⁷¹ [REDACTED]

¹⁷² American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali", p.40.

¹⁷³ Ibid.

are called upon to take the decision often consult their wives at night.¹⁷⁴ However, everything indicates that women's interests are sidelined in these traditional mechanisms. For example, women's views are only heard under certain conditions: "[unless] they are old and considered wise, [...] are directly involved in disputes as victims and/or witnesses, and [...] do not expose themselves in public [...] it would appear that women find it difficult to go beyond [...] the role of 'counsellors of their husbands' and reach a higher level of decision-making [in] (public) and formal roles in society".¹⁷⁵

116. This is, in and of itself, incompatible with the rights conferred by the Malian Constitution. Article 2 declares that "[a]ll Malians are born and live free and equal in their rights and duties. Any discrimination based on social origin, colour, language, race, sex, religion, or political opinion is prohibited". In addition, Mali is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child. As Mali is a monist state, international treaties are directly applicable and have "superior authority over laws of the State".¹⁷⁶ The reality, however, differs even at the state level. In 2009, a new Malian civil code more in keeping with international standards of women's rights was "ultimately withdrawn, following mass protests led by conservative religious leaders".¹⁷⁷

117. Another disadvantage is that customary leaders lack the authority to enforce decisions. This means that agreements "are often not respected, and the same disputes resurface".¹⁷⁸ When a party disagrees with the outcome of a decision, they may engage in "forum-shopping".¹⁷⁹ Reports suggest that non-compliance is a frequent phenomenon and may be on the rise, particularly in urban areas, as Malian society modernises and traditional family values lose their influence.¹⁸⁰

118. [REDACTED]
[REDACTED]
[REDACTED] these leaders would be unable to deal with crimes related to the crisis. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] lack of financial means and technical expertise would make it particularly difficult for them to handle war crimes. [REDACTED]
[REDACTED] since the nature and extent of the problem would be beyond their "comfort zone" (that is, marital or inheritance issues).¹⁸¹ Hence, "there is a tension between the need and limitations of involving customary justice mechanisms in supporting transitional justice efforts".¹⁸²

¹⁷⁴ [REDACTED] see also, Allegrozzi and Ford, "Reconstruire la Mosaïque", p. 19, recalling [REDACTED]: "*Les femmes sont consultées à des heures tardives, au lit.*"

¹⁷⁵ Allegrozzi and Ford, "Reconstruire la Mosaïque", p. 19.

¹⁷⁶ Article 116 of the Constitution of the Republic of Mali (27 February 1992).

¹⁷⁷ Veen, Goff and Van Damme, "Beyond dichotomy", p. 33.

¹⁷⁸ American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali", p. 44.

¹⁷⁹ [REDACTED]

¹⁸⁰ American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali", p. 44.

¹⁸¹ [REDACTED]

¹⁸² American Bar Association Rule of Law Initiative, "Access to Justice Assessment for Mali", p. 48.

119. That said, the tension might be dissipated if [REDACTED]
[REDACTED] In fact, as depositaries
of traditional knowledge, whose authority is respected by local communities, [REDACTED]
[REDACTED]
[REDACTED]. One example
of this is when, in the context of a land dispute, [REDACTED]
[REDACTED]
[REDACTED]¹⁸³

E. Observations on the appropriateness of traditional justice mechanisms in the reparations phase of the Al Mahdi case

120. Although *cadis* are the most widely accepted customary leaders in Timbuktu, they typically deal with family disputes, property claims and low-level crimes. Because of this [REDACTED] that fall under the jurisdiction of the ICC. Nonetheless, [REDACTED]
[REDACTED]

121. [REDACTED] risks creating an impression of foreign imposition, disrupting local traditions and social dynamics. Given the centre-north divide in the country, [REDACTED]
[REDACTED] and it is not exclusively managed by the central administration in Bamako. For example, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁸⁴

122. T [REDACTED] given the authority vested in them by the local population and the fact that they possess or can obtain information to determine the veracity of evidence and claims. However, to [REDACTED]
[REDACTED]
[REDACTED]

123 [REDACTED]
[REDACTED]
[REDACTED]
particularly as not all mausoleums had the same relevance o
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁸³ [REDACTED]
¹⁸⁴ [REDACTED]

[REDACTED]

124. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],¹⁸⁵ something that could “unintentionally strengthen the dominant group [...] and leave the marginalised members of the community worse off”.¹⁸⁶ However, i
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁸⁵ Goff, Diana, “Working with information justice: Key considerations for confident engagement” (The Hague: December 2016, Clingendael Institute – Conflict Research Unit), p. 9.

¹⁸⁶ Ibid.

PART FOUR

Recommendations on the modalities of reparations

125. As expressed by the Appeals Chamber in *Lubanga* “certain crimes may have an effect on a community as a whole”.¹⁸⁷ The nature of the crime of destruction of cultural heritage is an embodiment of this statement. Thus, as a general observation, it is recommended that reparations should be awarded on a collective basis as far as possible. The mausoleums and the door of the Sidi Yahia Mosque are locations of a collective concern, in which the entire faithful community has an interest. Nonetheless, t [REDACTED]

126. The persons harmed by the crimes for which Al Mahdi is responsible include t [REDACTED] the other faithful inhabitants of Timbuktu, the rest the population in Mali, and the international community. However, the latter two groups (the broader Malian population and the international community), do not require additional reparative measures, as those directed at the [REDACTED] Timbuktu inherently will effectively address the broader harm suffered by Malians and by the international community as a whole. In other words, the measures directed at the more specific harm will by necessary implication addressed the more general harm.

127. In terms of implementing the reparations, t [REDACTED] [REDACTED]. This will assist to maintain the legitimacy of the process and to manage victim’s expectations. An additional general observation is that a gender perspective should be incorporated into the formulation and modalities of the reparations. In this respect, [REDACTED] [REDACTED] are to be given equal treatment to other groups.

128. Turning to the specific measures recommended as a result of the preceding analysis and survey, these are set out according to the relevant type of harm resulting from the adjudicated crimes.

129. First, this report has identified moral harm resulting from human rights violations, including the restriction on the right of access to culture. In this respect, the report has offered guidelines based on international human rights law and precedents as well as the request of Mali to the UNESCO intangible heritage fund. It is recommended that

¹⁸⁷ ICC, *Lubanga* - Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 (3 March 2015), para. 212.

[REDACTED]

[REDACTED]¹⁸⁹ This should be done in consultation with UNESCO to ensure that the outstanding universal value of the sites is not endangered or degraded. For these measures designed to address human rights violations, it is unnecessary to distinguish between [REDACTED] and the rest of the population.

130. This report has identified moral harm arising from mental pain and anguish due to the destruction of the sites in Timbuktu, including fear, shock, distress, and humiliation. To reflect the irreplaceable loss of cultural authenticity which is at the source of this harm, [REDACTED]. In this respect, [REDACTED] are more gravely affected than the rest of the population of Timbuktu. Accordingly, it is suggested [REDACTED]

[REDACTED]¹⁹⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This portion of [REDACTED]

[REDACTED]

[REDACTED]. Remedying this consequential pecuniary loss is important for the ongoing protection of the mausoleums, as the economic viability of the city is critical to sustain the community and individuals who protect the integrity of the mausoleums.

131. Concerning the moral harm arising from deaths connected with the attacks on the mausoleums, and the harm caused by damage to relationships and loss of consortium, these should be [REDACTED]
- [REDACTED] and in line with the governing international standards for this form of harm.

132. Those who suffered actualised economic harm (i.e those who suffered due to the damage or destruction of sites [REDACTED] in connection with the destruction of the sites for which Al Mahdi was convicted) [REDACTED]
- [REDACTED]. No other actualised pecuniary loss was identified in this report.

133. Concerning consequential pecuniary loss, the report identified that this form of harm was suffered [REDACTED]. This harm should be remedied through [REDACTED]
- [REDACTED]. The Chamber may rely on the estimation provided by the *Réseau de Patrimoine Mondiale* set out above. In formulating and/or implementing these

¹⁸⁸ Two potential beneficiaries expressed a preference for this kind of measures, see victim applications 11 and 18.

¹⁸⁹ See victim applications 8, 12, 21 and 51.

¹⁹⁰ See victim applications 14, 26, 29, 31, 32, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61 expressing a preference for collective reparations, including projects aimed at generating income for the community.

reparations, as to the
[REDACTED] or each site's potential tourism and visitor based revenue.

[REDACTED] UNESCO has, with the help provided by states and other international actors, spent around \$3 million USD in the rehabilitation of the destroyed mausoleums (14 in total).¹⁹¹ However, it would be inappropriate to reimburse UNESCO since this type of activity goes in line with its general mission, and with the specific mandate of the World Heritage Convention system [REDACTED]

[REDACTED]

135. Lastly, a significant [REDACTED] during the time of the events and the occupation in general.¹⁹³ Even though this is not connected to the crime for which Al Mahdi has been charged, the Chamber could suggest the Trust Fund to use its "other resources" at its own discretion to support the victims according to Rule 98(5) of the Rules of Procedure and Evidence, and Rule 48 of the Regulations of the Trust Fund for Victims.

¹⁹¹ UNESCO, *Strategy on the reinforcement of UNESCO's Actions for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, adopted by the 38th General Conference in November 2015 (38C/49), para.

¹⁹² [REDACTED]

¹⁹³ [REDACTED]