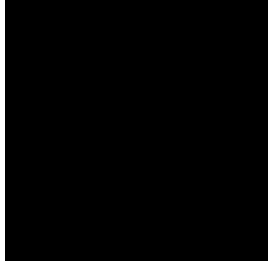


Annex I

Public



Brief by Ms. Karima Bennoune

UN SPECIAL RAPPORTEUR IN THE FIELD OF CULTURAL RIGHTS

Expert Appointed by the International Criminal Court in the Case of

The Prosecutor v. Ahmad Al Faqi Al Mahdi

ICC-01/12-01/15

Reparations Phase

27 April 2017



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In its Decision of 19 January 2017 Appointing Reparations Experts and Partly Amending Reparations Calendar, the International Criminal Court appointed experts for the reparations phase of the case, Prosecutor v. Ahmad Al Faqi Al Mahdi (ICC-01/12-01/15), including Karima Bennoune, the United Nations Special Rapporteur in the field of cultural rights. This brief addresses in detail the following questions referred to the experts by the Court: (I) the importance of international cultural heritage generally and the harm to the international community caused by its destruction; and (II) the scope of the moral harm suffered, to persons or organisations as a result of the crimes committed; as well as (III) the question of the expert's views on the reparation appropriate for such harms based on extensive research on this issue. [REDACTED] It will also briefly address the following question referred to the experts by the counsel for the defense which the Court instructed that the experts could explore at their discretion: (IV) the traditional mechanisms of conflict resolution and reparations in Timbuktu.

This report is based on documentary research, as well as field research [REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED] as well as [REDACTED]
interviews with UN human rights experts [REDACTED] the [REDACTED]
[REDACTED]
and academic experts in the fields of international law, archaeology, political science and sociology [REDACTED] from around the world. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

In this case, Mr. Ahmad Al Faqi Al Mahdi was convicted of the war crime of attacking protected objects under article 8(2)(e)(iv) of the Rome Statute in conjunction with attacks on 10 buildings “of a religious and historical character,” including mausoleums and a mosque. All the buildings but one were UNESCO World Heritage sites. The attacks took place in Timbuktu during the jihadist occupation of the city, between 30 June 2012 and 11 July 2012.¹ These crimes were carried out while Mr. Al Mahdi led the *Hesbah* or “morality

¹ Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment, paras. 38-39, (27 Sept. 2016).

police” of the armed group Ansar Dine.² From April 2012 until January 2013, Ansar Dine and Al-Qaeda in the Islamic Maghreb controlled Timbuktu.³ Mr. Al Mahdi was subsequently sentenced to 9 years of imprisonment on 27 September 2016. The case proceeded to the reparations phase for which this brief has been prepared. This brief underscores the importance of taking a human rights approach to understanding the meaning of the cultural heritage that Mr. Al Mahdi was convicted of attacking and the impact of its destruction, and in determining the most appropriate forms of reparation.

(I) The Importance of International Cultural Heritage Generally and the Harm to the International Community Caused by its Destruction

A) The Importance of International Cultural Heritage Generally⁴

The United Nations Special Rapporteur in the field of cultural rights urges the International Criminal Court to adopt a human rights perspective in assessing the importance of cultural heritage and the harm caused by its destruction. This will be of particular importance in the instant case as it is the first case in which destruction of cultural property has been charged and tried as a stand-alone war crime. Viewed from a human rights perspective, cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and groups and their identity and development processes.⁵ Cultural heritage is to be understood as encompassing the resources enabling the cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations.⁶

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict defines “cultural property” broadly so as to include movable or immovable

² According to the judgment, “[t]he *Hesbah* was entrusted with regulating the morality of the people of Timbuktu, and of preventing, suppressing and repressing anything perceived by the occupiers to constitute a visible vice.” *Id.* at para. 33.

³ *Id.* at para. 31.

⁴ This section includes material from the Report of the Special Rapporteur in the field of Cultural Rights, at Sec. II, U.N. Doc. A/71/317 (2016).

⁵ Report of the Special Rapporteur in the field of Cultural Rights, para. 77, U.N. Doc. A/HRC/17/38 (2011).

⁶ *Id.* at paras. 4-5

property, such as monuments of architecture, art or history, artworks, archaeological sites, manuscripts, books and scientific collections, as well as the institutions that house them (article 1).⁷ Cultural heritage is a broader concept which does not rest upon one agreed definition: it includes tangible heritage composed of sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value, as well as intangible heritage comprising traditions, customs and practices, knowledge, vernacular or other languages, forms of artistic expression and folklore. Both concepts should be understood in broad, holistic terms.

It is critical to emphasize the connections between culture more broadly and cultural heritage, and to recognize cultural heritage as living and in an organic relationship with human beings. Many experts take a holistic approach that focuses on the interconnections between tangible and intangible cultural heritage, while noting the particular logistical aspects of the destruction and preservation of tangible cultural heritage due to its physical manifestations.⁸ Attacks on one form of heritage are often accompanied by assaults on the other. Destruction of the tangible is linked to destruction of the intangible, such as religious and cultural practices related to cultural sites and objects.⁹ This impedes its transmission to future generations.

⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 1(a-b), May 14, 1954.

⁸Nobuo Ito, *Intangible cultural heritage involved in tangible cultural heritage*. In: 14th ICOMOS General Assembly and International Symposium: ‘Place, memory, meaning: preserving intangible values in monuments and sites’, 27 – 31 Oct 2003, Victoria Falls, Zimbabwe. (“The relationship between intangible culture and tangible cultural heritage including monuments and sites... is so close that it is impossible to separate. Intangible culture produces tangible cultural objects which require intangible culture.”) The Istanbul Declaration, a document that was accepted by 71 Ministers of Culture at a 2002 UNESCO meeting highlights that “an all-encompassing approach to cultural heritage should prevail, taking into account the dynamic link between the tangible and intangible heritage and their close interaction.” United Nations Educational, Scientific, and Cultural Organizations [UNESCO], *Istanbul Declaration: Intangible Cultural Heritage, mirror of cultural diversity*, para.2, Third Round Table of Ministers of Culture, (Istanbul, Sept. 16-17, 2002). See also Mounir Bouchenaki, Assistant Director General for Culture, UNESCO, Keynote address: *The Interdependency of the tangible and intangible cultural heritage*, 14th ICOMOS General Assembly and International Symposium, (Oct. 27-31, 2003).

⁹ Report of the Special Rapporteur in the field of Cultural Rights, para. 7, U.N. Doc. A/71/317 (2016).

While specific aspects of heritage may have particular resonance for and connections to particular human groups,¹⁰ damage to any cultural property damages the cultural heritage of all humankind, since each people makes its contribution to the culture of the world.¹¹ For example, as the former UN Special Rapporteur in the field of cultural rights and the Special Rapporteur on freedom of religion or belief articulated it in a joint statement in 2012, “the destruction of tombs of ancient Muslim saints in Timbuktu, a common heritage of humanity, is a loss for us all, but for the local population it also means the denial of their identity, their beliefs, their history and their dignity.”¹² Judge Cançado Trindade explained in his opinion related to the 2011 order of the International Court of Justice regarding the case of the Temple of Preah Vihear, “the ultimate titulaires of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole.”¹³

A fully gender-sensitive approach to the protection of cultural heritage and to the combating of its destruction is essential.¹⁴ This should include: recognizing the work of women cultural heritage defenders, who may face not only the risks encountered by their male colleagues but also gender discrimination; promoting the inclusion of women cultural heritage experts in relevant national and international forums and institutions, including at the highest levels; and combating the particular challenges faced by women in accessing cultural heritage without discrimination. Moreover, intangible heritage plays a particularly important role in the enjoyment of human rights by many women and girls.¹⁵

¹⁰ Report of the Special Rapporteur in the field of Cultural Rights, para. 77, UN Doc. A/HRC/17/38 (2011).

¹¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, preamble, 249 U.N.T.S. 240.

¹² Office of the United Nations High Commissioner for Human Rights, A very dark future for the local populations in Northern Mali’, warn UN experts, (10 July 2012).

¹³ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2013, p. 606, para. 114.

¹⁴ Report of the Special Rapporteur in the field of Cultural Rights, para. 11, UN Doc. A/HRC/17/38 (2011). G. A. Res. 33/20, para. 9 (27 Sept. 2016).

¹⁵ Report of the Special Rapporteur in the field of Cultural Rights, para. 11, UN. Doc. A/71/317 (2016).

Culture is constituted by social practices that change over time.¹⁶ Sometimes, cultural change is mandated by human rights law when practices violate human rights, as required, for example, under article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women. While cultural diversity is to be celebrated, cultural rights, being firmly embedded in the universal human rights framework, cannot be invoked to excuse human rights violations, discrimination or violence. Cultural rights include the right to cultural syncretism: human history demonstrates that cultures are often mixed and are not fixed in time.¹⁷ In challenging intentional destruction of cultural heritage, the Special Rapporteur noted in her report that she opposes the application of coercion, violence and discrimination to impose cultural change in violation of human rights.¹⁸ Much of what we consider heritage is the result of continuous recreation throughout history, with each layer adding to its meaning and value. As stressed many times by the first Special Rapporteur in the field of cultural rights, the mandate on cultural rights has been established to protect not culture and cultural heritage per se, but rather the conditions allowing all people, without discrimination, to access, participate in and contribute to cultural life through a process of continuous development.¹⁹ These conditions are greatly jeopardized when cultural heritage is at risk or destroyed. Therefore, *prima facie*, destruction of cultural heritage must be considered a violation of cultural rights and one which affects many other human rights as well.

However, it is also important to make a clear distinction between on the one hand actions such as the crimes in this case in which unique and non-fungible tangible heritage sites were deliberately destroyed and damaged, in absolute, definitive and irremediable ways, irreparably harming the human rights of others, and on the other cases where harm to religious sensibilities or feelings is alleged against those engaging in speech or artistic expression which is perceived to challenge religious or cultural beliefs but can in no way be

¹⁶ Report of the Special Rapporteur in the field of Cultural Rights, U.N. Doc. A/HRC/31/59 (2016).

¹⁷ Report of the Special Rapporteur in the field of Cultural Rights, para. 12, U.N. Doc. A/71/317 (2016).

¹⁸ *Id.* at para. 13.

¹⁹ *Id.* Report of the Special Rapporteur in the field of Cultural Rights, paras. 54-66, U.N. Doc. A/HRC/14/36 (2010).

considered an intentional destruction,²⁰ and does not involve harm to objects or property with unique manifestations. One involves a deliberate and coercive attempt to attack the human rights of others; while the other is an attempt to exercise rights. One aims to silence alternative voices, while the other aims at increasing the number of voices being heard. One involves an assertion that there is only one answer, whereas the other is about asking questions. The Special Rapporteur's brief is only intended to cover the intentional destruction of cultural heritage as that concept is formulated in international standards. She remains concerned about destruction of both tangible and intangible cultural heritage, in accordance with international standards.

B) The Relevant International Legal Framework

The right of access to and enjoyment of all forms of cultural heritage is guaranteed by international human rights law, including the Universal Declaration of Human Rights as well as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (both ratified by Mali in 1974). This right derives its legal basis, *inter alia*, from the right to take part in cultural life.²¹ Other human rights must also be taken into consideration, in particular the rights to freedom of expression, freedom of thought, conscience and religion, the right to education, the economic rights of the many people who earn a living through tourism related to such heritage and the right to development.²² The right of access to and enjoyment of cultural heritage includes the right of individuals and collectivities to, *inter alia*, know, understand, enter, visit, make use of, maintain, exchange elements of and develop cultural heritage, as well as to benefit from the cultural heritage and the creation of others. It also includes the right to participate in the

²⁰ See definition of "intentional destruction" *infra* at footnote 34.

²¹ Report of Special Rapporteur in the field of Cultural Rights, para. 14, U.N. Doc. A/71/317 (2016). Universal Declaration of Human Rights, art. 27, G.A. res. 217, U.N. GAOR, 3d Sess., U.N. Doc A/810 (1948). International Covenant on Economic, Social and Cultural Rights, art. 15, 3 Jan. 1976. International Covenant on Civil and Political Rights, art. 27, 16 Dec. 1966.

²² Report of the Special Rapporteur in the field of Cultural Rights, para. 14, U.N. Doc. A/71/317 (2016).

identification, interpretation and development of cultural heritage, as well as in the design and implementation of preservation and safeguard policies and programmes.²³

The United Nations Committee on Economic, Social and Cultural Rights which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights has explained that states' obligations to respect and protect freedoms, cultural heritage and diversity are interconnected and the obligation to ensure the right to participate in cultural life under article 15 of the International Covenant on Economic, Social and Cultural Rights includes the obligation to respect and protect cultural heritage.²⁴ In its resolution 6/1 on the protection of cultural rights and property in situations of armed conflict, the Human Rights Council reaffirmed "that the destruction of or any other form of damage to cultural property may impair the enjoyment of cultural rights, in particular under article 15 of the International Covenant on Economic, Social and Cultural Rights."²⁵ More recently, in its 2016 Resolution 33/20 on "cultural rights and the protection of cultural heritage," the Human Rights Council confirmed that "the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights."²⁶

Numerous other international instruments protect cultural heritage. Although not all of them take a human rights approach to cultural heritage, a shift in focus has occurred in recent years, from the preservation and safeguard of cultural heritage as such to the protection of cultural heritage as being of crucial value for human beings, including in relation to their cultural identity. Notable in this regard are the Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Convention on the Protection of the Underwater Cultural Heritage (2001), the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) and the Universal Declaration on Archives (2011).

A specific protection regime governs the protection of cultural heritage in times of armed conflict. Core standards include the Hague Conventions of 1899 and 1907, the Geneva

²³ *Id.* Report of the Special Rapporteur in the field of Cultural Rights, paras. 78-79, U.N. Doc. A/17/38 (2011).

²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right of everyone to take part in cultural life, para. 50, U.N. Doc. E/C.12/GC/21 (2009).

²⁵ Human Rights Council, Resolution 6/1, Protection of Cultural Rights and Property in situations of armed conflict, preamble, U.N. Doc. A/HRC/RES/6/1 (2007).

²⁶ Human Rights Council, Resolution 33/20, preamble, U.N. Doc. A/HRC/33/L.21 (2016).

Conventions of 1949 and the Additional Protocols thereto of 1977, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1954 and 1999 Protocols thereto and the Rome Statute of the International Criminal Court (1998). Besides these various treaties, a body of customary international humanitarian law protects cultural heritage in armed conflict and “(m)any of the relevant conventional rules, if not declaratory of custom when agreed, have come to reflect it in the period since, while others must now be interpreted in the light of later custom”.²⁷ The 1954 Hague Convention requires states parties to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. In addition, under article 3, the 1954 Hague Convention requires that states prepare in peacetime for protection of heritage in conflict.

Many provisions of the 1954 Hague Convention rise to the level of customary international law,²⁸ binding both states not party to the Convention and non-state actors. “[T]he prohibition of acts of deliberate destruction of cultural heritage of major value for humanity” rises to the level of customary international law and is a norm which is supported by “a general opinio juris”.²⁹ In the United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration concerning the Intentional Destruction of Cultural Heritage, adopted in 2003, the international community reaffirms its commitment to fight against the intentional destruction of cultural heritage in any form so that it may be transmitted to the succeeding generations. States are unequivocally instructed to prevent, avoid, stop and suppress intentional destruction, wherever such heritage is located.

Importantly, many provisions of international law relate to the role of non-state actors, such as article 19 of the 1954 Hague Convention, which applies to non-international conflicts, as well as article 8 of the Rome Statute of the International Criminal Court and article 16 of Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts. The last-mentioned

²⁷ Roger O’Keefe, *Protection of Cultural Property*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 498 (Andrew Clapham & Paola Gaeta eds., 2014).

²⁸ Francesco Francioni & Federico Lanzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 No. 44 EUROPEAN JOURNAL OF INTERNATIONAL LAW 619 (2003).

²⁹ *Id.* at 635.

prohibits any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and applies to both state and non-state actors within the context of non-international armed conflicts.

Classical international human rights law focused on the obligations of states. However, an evolving approach, increasingly applied by UN human rights mechanisms “recognizes the importance and impact of certain non-state actors, arguing that some human rights obligations also apply to them, including non-state armed groups with (or even arguably without) effective control over a territory.”³⁰ This approach has been recognized by the Special Rapporteur on freedom of religion or belief, and by the UN Committee on the Elimination of All Forms of Discrimination against Women in its General Recommendation No. 30 (2013) on women in conflict prevention, conflict and post conflict situations.³¹ That General Recommendation opined that “under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-state actors are obliged to respect international human rights.”³² The Special Rapporteur in the field of cultural rights endorses this approach, and in particular its applicability to a group like Ansar Dine in Timbuktu in 2012 during the occupation when the crimes in this case were committed. As the judgment notes, “Ansar Dine and AQIM qualified as organised armed groups at the relevant time, with... military capacity to displace the Malian army, capture Timbuktu and exercise some form of government over it for approximately nine months.”³³

C) Intentional Destruction of Cultural Heritage as a Violation of Human Rights

³⁰ Report of Special Rapporteur on freedom or religion or belief, para. 54, U.N. Doc. A/HRC/28/66 (2014). Note also the litany of examples of other UN mechanisms doing so listed in *id.* at para, 55, including U.N. Secretary-General, *Elimination of all forms of religious intolerance*, paras. 27-30, U.N. Doc. A/56/253 (31 July 2001) and Report of the independent expert on the situation of human rights in Somalia, para. 31, U.N. Doc. A/HRC/18/48 (2011).

³¹ Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, U.N. Doc. CEDAW/C/GC/30 (2013).

³² *Id.* at para. 16.

³³ Prosecutor v. Al Mahdi, *supra* note 1 at para. 49.

The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage defines “intentional destruction” as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience”.³⁴ Most often, intentional destruction of cultural heritage constitutes a violation of human rights and may be accompanied by other grave human rights violations. A human rights approach to the destruction of cultural heritage is essential.³⁵ In fact, one of the most important ways for the International Criminal Court to assess all of the questions at issue in this brief – from the nature of the harm to the appropriate reparation - is through the lens of human rights and the Court could make a landmark contribution by endorsing a human rights approach. Noted international cultural heritage law expert Professor Patty Gerstenblith has called for “reuniting cultural heritage with humanity,”³⁶ and urged that “the international community should honor this human dimension.”³⁷ She argues that

[s]eeing cultural heritage through the lens of human rights assists us in reaching a more integrated understanding of the role that cultural heritage plays in the lives of human beings – the local community that lives among the heritage, the regional and national communities, and the world community.³⁸

The preamble of the 2003 UNESCO Declaration stresses that cultural heritage is an important component of cultural identity and of social cohesion “so that its intentional destruction may have adverse consequences on human dignity and human rights”.³⁹

³⁴ The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003, Section II.

³⁵ Note, for example, International Union for Conservation of Nature (IUCN), International Council on Monuments and Sites (ICOMOS) and International Centre for Study of the Preservation and Restoration of Cultural Property (ICCROM), “World heritage and rights-based approaches”, report from Workshop in Oslo, 1-3 April 2014. See, also, Press Release, The destruction of cultural heritage is a violation of human rights (March 4, 2016).

³⁶ Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?*, 15 THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW 336, 389 (2016).

³⁷ *Id.* at 393.

³⁸ *Id.* at 389.

³⁹ The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, October 17, 2003.

The human rights approach to cultural heritage obliges one to go beyond preserving and safeguarding an object or a manifestation in itself to take into account the rights of individuals and groups in relation to such object or manifestation and to connect cultural heritage with its source of production.⁴⁰ It is impossible to separate a people's cultural heritage from the people itself and that people's rights. The importance of having access to one's own cultural heritage and to that of others has been emphasized by the Committee on Economic, Social and Cultural Rights in its general comment No. 21. A human rights approach must also emphasize the many living connections between tangible and intangible heritage, and focus on the ways in which attacks on each are interrelated.

A human rights approach emphasizes accountability and the combating of impunity, and also prevention and education on the importance of cultural heritage and cultural rights, and a teaching of history that stresses its complexity.⁴¹ For cultural heritage to be safeguarded over the long term, young people must be positively engaged in this process.

One grave pattern of intentional destruction of cultural heritage, including the crimes in this case, is that carried out by states or non-states actors, whether in times of armed conflict or not, with a specific aim of attacking cultural diversity and cultural rights; erasing memory of current and past events, civilizations and peoples; erasing evidence of the presence of minorities, other peoples, philosophies, religions and beliefs; or deliberately targeting or terrorizing individuals and groups on the basis of their cultural, ethnic or religious affiliation, or their ways of life and beliefs.⁴² These acts may be of different magnitudes, may be carried out systematically or sporadically, and may be part of a wider scheme to forcibly assimilate or deliberately kill a group of people. Such destruction undermines numerous human rights, including the right to freedom from discrimination; the right to freedom of thought, conscience and religion; and the right to take part in cultural life, including the right to maintain and develop the cultural practices of one's choice, and to

⁴⁰ Report of the Special Rapporteur in the field of Cultural Rights, Corr. 1, para. 2, U.N. Doc. A/17/38 (2011).

⁴¹ Report of the Special Rapporteur in the field of Cultural Rights, para. 88(a), U.N. Doc. A/68/296 (2013).

⁴² See Robert Bevan, *THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR* (2d. Ed. 2016); Lawrence Davidson, *CULTURAL GENOCIDE* (2012); and Report of the Special Rapporteur in the field of Cultural Rights, paras. 33-42, UN. Doc. A/71/317 (2016).

access cultural heritage including one's own history, and the right to freedom of artistic expression and creativity.

These acts of intentional destruction harm all. Aiming at homogenization of world views, they contribute to intolerance and tensions between people, and deprive all humanity of the rich diversity of heritage that should be transmitted to future generations.⁴³ There are many examples where destruction is part of the “cultural engineering” practised by diverse extremists who, rather than preserving tradition, seek to radically transform it, erasing whatever does not accord with their vision.⁴⁴ They seek to create new historical narratives affording no alternative vision. Well-known examples include cases raised by the first Special Rapporteur in the field of cultural rights and other human rights mechanisms, such as the destruction of Sufi religious and historic sites and desecration of graves in Libya in 2011 and 2012,⁴⁵ the destruction of cultural and religious sites, artefacts and manuscripts during the occupation of northern Mali in 2012 and early 2013, accompanied by a ban on music and restrictions on women's dress, with the deliberate and asserted intention to impose a world view,⁴⁶ and the past and ongoing destruction of temples, monasteries, shrines and millenniums-old sites such as at Palmyra in the Syrian Arab Republic.⁴⁷

Across the regions of the Middle East, North Africa, West Africa and beyond, many fundamentalist groups are reported to be involved in ideologically motivated destruction, which is often openly proclaimed, and for which attempts at justification are made on religious grounds.⁴⁸ Putting an end to these forms of destruction requires tackling the

⁴³ Report of the Special Rapporteur in the field of Cultural Rights, para. 35, U.N. Doc. A/71/317 (2016).

⁴⁴ *Id.* at para. 36. Report of the U.N. High Commissioner for Human Rights on the situation of human rights in Mali, paras. 44-45, U.N. Doc. A/HRC/22/33 (2012). Report of the U.N. High Commissioner for Human Rights on the situation of human rights in Mali, ¶ 88, U.N. Doc. A/HRC/25/72 (2014). Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, paras. 85-93, U.N. Doc. A/HRC/31/68 (2016).

⁴⁵ UN Doc. LYB 2/2012.

⁴⁶ UN Doc. MLI 1/2012.

⁴⁷ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, paras. 85-93, U.N. Doc. A/HRC/31/68 (2016).

fundamentalist ideology motivating them, in accordance with international human rights standards, in particular through education on the subjects of cultural rights, diversity and heritage.⁴⁹

Acts such as iconoclasm and biblioclasm have a long history in all regions of the world, whether perpetrated during wars, revolutions or waves of repression.⁵⁰ However, in the early twenty-first century, a new wave of deliberate destruction is being recorded and displayed for all the world to see, the impact magnified by widespread distribution of the images. Such acts are often openly proclaimed and justified by their perpetrators. This represents one form of cultural warfare against populations and humanity as a whole, and a form that is to be condemned in the strongest terms. In the view of UNESCO, these acts of intentional destruction sometimes constitute “cultural cleansing”.⁵¹ They take the terrorization of a population to a heightened level through an attack on its very history and pose an urgent challenge to cultural rights, which requires rapid and thoughtful international response. In recent cases, as in those involving their historical antecedents, the objects in question have clearly been targeted not in spite of the prohibitions on attacking cultural heritage and notwithstanding the value of the objects in question, but precisely because of the existence of that value and those norms, whether in conflicts or non-conflict situations.

A human rights approach to armed conflict is an important complement to approaches based on international humanitarian law.⁵² There is no provision on derogation in the International Covenant on Economic, Social and Cultural Rights and the Committee on Economic, Social and Cultural Rights has confirmed that the Covenant applies in times of

⁴⁸ For a regional overview, see Heghnar Watenpaugh, *Cultural heritage and the Arab Spring: war over culture, culture of war and culture war*, 5 *International Journal of Islamic Architecture* 245-263 (2016).

⁴⁹ See discussion *infra* text at notes 95 to 109.

⁵⁰ Bevan, *supra* note 42.

⁵¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), *Reinforcement of UNESCO's Action for the protection of culture and the promotion of cultural pluralism in the event of armed conflict*, UNESCO Document 38 C/49 (November 2, 2015).

⁵² On the need for such an approach, see Frédéric Mégret, *What is the 'specific evil' of aggression?*, *THE CRIME OF AGGRESSION: A COMMENTARY* 1424-1428 (Claus Kreß and Stefan Barriga, eds. 2016).

conflict or emergency.⁵³ The Committee has noted “that even during armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law”.⁵⁴ The International Court of Justice has confirmed the applicability of international human rights law to situations of military occupation and noted that the occupying Power is bound, inter alia, by the provisions of the International Covenant on Economic, Social and Cultural Rights.⁵⁵ International humanitarian law and human rights law provide complementary and mutually reinforcing protection of economic, social and cultural rights in situations of conflict. In addition, “(t)he application of human rights law, and in particular the International Covenant on Economic, Social and Cultural Rights, to conflict situations, helps in clarifying the content” of the relevant humanitarian norms.⁵⁶

It also supplements those norms, as in the case of intangible cultural heritage which is not adequately covered by international humanitarian law.⁵⁷ Some experts on international humanitarian law argue that a teleological approach to the question of *lex specialis* suggests that the rule to be applied should be the one that best responds to the needs and specificity of the context, and is also the fairest under the circumstances. Sometimes human rights law should take precedence, because “this allows for heightened protection of cultural heritage in armed conflict, in particular of its intangible dimension”.⁵⁸ Relevant norms of international

⁵³ Report of the U.N. High Commissioner for Human Rights, paras. 12-15, U.N. Doc. E/2015/59 (2015).

⁵⁴ Gilles Giacca, *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ARMED CONFLICT* 261 (Oxford University Press, 2014).

⁵⁵ Report of the U.N. High Commissioner for Human Rights, para. 7, U.N. Doc. E/2015/59 (2015).

⁵⁶ Report of the U.N. High Commissioner for Human Rights, para. 68, U.N. Doc. E/2015/59(2015).

⁵⁷ Report of the Special Rapporteur in the field of Cultural Rights, para. 61, U.N. Doc. A/71/317 (2016).

⁵⁸ Christiane Johannot-Gradis, *LE PATRIMOINE CULTUREL MATÉRIEL ET IMMATÉRIEL: QUELLE PROTECTION EN CAS DE CONFLIT ARMÉ* 175 (Geneva, Schulthess, 2013). *See also*, Marco Sassòli, *The role of human rights and international humanitarian law in new types of armed conflicts*, in *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* (Orna Ben-Naftali ed. 2011).

humanitarian law should be fully and rigorously implemented. In addition, the Special Rapporteur advocates a human rights approach to cultural heritage protection in armed conflict, both as a means of facilitating an understanding of those norms and as a complement to them.

A critical dimension of the human rights approach to cultural heritage, which currently receives insufficient attention, is the protection of the defenders of cultural heritage who are at risk. In Mali, and around the world, they include cultural heritage professionals, who today labour in obscurity and in conditions of danger, as well as ordinary people. In Resolution 33/20, the Human Rights Council “highlight[ed] the important contribution made by cultural rights defenders involved in the protection of the cultural heritage of all humankind,” and “Call[ed] for the safety and security of cultural rights defenders involved in the protection of cultural heritage to be protected, including by investigating and, where appropriate, bringing to justice anyone alleged to have harmed them.”⁵⁹

Cultural heritage should build bridges, not walls. It can be a means of bringing people together. Just as the intentional destruction of cultural heritage has a devastating impact on cultural rights, protecting, reconstructing and/or memorializing cultural heritage can have a positive impact on morale and rights in situations of conflict or repression. Acts of deliberate destruction must be addressed within the context of holistic strategies for the promotion of human rights and peacebuilding. Peacebuilding processes, as well as processes of truth and reconciliation, should include the issue of cultural heritage.⁶⁰

Adopting a human rights approach to cultural heritage entails consulting the people who have particular connections with heritage, including for the purpose of understanding that heritage, and determining whether (or not) they wish to rebuild, reconstruct and re-establish such a heritage and if so, how.⁶¹ Such consultations must include [REDACTED] [REDACTED] further, women must be fully involved. Consultations must aim at obtaining free,

⁵⁹ Human Rights Council, Resolution 33/20, preamble, para. 10, U.N. Doc. A/HRC/33/L.21 (2016).

⁶⁰ Report of the Special Rapporteur in the field of Cultural Rights, Corr. 1, para. 15, U.N. Doc. A/17/38 (2011).

⁶¹ Note the discussion of this topic throughout the Report of the Special Rapporteur in the field of cultural rights on her mission to Cyprus, U.N. Doc. A/HRC/34/56/Add.1 (2017).

prior and informed consent and at engaging people in sustainable reconciliation and peace-building efforts.

(II) The Scope of the Moral Harm Suffered, to Persons or Organisations, as a Result of the Crimes Committed

A) The Meanings and Roles of the Cultural Heritage That Was Attacked in the Instant Case

To understand the seriousness of the moral harm suffered in this case, one has to consider the local, national, regional and international importance of the cultural heritage that was attacked, including 9 mausoleums and the Sidi Yahia mosque (and in particular its door).⁶² This cultural heritage has particular value for the people of Timbuktu, and significance for all the people of Mali, as well as for people throughout the entire region, and around the world. As a Malian archaeologist said, “we cannot teach the history of Mali without teaching Timbuktu.” Timbuktu, likely founded in 1080 AD, is an important focal point of Islamic learning and culture, and was especially important in the 15th and 16th centuries.⁶³ It is also a significant historical carrefour between peoples, and a site of diverse economic and cultural exchanges. As Malian experts have written: “Timbuktu is the meeting point for various peoples: Berber, Arab, Songhay, Tuareg, Peuhl... The result is a syncretic and almost hybrid culture and civilization...”⁶⁴

The city brings together mosques, manuscripts, centers of learning and mausoleums in which those termed saints are buried. Timbuktu is widely known as the city of 333 saints. According to the guide to Timbuktu prepared by [REDACTED]

The history of Timbuktu is marked by the presence of “Saints”, men who have distinguished themselves for their devotion, the extent of their knowledge, and their contribution as professors at the University of Sankoré. Their shrines are places of worship. They are found in various places including along the limit of the ancient

⁶² [REDACTED]

⁶³ [REDACTED]

⁶⁴ *Id.* at 36.

city, constituting a strong symbolic barrier around the city, protecting it from misfortune.⁶⁵

[REDACTED]

[REDACTED] “We cannot live without the saints.” Of the mausoleums, [REDACTED] “our spirits are there.” [REDACTED] “it is because these spirits are there that we survive.” [REDACTED] that the people of Timbuktu and of Mali are respected because of these saints. [REDACTED] [REDACTED]: “Our existence and all we have in this life is due to the mausoleums.”

The mausoleums are, as the judgment noted, “places of prayer and, for some, places of pilgrimage,”⁶⁶ and are an expression of the local practice of Islam. This stands in stark contrast to the Wahhabi Islam espoused by the jihadists who occupied northern Mali from April 2012-January 2013 and carried out destructions of tangible cultural heritage while also attacking intangible cultural heritage, including local music, religious practice and forms of dress. [REDACTED] a prominent [REDACTED] sociologist explained local practices in the region as

a way of practicing Islam based in Qur’anic texts *and* local practice. Islam was naturalized in the cultural, juridical and social systems in West Africa. We have culturalized Islam, a balance that was deformed by jihadists. Interculturality is very strong between Islam and local culture.

The jihadist attacks on cultural heritage were attacks on these connections and links. [REDACTED] [REDACTED] “they wanted to show their Islam is the real one and it is against the mausoleums. They targeted syncretism.”

[REDACTED] of the mausoleums and the mosque door attacked in this case that “these are symbols of cultural diversity, and the cultural mixing and the tolerance of Timbuktu.” [REDACTED] that many ethnic groups were represented among the saints. [REDACTED] these sites make up the cultural identity of Timbuktu and have links to Arabo-Islamic culture, to Malian culture and to the

⁶⁵ [REDACTED]

⁶⁶ Prosecutor v. Al Mahdi, *supra* note 1 at para. 34.

specific culture of Timbuktu. Thus, they should be understood as both religious and cultural sites.

The cultural heritage in question has particular significance for the Muslim population of Timbuktu, but also for non-Muslims. While recognizing particular connections to particular sites, cultural heritage should never be used to construct discourses or policies aimed at the exclusion of others. Cultural heritage is “multilayered”.⁶⁷ [REDACTED]

[REDACTED] did a study among non-Muslims, in particular Catholics and Protestants, who said that they went to mausoleums and made wishes there, having respect for Muslim beliefs. [REDACTED]

[REDACTED] that non-Muslims, including Christians, also came to the mausoleum on Friday to ask for blessings and to make donations. Hence, the destructions also affected non-Muslims and their right to freely participate in cultural life and build relationships of mutual respect and understanding with others.

[REDACTED] pilgrims came to visit the mausoleums from all over Africa, which was important for those pilgrims’ religious and cultural practices, and also benefitted the economy of the city. For example, [REDACTED]

[REDACTED] at the Sidi Mahamoud mausoleum, 20 persons would come each morning for a blessing, taking sand from the mausoleum to give to others as gifts,⁶⁸ and making a donation.

As [REDACTED] analyzed the situation: “The mausoleums are not just for Timbuktu. They were destroyed for the whole world [REDACTED] the most affected but everyone was affected.” It was especially striking to [REDACTED]

[REDACTED] that the sites also comprised heritage which belongs to everyone.

The mausoleums destroyed in this case and the mosque that was damaged have many overlapping cultural, religious, economic, historical, symbolic and personal functions and meanings, and hence deep significance for the population. [REDACTED]

[REDACTED] “Timbuktu is a symbol because saints are buried there.”

⁶⁷ Preliminary observations by the Special Rapporteur in the field of cultural rights, Karima Bennouna at the end of her visit to Serbia and Kosovo, October (2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20675&LangID=E>.

⁶⁸ This is one of the specific practices which Mr. Al Mahdi criticized in his attempt to justify the attacks. Prosecutor v. Al Mahdi, *supra* note 1 at para. 41.

These saints are widely venerated, though not worshipped, especially by Sufi Muslims or those who “follow certain practices closely tied to Sufism, Sufi orders and their leaders.”⁶⁹ There is a close link between the tangible heritage sites attacked in this case, and intangible heritage and practices, including religious and cultural practices, and even the arts, in light *inter alia* of the important *Festival au Désert* organized in Timbuktu which coalesced the goals of preserving and developing cultural heritage and promoting Sahelian culture and performing arts at the international level.⁷⁰ Hence, as will be discussed below, the physical assaults on the sites were also strikes against each of these aspects of intangible heritage, and against culture and cultural rights more broadly.

[REDACTED] the common cultural practice of making wishes at or near the sites of mausoleums, including especially women wishing to have children, or wishing for the success of their children, or young people wishing for success on their exams, or anyone praying for food or for rain during a drought. For some this was especially important around the time of Mawlut, the birthday of the Prophet Muhammad. [REDACTED] [REDACTED] that people came from far away to make such wishes. “It was something they believed in and the fact that it was destroyed shook them.” [REDACTED] “the mausoleums are like confidantes. You can say everything you have in your heart. These are places of solace.” Some people would come once in a lifetime from far away to make a wish; others came to do so regularly. [REDACTED] they came every morning for a blessing.

[REDACTED] the wishes less important and emphasized other meanings. There is also a deep philosophical significance [REDACTED] “Islam says it is good to visit the dead, so that you remember you have to join them some day and you have to think of them.”

For some people [REDACTED]

[REDACTED] these sites also have very [REDACTED] meanings [REDACTED] [REDACTED] a practice which is meant to protect the dead.⁷¹ [REDACTED]

⁶⁹ Benjamin Soares, Saint and Sufi in contemporary Mali, *in* SUFISM AND THE “MODERN” IN ISLAM 76, 79 (Julia Howell and Martin van Bruinessen eds. 2007)

⁷⁰ [REDACTED]

⁷¹ Felicitas Becker, *Islamic Reform and Historical Change in the Care of the Dead: Conflicts over Funerary Practice among Tanzanian Muslims*, 73 *Africa* 416, 429 (2009).

██████████; I cannot even express what it means,” ██████████

██████████ In numerous cases, family tombs were reported damaged or even destroyed during the attacks on the mausoleums at issue in this case. ██████████

██████████ that it is important to take into consideration the tombs that were attacked, along with the mausoleums.

██████████ The tombs ██████████ were attacked during the destruction of one of the mausoleums ██████████

██████████ they wish for the mausoleums not to be spoken of as if they were “anonymous,” that it was important to emphasize and name the specific saints and families associated with each one. “We do not see mausoleums simply as constructions in a place, but rather in a cemetery where the entire line of descendants of the saints are buried. When they attacked the mausoleums, they profaned the tombs of all the descendants in that line.” ██████████ reportedly had to ██████████ after the end of the occupation of Timbuktu, and to do so ██████████ many of whom had difficulty estimating their financial costs ██████████, have reportedly not been compensated.

Women also have particular links with mausoleums.⁷² ██████████ in Timbuktu women are the most numerous visitors at mausoleums, but only men are allowed to guide “ziyaras” or visits. ██████████ women are only able to visit some mausoleums, and only after menopause, or only to access the perimeter of the sites. ██████████

██████████ questioned limitations on women’s access, ██████████

██████████ asking why women are not able to go inside and to guide visits when they are descendants of the saints, ██████████

██████████ questioned the limitations ██████████ explanation based on menstruation, and

██████████ expressing acceptance of limits on women’s access.

⁷² For a regional perspective, with a focus on the Maghreb, see Fatima Mernissi, *Women, Saints, and Sanctuaries*, *Women and National Development: The Complexities of Change*, 3(1), SIGNS, 101-112 (Autumn 1977).

B) Human Rights Impact of Destructions/Damage

i. The Nature of the Harm

Damage caused by the intentional destruction of cultural heritage in any case, and certainly in this case, cannot be reduced to its purported monetary value. The moral value and human rights meaning is more significant, and more greatly reflects the totality of the loss occasioned. It is worth noting the view of the United States 10th Circuit Court in *United States v. Shumway* concerning the damage caused by unauthorized excavation of two archaeological sites:

We agree with the district court ... the asserted cost of the artefact's fair market value and cost of restoration and repair, fails to reflect adequately the extent of damage Mr. Shumway inflicted. The fair market value and cost of repair calculation *was grossly insufficient to quantify the devastating and irremediable cultural, scientific and spiritual damage* Mr. Shumway caused to the American people in general and to the Native American community in particular.⁷³

This view is likewise reflected in the United States Sentencing Guideline for Cultural Heritage Resources Crimes. The explanation for its adoption provided in the guideline underscores that “[b]ecause individuals, communities, and nations identify themselves through intellectual, emotional and spiritual connections to places and objects, the effects of cultural heritage resource crimes transcend mere monetary considerations.”⁷⁴ Hence, the Guideline “takes into account the *transcendent and irreplaceable* value of cultural heritage resources...”⁷⁵ It is essential to do so in this case as well.

For example, Mr. Al Mahdi was also convicted for involvement in the destruction of the door of the Sidi Yahia Mosque, widely believed not to have been opened for 500 years and the opening of which was widely believed to lead to the Last Judgement. While the attack on the door was being carried out he justified it to journalists:

What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry... We fear that these myths will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that is the truth.⁷⁶

⁷³ *United States v. Shumway*, 112 F.3d 1413, 1425 (10th Cir. 1997) (emphasis added).

⁷⁴ United States Sentencing Guideline: Cultural Heritage Resource Crimes, 18 U.S.C. app. § 2B1.5 at “Reason for Amendment”.

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Prosecutor v. Al Mahdi*, *supra* note 1 at para. 38 (viii).

As this statement makes clear, in attacking such significant tangible heritage sites, the jihadists were also targeting the intangible heritage, beliefs and cultural practices associated with those sites and thereby were effectively seeking to harm the human beings for whom those sites, and related beliefs and practices, are central to the enjoyment of a range of human rights. Thus, these were not only crimes “targeting property”⁷⁷ or “crimes against property,”⁷⁸ similar to what would be the case were the Brandenburg Gate in Berlin or the Pyramids of Giza in Egypt or the Taj Mahal in India intentionally destroyed. They were also abuses of human rights with grave impact on human beings.

In fact, [REDACTED] hat the destructions were the most significant harm which had occurred. [REDACTED] [REDACTED] “With everything we lost, the mausoleums were the most important. Everything is linked, but the saints are in the first rank.” [REDACTED] full of anguish speaking about the destructions, and that, just as victims of many other human rights abuses might say, [REDACTED] as in these acts “ [REDACTED] lives were destroyed.” [REDACTED] lives are the saints.”

Harm to human beings is of more gravity than harm to property or objects. However, these acts *did* result in both direct and indirect harm to human beings who were also the targets. The response to these events must take into consideration these critical connections. It is also vital to understand these abuses in the context of and related to the other widespread abuses in the north of Mali during the occupation, including rape and the use of cruel punishments which are also of great concern [REDACTED].⁷⁹

In fact, [REDACTED] [REDACTED] other abuses, such as sexual assaults, had

⁷⁷ *Id.* at para. 72.

⁷⁸ *Id.* at para. 77.

⁷⁹ See, e.g., U.N. Secretary-General, *Report of the Secretary-General on the Situation in Mali*, U.N. Doc. S/2012/894 (29 November 2012); *Mali Unwed couple ‘stoned to death,’* AlJazeera.com, (30 July 2012); Faith Karimi, *Fear grows as Mali extremists compile list of unmarried mothers*, CNN.com, (13 October 2012); *Malian youth, Islamists clash over planned amputations*, Reuters, (8 July 2012); [REDACTED] *Les Maliens subissent la loi de Ançar Eddine: au pavillon des amputés à Gao*, ElWatan.com, (30 September 2012).

escalated during the timeframe when these destructions were carried out, as the jihadists were mobilized and active. Especially as this is the first engagement of the International Criminal Court with the situation in Mali, and as justice remains outstanding for many other gross abuses, a contextual approach, offering a holistic view of human dignity – even while focusing on the specific crimes of this defendant - is essential. This is true most importantly as a matter of human rights principle, and in light of the principles of the interdependence and indivisibility of human rights. However, it is also important to strengthening the legitimacy of the vital project of achieving accountability for the destruction of cultural heritage itself.

ii. The Identities of the Victims

This case offers a broad pattern of victimhood, both in terms of the number of people and the number of rights affected. Rule 85(a) of the International Criminal Court Rules of Procedure and Evidence defines “victims” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.” Rule 85(b) complements this with “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

According to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [hereinafter Guidelines on the Right to a Remedy] adopted by the UN General Assembly in 2006,

victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family of dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁸⁰

As [REDACTED]

[REDACTED]

[REDACTED] there were both direct

⁸⁰ G.A. Res. 60/147, para. 8 (March 21, 2006).

and indirect victims who have a right to reparations in this case.⁸¹ This approach is supported by the Appeals Chamber's holding in *Lubanga*.⁸² Moreover, [REDACTED] "the crime of which Mr. Al Mahdi was convicted had an effect not only on individuals but on a community as a whole."⁸³ [REDACTED] interpret the term "community"⁸⁴ as "a group of people living in one place."⁸⁵ Following *Lubanga* it is clear that this approach has been recognized, as has the fact that an entire population or "community" or collectivity may appropriately receive a collective reparations award.⁸⁶

What is novel in this case, as is identified both in the Court's judgment in the Al Mahdi case, and in [REDACTED] is that the crimes in question had an impact "on

[REDACTED]

[REDACTED]

⁸²The Prosecutor v. Lubanga Dyilo, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to the reparations' of 7 August 2012, ICC-01/04-01/06-3129, Appeals Chamber, ¶¶ 183-184 (March 3, 2015).

⁸³ [REDACTED]

⁸⁴ The Special Rapporteur has raised questions about the over use of the term "community" without precise definitions in her first report to the UN Human Rights Council. Report of the Special Rapporteur in the field of Cultural Rights, paras. 10-17, U.N. Doc. A/HRC/31/59 (3 February 2016). The Special Rapporteur regards the assumption of "community" as one that can have positive consequences for securing the rights of individuals to enjoy and practise their culture with others and also as one that can pose a threat to the rights of dissenting or disempowered individuals within any of these groups and to social cohesion if carelessly applied. *Id.* As her predecessor did, the Special Rapporteur recognizes that "communities are run through with divergent interests... [and] thick seams of power that structure any given collection of people." Emma Waterton and Laurajane Smith, *The recognition and misrecognition of community heritage*, 16(1-2), INTERNATIONAL JOURNAL OF HERITAGE STUDIES, 4-15, 8 (Jan-March 2010). The Special Rapporteur hopes to problematize the term "community" along the lines of the critical conceptualization suggested by some cultural heritage experts: "one that engages with social relationships in all their messiness, taking account of action, process, power and change." *Id.* at 5. Hence, she will aim to use alternate terms like "group" and "collectivity" when possible and, where she refers to "community," to do so carefully.

⁸⁵ [REDACTED]

⁸⁶ Prosecutor v. Lubanga Dyilo, *supra* note 82 at para. 212.

the people of Timbuktu and, more generally, on the people of Mali and the international community.⁸⁷ The judgment itself explained carefully that

Furthermore, all the sites but one [...] were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.⁸⁸

In fact, this breadth of impact is one of the specificities of conceptualizing victimhood and achieving justice for crimes involving destruction of cultural heritage that is part of the heritage of all humankind.

[REDACTED] following groups of victims: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (which are in fact largely [REDACTED] as well as 3) the entire population of Timbuktu and 4) of Mali, all of which suffered harm. The international community should not be forgotten here as a collective to which harm was done, however as the Special Rapporteur in the field of cultural rights has noted in other contexts, varying degrees of access to and enjoyment of cultural heritage may be recognized, taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages⁸⁹, so it may make sense [REDACTED]
[REDACTED] making sure to recognize broader connections.

The Special Rapporteur finds compelling the views of cultural heritage experts [REDACTED] that the need to take into account these layers of victims, including at the local, national, regional and international levels is important and very specific to this kind of crime. She believes it essential to recognize all these connections. At the same time, she believes based on consultation with reparation experts that the wider the victim pool, the less likely they will receive anything of significance. What is needed is to strike an appropriate balance. Moreover, the [REDACTED]

⁸⁷ [REDACTED]

⁸⁸ Prosecutor v. Al Mahdi, *supra* note 1 at paras. 78-80.

⁸⁹ Preliminary observations by the Special Rapporteur in the field of cultural rights, Karima Bennoune at the end of her visit to Serbia and Kosovo, 3-14 October 2016, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20675&LangID=E>.

intermingling of religious and cultural practices and of religious and cultural heritage. In fact, these rights and the right to freedom of religion or belief are enjoyed together in this context and clearly indivisible and interdependent, hence an abuse of one right affects the others. The sites where people engage in religious and cultural practice, or which are the wellspring of their religious and cultural beliefs and practices were destroyed or damaged, and though reconstructed, are for most people not the same and may never be the same.

[REDACTED] their wishes no longer come true which is both a sincere expression of religious and cultural beliefs and practices, and may also be interpreted as a powerful metaphor for the situation they now live in in the aftermath of the occupation.

One of the recurring themes [REDACTED]

[REDACTED] was the humiliation [REDACTED] due to the crimes in this case, sometimes a collective humiliation for [REDACTED] and a pervasive sense of shame [REDACTED] unable to stop the destructions. “Al Mahdi humiliated us, and made our humiliation known throughout the world,” [REDACTED] “It was a total humiliation,” [REDACTED]

[REDACTED] [REDACTED] “did not know how he could explain to the children of Timbuktu that the mausoleums were destroyed [REDACTED]”

[REDACTED] become mentally or physically ill after hearing the news of the destruction of the mausoleums, and in some cases those persons were reported to remain ill, or even to have died. For example, [REDACTED]

[REDACTED]⁹¹

Given the sometimes severe physical and mental suffering and humiliation occasioned, the destructions in this case of heritage so central to the enjoyment of human rights could also be said for some victims to have risen to the level of cruel, inhuman or

91 [REDACTED]

degrading treatment.⁹² Nigel Rodley, the former UN Special Rapporteur on torture, noted in his authoritative explanation of the parameters of cruel, inhuman or degrading treatment or

⁹² The U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that cruel, inhuman or degrading treatment “should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental...” Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, at 298, U.N. Doc. A/RES/43/173 (Dec. 9, 1988). Cruel, inhuman or degrading treatment lies on a continuum of practices with torture. Both are illegal and violations of human rights, though torture entails a higher severity of pain and suffering. As the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explains, “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. Res. 3452, at 91, U.N. Doc. A/10034 (Dec. 9, 1975). Treatment can be humiliating or degrading even when there was no “positive intention of humiliating or debasing” the victim, if it is shown that the conduct “affect[s] the applicant in a manner incompatible with” the prohibition of torture and inhuman or degrading treatment. *Peers v. Greece*, App. No. 28524/95, European Court of Human Rights, 74-75 (2001).

Moreover, persons in non-custodial settings, such as some family members of disappeared persons, have long been recognized as having suffered a violation of the prohibition of torture and other cruel, inhuman or degrading treatment due to anguish and stress caused by a perpetrator’s conduct. See, e.g., *UN Human Rights Committee, Quinteros v. Uruguay* (1983), Communication No. 1071981, UN Doc. CCPR/C/OP/2 at 138 (1990s) para 14; and *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, European Court of Human Rights, paras. 133-4 (1998).

The Inter American Court of Human Rights found that the relatives of a disappeared person were victims of cruel, inhuman or degrading treatment because of the suffering, anguish, insecurity, frustration, and a feeling of powerlessness they felt as a result of the authorities’ abduction of the victim. *Sánchez v. Honduras*, Judgement, Inter-American Court of Human Rights, (ser. C) No. 99, (7 June 2003). This should be understood to be limited in application based on heightened vulnerability to suffering, and not the general rule. Not every relative of a victim of human rights violations, and not even every person who has experienced anguish as a result of being a relative of a disappeared person, is also a victim of cruel, inhuman or degrading treatment. *Çakici v. Turkey*, Appl. No. 23657/94, European Court of Human Rights, paras. 98-99 (1999). There the court said: “Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.” The

punishment that intentional and unnecessary destruction of homes on a discriminatory basis has been found to fall within these prohibited categories.⁹³ He further notes generally that

to be an offence against the prohibition an act probably must be one which the *victim* finds, or would be expected to find, degrading, and although there may be great variability in the nature of such acts, the criterion of degradation remains similarly constant.⁹⁴

Regardless of the precise crimes for which the defendant was convicted, there may well be other categories which also reflect the experience of his victims and the infringement on their human rights, in light of the connections between them and the heritage that was the direct target of the crimes.

There were also significant impacts on the economic rights of those who earned a living related to the heritage that was attacked, whether from donations by pilgrims or revenues from their shops near the sites. The impacted rights included the right to work, to a decent living and to an adequate standard of living. [REDACTED]

[REDACTED] today the city receives at least 75% fewer visitors than in spring 2012 before the occupation. [REDACTED] “before people came, and now they do not come any more except for journalists who do not give any money.” This has had both psychological and financial impacts on the population. [REDACTED]

[REDACTED] It was difficult to get an estimate about this, however, [REDACTED]

Special Rapporteur notes that these criteria all involve the relationship to harm to a person rather than property, and so are not precisely analogous. However, she feels that this provides useful guidance.

In addition, Andrew Clapham points out that “the International Tribunal for the Former Yugoslavia has confirmed that the customary international crime of torture can be committed by a non-state actor with no nexus to a state.” Andrew Clapham, *Human Rights Obligations of Non-State Actors*, 18 (2006). *Prosecutor v. Kunurac et al.* IT-96-23 & IT-96-23/1, International Criminal Tribunal for the former Yugoslavia [ICTY], para. 147 (12 June 2002).

⁹³ Nigel Rodley, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW*, 125 (2009). *Dzemajl et al. v. Yugoslavia*, CAT/C/29/D/161/2000, U.N. Committee Against Torture [CAT], (2 December 2002). U.N. Secretary-General, *Situation of human rights in East Timor*, paras. 70-71, U.N. Doc. A/54/660 (December 10, 1999). *Ayder v. Turkey*, Appl. no. 23656/94, European Court of Human Rights, paras. 104-111 (2004).

⁹⁴ Rodley, *supra* note 93, at 128.

[REDACTED] was coming in to a particular mausoleum every 2 weeks prior to the destructions. It must be conceded that it was sometimes difficult to distinguish between economic losses caused by the destructions specifically, and those caused by the entire situation in Northern Mali, including especially the security situation, though the crimes in this case seem to have been especially harmful, precipitating displacement and sending a message to the world that Northern Mali is not safe.

C) The Crimes as Part of an Orchestrated Fundamentalist Attack Against Cultural Rights

As recently noted by the Special Rapporteur in the field of cultural rights in a report to the Human Rights Council, there are common themes across fundamentalist⁹⁵ and extremist⁹⁶ abuses of cultural rights, such as those carried out by jihadist armed groups and the defendant in this case. Such abuses often involve attempts at cultural engineering aimed at redesigning culture based on monolithic world views, focused on “purity” and enmity toward “the other”, claiming cultural and moral superiority, imposing a claimed “true religion” or “authentic culture” along with dress and behaviour codes often alien to the lived cultures of local populations, stifling freedom of artistic expression.⁹⁷

⁹⁵ That report posits that fundamentalisms are: “political movements of the extreme right, which in a context of globalization ... manipulate religion, culture or ethnicity, in order to achieve their political aims”. Marième Hélie-Lucas, “What is your tribe? Women’s struggles and the construction of muslimness”, in “Dossier 23-24”, Harsh Kapoor, ed. (London, Women Living Under Muslim Laws, 2001), pp. 49 and 51. They usually articulate public governance projects, in keeping with their theocratic visions, and impose their interpretation of religious doctrine on others as law or public policy, so as to consolidate social, economic and political power in a hegemonic and coercive manner. Jessica Horn, *Christian fundamentalisms and women’s rights in the African context: mapping the terrain*, AWID (2010). Report of the Special Rapporteur in the field of Cultural Rights, para. 4, U.N. Doc. A/HRC/34/56 (16 January 2017).

⁹⁶ For a discussion of the meanings of the term “extremism,” see Report of the Special Rapporteur in the field of Cultural Rights, paras. 9-14, U.N. Doc. A/HRC/34/56 (16 January 2017).

⁹⁷ *Id.* at para. 3.

All of these things happened in northern Mali during the jihadist occupation⁹⁸, and the destructions of cultural heritage should be understood as a part of this broader program. Any attempt to redress these crimes must also take into account the orchestrated and ideological aspect of these offenses. These offenses were never denied but openly documented, “justified” and publicized by their perpetrators. In the words of women human rights defenders in neighboring Algeria regarding the organized fundamentalist violence in their country in the 1990s,

This absolute violence is neither a reflection of collective insanity, nor of perversity nor of the sadism of particular individuals... but is the consequence of a political project in which all practices are based on juridico-religious justifications.⁹⁹

Both religious believers who do not conform to fundamentalist dogma, including clergy, as well as their practices and sites, and non-religious people have often been targets of fundamentalist movements. As was the case in northern Mali, fundamentalist groups often seek to impose a politicized version of religion alien to local populations, aiming at eradication of lived local cultural and religious practice.

[REDACTED] the destructions aimed at causing fear in the hearts of the population, related to trying to impose a new form of Islam or Islamist ideology¹⁰⁰, and to taking power over the population thereby. [REDACTED]

[REDACTED] the destructions as a form of terrorism, seeking to make those who are not in agreement with the jihadists afraid. One interpretation of the attacks on the mausoleums suggests that they were an act of revenge against the population after its rejection of the jihadist occupiers and the ideology they purvey, in particular after they began preaching it in the local mosques in areas they controlled.¹⁰¹

⁹⁸ [REDACTED]

⁹⁹ Association Rachda, TEMPS DE VIOLS ET DE TERRORISME, 45 (2004).

¹⁰⁰ For a regional perspective on the nature of these ideologies and the policies to which they give rise, see Liess Boukra, LE DJIHADISME: L'ISLAM À L'ÉPREUVE DE L'HISTOIRE (2009). For a historical perspective on fundamentalist movements that promoted *inter alia* book burning and “an intellectual *hara kiri*”, see Mahfoud Bennoune, *How Fundamentalism Produced a Terrorism Without Precedent*, originally published in El Watan, No. 1245 (November 7, 1994), available in English translation at <https://www.mahfoudbennoune.com/article/how-fundamentalism-produced-a-terrorism-without-precedent/>.

¹⁰¹ [REDACTED]

[REDACTED] a sociologist [REDACTED] destructions also represented an attempt to destroy history itself, and in particular anything that testifies to pre-Islamic history. This view is shared [REDACTED] “Indeed, it is the entire local formulation of cultures that is thereby rejected and fought because it is a source of resistance to the project of this globalized political Islam which is based on the erasure of local memory.”¹⁰² The first Special Rapporteur in the field of cultural rights hinted at this kind of threat to cultural rights when she noted generally in her report on history-teaching that: “The ability of people, in various contexts, to have access to and have acknowledged their own cultural heritage, and that of others, in terms of historical narratives. is at stake.”¹⁰³

It must be recognized that what happened in this case was part of a broader regional pattern of fundamentalist attacks on Sufi shrines across northern Africa and beyond, including by overlapping Al Qaeda linked groups, occurring also *inter alia* in Egypt, Tunisia, and Libya.¹⁰⁴ The motivation of diverse Salafi groups in carrying out these destructions includes attacking “black magic,” “signs of idolatry,” “false idols,” what are perceived as challenges to true monotheism and the oneness of God, and *shirk* (worshipping a god other than Allah; otherwise polytheism or idolatry) and to preserve a claimed “purity.”¹⁰⁵ A [REDACTED] specializing [REDACTED] consulted by the Special Rapporteur, [REDACTED] explained that some salafis attack cultural heritage because of their fundamentalist view of monotheism.¹⁰⁶ It is to be pointed out that this fundamentalist view is counter to the

¹⁰² Soufian al Karjousli, Diamo Cissouma, Anne Ouallet, Diversité, conflictualités et sociabilités au cœur de la patrimonialisation de l’islam au Mali, *in* LE MALI CONTEMPORAIN 295, 309 (Joseph Brunet-Jailly et. al. eds., 2015)(translated from French by the Special Rapporteur).

¹⁰³ Report of the Special Rapporteur in the field of cultural rights, para. 2, U.N. Doc. A/68/296 (9 August 2013).

¹⁰⁴ See discussion in Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?*, 15, THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW, 336, 356 (2016).

¹⁰⁵ See Tamara Albertini, *The Seductiveness of Certainty: The Destruction of Islam’s Intellectual Legacy by the Fundamentalists*, 53(4), PHILOSOPHY EAST AND WEST, 455, 456 (2003).

¹⁰⁶ Ibn Abd Al-Wahhab, the 18th century founder of this sect, distinguished between two forms of what he saw as the all-important duty of *Tawhid* (Oneness of God). Michael Crawford, IBN

lived Islams of hundreds of millions of people across West and North Africa and also in places like Pakistan where saints are venerated- not worshipped - and their associated shrines are important spiritual sites.¹⁰⁷

It is also important to note the complexity of these issues as indeed the social hierarchy of Timbuktu is based in part on affiliation with saints and cultural heritage sites.¹⁰⁸ Hence, the attacks on heritage were also in part efforts to challenge and replace those elites with a fundamentalist and theocratic power structure, efforts which were rejected by the vast majority of the population as alien to their ways of life.

The struggle for women's rights is an essential component of the fight against all forms of extremism, fundamentalism and terrorism which is yet another reason that it is so important to take a gender sensitive perspective to reparations in this case.¹⁰⁹ The gender component is not optional. [REDACTED]

“Every step forward in the fight for women's rights is a piece of the struggle against fundamentalism.”¹¹⁰ [REDACTED] have been leading the fight against fundamentalism and extremism for decades, including in Mali, without sufficient attention being paid to their concerns by Governments and the international community.¹¹¹

It will be impossible to guarantee the non-repetition of these destructions and the human rights abuses they have occasioned without effectively, and in accordance with international norms, tackling and countering the ideologies that promoted and sought to

ABD AL-WAHHAB, 29 (London: One World Publications, 2014). One of these forms is *Tawhid al-uluhiyya* according to which God alone should be the addressee of prayers and other forms of worship. According to al-Wahhab and his contemporary fundamentalist followers, any Muslim who does not follow this doctrine, and who believes in saints is considered an “unbeliever.” “Anything worshipped in place of God was an idol (*taghut*).” *Id.* Extrapolating from this, [REDACTED] concludes that “this includes the cultural heritage which is considered to represent idols that are worshipped in place of God.”

¹⁰⁷ See, e.g., Émile Dermenghem, *LA CULTE DES SAINTS DANS L'ISLAM MAGHRÉBIN* (1982) and Mernissi, *supra* note 71.

¹⁰⁸ Rosa de Jorio, *CULTURAL HERITAGE IN MALI IN THE NEOLIBERAL ERA*, 120, 127 (2016).

¹⁰⁹ Report of the Special Rapporteur in the field of Cultural Rights, para. 75, U.N. Doc. A/HRC/34/56 (16 January 2017).

¹¹⁰ *Id.*

¹¹¹ *Id.*

justify them, ideologies which are still present in the region and purveyed by what are often powerful and well-resourced fundamentalist and extremist social movements and armed

[REDACTED]

[REDACTED]

[REDACTED] It is essential to bear this in mind in fashioning the most appropriate reparations in this case.

(III) Appropriate Reparation for These Crimes

A) General Issues and Approach

The experts appointed in the reparations phase by the International Criminal Court in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi have not been expressly requested by the Court to comment on appropriate reparations to be made in the case. However, in light of the importance of this question for the enjoyment of cultural rights, the fact that there seems not to have been a great deal of scholarship on the specific question of reparations for destruction of cultural heritage,¹¹² and the close linkages between this issue and the questions addressed above, the Special Rapporteur will elaborate on this critical topic. She does so, taking note of the fact that “transitional justice has generally and systematically ignored claims of culture,” and that “cultural interventions should be taken more seriously in transitional processes.”¹¹³ This suggests that more must be done to center culture and cultural rights in reparations awards, especially those involving grave violations of cultural rights.

The UN Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence emphasized in his 2014 report to the General Assembly: “human rights should be placed at the centre of the design and implementation of reparation programmes.”¹¹⁴ Hence,

¹¹² There are some notable exceptions to this, such as A.F. Vrdoljak, *Reparations for Cultural Loss*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES, 197-228, (Oxford University Press: F. Lenzerini, ed., 2008) (considering the need for reparations for cultural losses to indigenous people).

¹¹³ Pablo de Greiff, *On Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes*, in TRANSITIONAL JUSTICE, CULTURE, AND SOCIETY: BEYOND OUTREACH, 11, 12 (Clara Ramírez-Barat ed., 2014).

¹¹⁴ Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, para. 67, U.N. Doc. A/69/518 (October 8, 2014).

the Special Rapporteur in the field of cultural rights, building on his approach, advocates a human rights-based, and specifically cultural rights-based approach to the question of reparation in the instant case.

The cultural rights approach emphasizes a human rights approach to the destruction of cultural heritage, the promotion of culture and education in accordance with international standards, the right to take part in cultural life for all without discrimination, the importance and mutually reinforcing nature of universal human rights along with pluralism and cultural diversity, and the consultative and participatory aspects of reparation. As the first Special Rapporteur in the field of cultural rights described it in her first mapping report,

cultural rights are pivotal to the recognition and respect of human dignity, as they protect the development and expression of various world visions – individual and collective – and encompass important freedoms relating to matters of identity.¹¹⁵

It is worth recalling that the UN Human Rights Council has confirmed in a long series of resolutions, including Resolution 10/23, that cultural rights are an integral part of human rights, which are indivisible, interrelated and interdependent.¹¹⁶ Accountability for violations and abuses of cultural rights, and reparation for their victims is a critical part of realizing this vision, making this case and the reparations to be provided - and the way that those reparations are articulated - absolutely critical.

Reparations for crimes involving intentional destruction of cultural heritage need to take into account certain particular factors associated with such crimes and their human rights impact. They need to respond to the fact that there are multiple layers of victims, extending out from local victims to the national, regional and international levels, indeed to the international community as a whole. However, these layers of victims may have different

¹¹⁵ Report of the Independent Expert in the field of Cultural Rights, para. 3, U.N. Doc. A/HRC/14/36 (22 March 2010).

¹¹⁶ Human Rights Council, Resolution 14/9, U.N. Doc. A/HRC/RES/14/9 (2010); Human Rights Council, Resolution 17/15, U.N. Doc. A/HRC/RES/17/15 (2011); Human Rights Council, Resolution 19/6, U.N. Doc. A/HRC/RES/19/6 (2012); Human Rights Council, Resolution 20/11, U.N. Doc. A/HRC/RES/20/11 (2012); Human Rights Council, Resolution 23/10, U.N. Doc. A/HRC/RES/23/10 (2013); Human Rights Council, Resolution 25/19, U.N. Doc. A/HRC/RES/25/19 (2014); Human Rights Council, Resolution 28/9, U.N. Doc. A/HRC/RES/28/9 (2015); Human Rights Council, Resolution 31/12, U.N. Doc. A/HRC/31/12 (2016); Human Rights Council, Resolution 34/2, U.N. Doc. A/HRC/34/2 (2017). The first adoption of this language was in resolution 2002/26 of the then-Commission on Human Rights, *Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities*. U.N. Doc. E/2002/23-E/CN.4/2002/200 (22 April 2002).

relationships with the cultural heritage in question and may have experienced widely different levels and types of harm, and this too needs to be carefully considered. All of this means that the issue of [REDACTED] is of especially critical importance. The harm done to any victims may span a wide range of their human rights, including economic, social and cultural rights as well as civil and political rights. These harms may be experienced both individually and collectively, with a significant impact on both discrete victims, and collectivities or the society as a whole. The collective harm aspect is particularly pronounced in this area. Reparations for crimes involving intentional destruction of cultural heritage must redress the harms caused by the violations of the right to access and enjoy cultural heritage, including the heritage of others, and other relevant human rights.¹¹⁷ Such reparations must respond to the harms to heritage, but most importantly to the harms to human rights in relation to this heritage. The promotion and protection of cultural heritage and the right to access and enjoy it, as well as the broader right to take part in cultural life without discrimination, should be constantly borne in mind. The impact on cultural rights should be a central consideration as should the importance of culture and cultural rights related remedies.

The preamble to the UN Guidelines on the Right to a Remedy recognizes “that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law...”¹¹⁸ These principles set out that victims have a right to “adequate, effective and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms.¹¹⁹ Reparations are to be proportional to the gravity of the violations and the harm suffered, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹²⁰ The application of the Guidelines on the Right to a Remedy is to be “without any discrimination of any kind...”¹²¹

¹¹⁷ See discussion of the range of human rights affected *supra* text at notes 76 to 93.

¹¹⁸ G.A. Res. 60/147, *supra* note 80, preamble.

¹¹⁹ *Id.* ¶ 11.

¹²⁰ *Id.* ¶ 15 and 18.

¹²¹ *Id.* ¶ 25.

The Special Rapporteur also underscores the importance of such reparation for violations of economic, social and cultural rights, as well as civil and political rights, as expressed *inter alia* in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights: “All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.”¹²²

Moreover, the Special Rapporteur in the field of cultural rights echoes the important recommendation of the Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence that

those responsible for designing reparation programmes... consider the great advantages of distributing benefits of different kinds and... not reduce reparation to a single dimension, be it material or symbolic. The great harms that reparation is supposed to redress require a broad array of coherently organized measures.¹²³

She likewise notes the view of Diane Orentlicher, the independent expert to update the Set of Principles to combat impunity that “a reparations programme is internally coherent if it establishes relations of complementarity or mutual support between the various kinds of benefits it distributes.”¹²⁴ Such a holistic approach must also be accompanied by a contextual approach which grasps the meaning of the harms in this case in the context of the situation in northern Mali and the absence of other reparations for the broader situation, as well as a consultative approach which involves diverse categories of victims, and local experts and civil society. As the Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-recurrence has concluded: “[w]hile well-designed reparation programmes should primarily be directed at victims of massive violations, they can have positive spillover effects for the whole society.”¹²⁵

¹²² The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, para. 22 (22-26 January 1997).

¹²³ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *supra* note 114, at para. 84.

¹²⁴ Report of the independent expert to update the Set of Principles to combat impunity, para. 59(c), U.N. Doc. E/CN.4/2005/102 (2005).

¹²⁵ Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *supra* note 114, at para. 82.

In cases before the International Criminal Court, according to the court's website, at the end of a trial, the trial chamber may order a convicted person to pay compensation to the victims of the crimes for which the person in question has been found guilty.¹²⁶ Such reparations may take the form of monetary compensation, return of property, rehabilitation or symbolic measures such as apologies or memorials. Reparations may be individual or collective, depending on what is deemed the most appropriate response for the victims. Collective reparations are understood to be particularly advantageous in that they can "provide relief to an entire community and help its members to rebuild their lives, such as the building of victim services centres or the taking of symbolic measures."¹²⁷

When the convicted person does not have adequate resources to comply with a reparations order, this can be supplemented by the Trust Fund for Victims. The Special Rapporteur would like to point out that if guilt is no longer in question and the defendant is unable to pay, it is difficult to understand why there remains a possibility [REDACTED]

[REDACTED] This can have a chilling effect on ascertaining the requirements of justice in a particular case, [REDACTED] At the reparations stage, this should become a process focused on concrete justice for victims. Because this phase concerns reparations rather than determining guilt, the balancing of interests should weigh in favour of victim/witnesses.

The Special Rapporteur in the field of cultural rights is persuaded by the view expressed by experts that "ultimately the goal of reparations within the ICC regime should be to avoid creating unrealistic expectations or contributing to arbitrary distinctions, but instead to benefit a wide scope of victims by designing an approach responsive to their particular circumstances and respectful of their dignity."¹²⁸

¹²⁶ See Reparation/Compensation Stage, www.icc-cpi.int/pages/reparationCompensation.aspx.

¹²⁷ *Id.*

¹²⁸ Pablo de Greiff and Mariëka Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS*, 225, 243 (K. De Fetter et. al. eds., 2005).

victims and the region, and can help to protect cultural heritage and human rights going forward.

The Special Rapporteur believes that there should be a combination of individual and collective reparations in this case, with an emphasis [REDACTED]

[REDACTED], including

In addition, one of the most critical aspects of the reparations will be effective measures to guarantee non-repetition by providing greater security for the sites that were destroyed in the crimes at issue in this case. [REDACTED]

[REDACTED] in the current security environment in Timbuktu [REDACTED] greatly feared the possibility of the recurrence of similar destructions and [REDACTED]

[REDACTED] have been taken at the reconstructed sites. Cultural heritage expert Marina Lostal has warned of the ongoing presence of jihadist armed groups in the North, including Ansar Dine which was associated with the crimes in this case, “posing a very real threat to civilians, to MINUSMA, and of course to Mali’s cultural heritage.”¹³²

Guaranteeing the security of sites requires undertaking needed technical measures in consultation with [REDACTED]

[REDACTED] and also should be carefully balanced with respect for the right to access and enjoy the heritage in question

¹³² Marina Lostal, INTERNATIONAL CULTURAL HERITAGE LAW IN ARMED CONFLICT: CASE-STUDIES OF SYRIA, LIBYA, MALI, THE INVASION OF IRAQ, AND THE BUDDHAS OF BAMIYAN 131 (2017). Ongoing incidents have included a suicide attack in Gao on 18 January 2016 which killed more than 50 people, including many soldiers. *Al Qaeda affiliate claims Mali car bomb attack in Gao*, BBC, 18 January 2017. *Islamist Group Abuses, Banditry Surge*, Human Rights Watch, 18 January 2017. [REDACTED]

[REDACTED] so many people have left the city and been unable to return due to the security situation which can also lead to the deterioration of cultural heritage over time.

[REDACTED]

[REDACTED]

[REDACTED] there need to be programs aimed at enhancing respect for and understanding of cultural heritage and the right to access and enjoy it. The challenges to cultural heritage protection in Mali are significant [REDACTED] [REDACTED] the problem of extreme poverty which creates an impetus for looting, for example, and the fact that there are perhaps not more than [REDACTED]

Programming to promote cultural heritage needs to include educational and awareness raising programs, in particular for youth, to challenge and discredit the fundamentalist ideology which gave rise to the destruction [REDACTED]

[REDACTED]. This is especially appropriate in this case in light of Mr. Al Mahdi's own role as a propagandist and spokesperson for the campaign of destruction, and the need to address the harm caused by his own sermon on the destructions and ideological claims made in support of and to promote these crimes.¹³³ Such efforts should be implemented with the involvement of local [REDACTED]

[REDACTED] feared a reprise of the destructions and [REDACTED] the reported rise of fundamentalist views, impacting youth in particular, citing several incidents, including one on 25 February 2017 when some 200 youth reportedly belonging to "Muslim youth associations" attacked bars and the only discotheque in Timbuktu termed "places of depravity," reportedly resulting in hundreds of thousands of West African CFA francs worth of damage.¹³⁴

¹³³ See judgment at paras. 40-41, 53-54, 85. Moreover, the judgment expressly recognizes that "the justifications stated during the attack [on sites] were the same as those advanced by the armed groups for taking over Timbuktu and Northern Mali more generally." *Id.* at para 49. Footnote 102 related to this assertion clarifies that this included "introduce[ing] sharia." *Id.* at footnote 102. Moreover, in indicating that the crime was of "significant gravity," the judgment indicates that what the court termed "the discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to its assessment of the gravity of the crime." *Id.* at para. 81.

¹³⁴ *Timbuktu bars smashed by Muslim protesters in Mali*, (25 Feb. 2017), <http://www.france24.com/en/20170225-timbuktu-bars-smashed-muslim-protesters-mali>. See also, *Tombouctou: Des jeunes et des femmes saccagent des bars de la ville*, Malijet.com (February 25, 2017), <https://malijet.co/nord-mali/tombouctou-des-jeunes-et-des-femmes-saccagent-des-bars-de-la-ville> and *Des bars saccagés à Tombouctou*, (25 Feb. 2017), Belga,

The Special Rapporteur in the field of cultural rights has recently outlined a human rights approach to combatting fundamentalism and extremism in her 2017 report to the UN Human Rights Council. Cultural rights are a critical component of this approach. Policies that combat discrimination in the right to take part in cultural life or promote education in

[REDACTED]

[REDACTED]

[REDACTED]

The Special Rapporteur's report further noted that [REDACTED]

[REDACTED]

by guaranteeing education aimed at the objectives specified in article 13 (1) of the International Covenant on Economic, Social and Cultural Rights and article 26 (2) of the Universal Declaration of Human Rights, as interpreted by the Committee on Economic, Social and Cultural Rights in general comment No. 13 (1999) on the right to education. Such education should strengthen respect for human rights, promote understanding, tolerance and gender equality and be informed by humanism and include the value of cultural diversity.

[REDACTED]

Another aspect which she emphasized was states' obligations to ensure that the

[REDACTED]

[REDACTED] It will be a critical component of non-repetition measures to ensure that the history of these destructions and their human rights impact, [REDACTED]

[REDACTED] She also called on states to promote documentation and analysis of [REDACTED]

[REDACTED] It will be essential to preserve the documentary record about the destructions and how and why they happened, who tried to stop them and how people and their human rights were harmed.

Memorialization of the destructions and those who resisted them should be another critical component of the reparation. The Special Rapporteur reiterates and endorses the relevant recommendations made by the first UN Special Rapporteur in the field of cultural rights with regard to memorialization, including the assertion that justice and memorialization

<http://www.7sur7.be/7s7/fr/1505/Monde/article/detail/3090714/2017/02/25/Des-bars-saccages-a-Tombouctou.dhtml>.

are both necessary and complementary and neither can replace the other, that memorial policies should provide symbolic reparation and public recognition to the victims, as well as being transparent and promoting civic engagement, civil society participation and being victim-centred.¹³⁵ [REDACTED]

enthusiasm about a site of memorialization for the destructions and those who tried to resist them, perhaps a square, and analogized that to the Flame of Peace monument commemorating the end of an earlier conflict in Timbuktu which is still used as a symbolic site for civil society actions. [REDACTED]

[REDACTED] it was particularly important to commemorate the resistance to the jihadist occupation as so far there had been no such commemoration. This is important both in terms of the historical record, and also in terms of preventing the recurrence of crimes like those in this case.

The Special Rapporteur in the field of cultural rights notes that there is precedent for Courts to order the building of memorials. For example, the Inter-American Court of Human Rights has done this in at least three cases of which she is aware, including in the Case of the 19 Merchants v. Colombia, Judgment of July 5, 2004,¹³⁶ the case of the Río Negro Massacres v. Guatemala,¹³⁷ Judgment of September 4, 2012, and the Case of the Miguel Castro-Castro Prison v. Peru,¹³⁸ Judgment of November 25, 2006. All those cases have

¹³⁵ Report of the Special Rapporteur in the field of Cultural Rights, paras. 98, 104(b), 104(f) and 106(b), U.N. Doc. A/HRC/25/49 (23 Jan. 2014).

¹³⁶ Merchants v. Colombia, Judgment, I/A Court H. R., (Ser. C) No. 109, para. 273 (5 July 2004) (“The Court considers that the State should erect a monument in memory of the victims. The Court considers that the State and the victims’ next of kin must reach an agreement on the choice of the place where the monument is to be erected. Colombia should place a plaque with the names of the 19 tradesmen, which expressly mentions that it is there in compliance with the reparation ordered by the Inter-American Court, at that place during a public ceremony in the presence of the victims’ next of kin. This will also contribute to awakening public awareness to avoid repetition of acts such as those that occurred in the instant case and to keeping the memory of the victims alive.”)

¹³⁷ Massacres v. Guatemala, Judgment, I/A Court H.R., Series C No. 250, ¶¶ 279-280 (4 September 2012) (Relating recommendation of the Inter-American Commission on Human Rights, based on request of victims in the case, of creating a museum to be built at a location chosen by victims and with the involvement of the National Reparations Program, the Ministry of Culture and Sports and the National Fund for Peace.)

emphasized the importance of consulting and involving victims in the memorialization process, from its inception. This is critical in all aspects of the reparations and with regard to all relevant constituencies. The Special Rapporteur recalls here, for example, that many of the sites that were attacked in this case include cemeteries with direct and intimate connections to families [REDACTED]

C) Focal Issues

i. Women

[REDACTED] it significant to have a gender specific component of the reparations that recognizes women's connections to the cultural heritage that was targeted, their suffering during the jihadist occupation and the [REDACTED] [REDACTED] in countering the fundamentalist ideology that inspired the destructions. The Special Rapporteur believes that it would be essential to do this in conjunction with [REDACTED] [REDACTED] Such reparations could aim at promoting training for [REDACTED] fostering discussions of the issue of non-discrimination in access to cultural heritage sites, and supporting the work of [REDACTED] [REDACTED] as a means of guaranteeing non-repetition of the abuses in this case. [REDACTED] if there was no specific provision made for reparations for women, women will be unlikely to be beneficiaries of the reparations. The reparations process can afford an opportunity to strengthen their recognition and involvement in the protection, care and transmission of cultural heritage.

The [REDACTED] has been critical of the failure to adequately include women and show gender sensitivity in reparation, and he emphasized that "the main objective of reparation programmes is to tackle and, to the extent possible, subvert pre-existing patterns of structural discrimination against and inequalities experienced by women."¹³⁹ Additionally, reparations should not contribute to the entrenchment of discrimination. He points to the example of the Moroccan Equity and

¹³⁸ Case of the Miguel Castro-Castro Prison v. Peru, Judgment, Inter-American Court of Human Rights (Ser.C) No. 160, para. 463 (25 Nov. 2006); (calling for representation of all the victims in the case in a particular monument).

¹³⁹ [REDACTED]

It will also be important to be sensitive to the fact that [REDACTED] [REDACTED] cultural heritage was attacked by the jihadists in other instances not covered by this case (such as the Monument El Farouk and the Municipal Museum in Timbuktu), and that there are real risks to cultural heritage of a variety of kinds throughout Mali. The reparations must be carefully structured so as to both recognize the importance of the heritage of Timbuktu that was attacked in this case, as well as other heritage in Timbuktu, and elsewhere throughout Mali, and certainly not to bolster the very regional tensions which were part of the matrix within which the situation in northern Mali developed in 2012. It is also critical to involve and empower victims at every stage of the process. As stressed to the Special Rapporteur by experts in the reparations area, inclusive participation in the process, including by women victims, can itself be a significant form of reparation insofar as it restores agency to victims.¹⁴¹

In light of the expectations created in Mali about the future of international justice there, and about the possibility of reparations in this case, as ascertained during the field research, it is clear that whatever the award made, it will be essential to have a thorough process of consultation and of explanation of and public discussion about the reparations in this case, and about the human rights meanings of cultural heritage and its destruction. Reparations of this kind for destruction of cultural heritage will be novel and precedent-setting. If one of the legacies of this case is that there will be a broad and inclusive consultation with victims about what they want in terms of reparation it would be a major and transformational outcome for the protection of cultural heritage around the world.

(IV) The Traditional Mechanisms of Conflict Resolution and Reparations in Timbuktu

With regard to this topic, the Special Rapporteur would simply like to point out that [REDACTED] traditional mechanisms of conflict resolution and reparation in Timbuktu [REDACTED] that mechanisms such as the *qadi* and the *griot* and community mediation were not very relevant for cases like this one. Moreover, [REDACTED] [REDACTED] such mechanisms were likely to result in either discrimination

¹⁴¹ See discussion of related issues in Laurel Fletcher and Harvey Weinstein, *Transitional Justice and the “Plight” of Victimhood*, in RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE, (Cheryl Lawther, Luke Moffett, Dov Jacobs, eds. (forthcoming)).

against women and/or the exclusion of women's concerns from reparations. [REDACTED]
[REDACTED] women would prefer recourse to formal legal mechanisms of reparation.

(V) Conclusion

In closing, the Special Rapporteur would like to note that she hopes that there will be other cases in the future that bring to justice perpetrators of intentional destruction of cultural heritage around the world, and afford reparations to its many victims. The reparations designed here can help to shape those future processes. Moreover, she hopes that there will be more accountability and justice for the many other Malian victims of other grievous abuses during the jihadist occupation of the north, of which the grave crimes in this case were one significant component.

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27 April 2017