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TRIAL CHAMBER VIII

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

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI

Queen's University Belfast Human Rights Centre and the Redress Trust observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules

Source: Queen's University Belfast Human Rights Centre and the Redress Trust

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

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1. On the 27th September 2016, Trial Chamber VIII found Mr Al Mahdi guilty of the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Rome Statute in its 'Judgment and Sentence' decision.[1]

2. On the 29th September 2016 Trial Chamber VIII issued its 'Reparations Phase Calendar' and invited interested organisations to request leave to make submissions by 21 October 2016, in accordance with Rule 103 of the Court's Rules.[2]

3. On the 20th October 2016 Queen's University Belfast's Human Rights Centre (HRC) and the Redress Trust (REDRESS) requested leave to file a joint submission on these reparations-related issues identified by the Chamber.[3] On the 25th October 2016 Trial Chamber VIII granted the HRC and REDRESS permission to file a joint submission.[4]

Introduction

4. Reparations for cultural property have been a thorny issue in international law; historically the plundering of cultural property has been viewed as the 'spoils of war' and a justified means of recovering the cost of the conflict.[5] In addition, international law on cultural property has concentrated on the protection and prevention of damage and destruction to cultural property with the view that 'the possibility of civil reparations is of very minor interest when we are concerned with property which is essentially irreplaceable.'[6] This has seen an emphasis on penal sanction in response to the damage or destruction to reflect the gravity of such attacks.[7]

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[1] ICC-01/12-01/15-171.
[2] ICC-01/12-01/15-172.
[3] ICC-01/12-01/15-173.
[4] ICC-01/12-01/15-178. ICC-01/12-01/15-178. At Queen's Human Rights Centre this submission was prepared by Luke Moffett, Rachel Killean, Claire Smith, Christina Verdirame, Fiona McGrath, Daragh Fox, Rachel Marsland, and Leo Angelo Evasco. At REDRESS Carla Ferstman and Gaelle Carayon.
[5] Article 3 prohibits the use of cultural property as war reparations under the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954.
[6] Report on the International Protection of Cultural Property by Penal Measures in the Event of Armed Conflict, UNESCO, 5C/PRG/6 Annex 1, 8 March 1950, p2.
[7] Article 56, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

5. Although UNESCO has completed much of the restoration of the World Heritage sites around Timbuktu, with the sacred gate of the mosque of Sidi Yahia being restored on the 19th September 2016,[8] reparations remain important in acknowledging and remedying the harm caused to those individuals and communities affected by the destruction. Indeed, it is important that Mr Al Mahdi is held liable for such reparations, whether to indemnify some of the work that occurred or to deliver further reparations to the wider affected community in Timbuktu. This reflects the Lubanga reparation principles and more broadly the legal basis for reparations in international law.[9] As set down in the *Chorzow Factory* case, 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'[10]

6. Our submission on reparations considers relevant decisions and practice in other jurisdictions and legal fora that may assist the Court in awarding appropriate reparations in the *Al Mahdi* case. We have separated out the jurisprudence around four headings: the importance of cultural property; the impact of the destruction of cultural property on affected communities; restorative measures for damaged or destroyed cultural property; and appropriate measures to address the victims' psychological, moral and economic harm as a result. Together these four areas reflect the fact that the destruction of the mausoleums in Timbuktu not only destroyed and damaged physical structures, but caused harm, which rippled out into the community and diminished the link and identity the local community had with such valuable cultural property.

I. The Importance of Cultural Property

7. The international community values cultural property because it forms social identity and, in some instances, embodies the highest accomplishments of the human spirit.[11] Cultural property also allows a group to distinguish and identify itself in front of the world community. Inherent in the concept of cultural property is the idea that it

[8] UNESCO welcomes restoration of sacred gate of Sidi Yahia in Timbuktu, *UNESCO News*, 20 September 2016.
[9] *Lubanga,* Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, para.20.
[10] *Factory at Chorzow*, PCIJ Decision on Jurisdiction Judgment No. 8 of 26 July 1927, p21.
[11] Corinne Brenner, Cultural Property Law: Reflecting on the Bamiyan Buddhas' Destruction, *Suffolk Transnational Law Review* 29(2) (2005-2006) 237-268, p238.

symbolically represents much more than its physical manifestation, that is, it is much more than the stones and building material used to create it. Members of a group that reflect themselves in such heritage rely on it to feed their sense of worth and of belonging to their own community.[12] Because of its purpose and symbolism, most cultural property is unique and of some sentimental value and, therefore, is not fungible or readily replaceable. Once looted, defaced, or destroyed, cultural property may be lost forever.[13]

8. The importance of cultural heritage to communities is illustrated by the fact that the communities themselves often request that the protection of their cultural landmarks be prioritised, even in situations of violence where human life is at risk. As former Director for Legal Protection of Cultural Heritage Lyndel Prott explained,

> 'We are often asked the question, "Why protect monuments when people are dying?" The reason is, the people who are dying ring us up and say, "Please protect our monuments." If people feel strongly about their heritage, we don't feel the international community can simply stand back and say, "It's not important. As long as you're not dying, that's all that counts."'[14]

9. Symbolically important objects or places are destroyed to sap enemy morale,[15] attack the enemy's memory,[16] rupture a community's sense of continuity, and erase the manifestation of its collective sense of identity.[17] The loss of such heritage has broader, negative consequences as well, as it can also fuel a desire for revenge, and give rise to

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[12] Federico Lenzerini, The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage', in F. Francioni and J. Gordley (eds.), *Enforcing International Cultural Heritage Law*, (Oxford University Press 2013), p58.
[13] David W. Bowker et al., Confronting ISIS's War on Cultural Property, 20(1) *ASIL Insights*, 14 July 2016.
[14] Marion Forsyth, Casualties of War: the Destruction of Iraq's Cultural Heritage as a Result of U.S Action during and after the 1991 Gulf War, *DePaul Journal of Art, Technology and Intellectual Property Law* 14(1) (2004) 73-108, p106.
[15] Nicholas Stanley-Price, The thread of continuity: cultural heritage in post-war recovery, in ICCROM, *Cultural Heritage in Postwar Recovery: Papers from the ICCROM Forum held on October 4-6 2005*, p4.
[16] Neal Ascherson, Cultural destruction by war and its impact on group identities, in *Cultural Heritage in Postwar Recovery*, ibid, 17-25, p22.
[17] Hirad Abtahi, The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia, *Harvard Human Rights Journal* 14(1) (2001) 1-33, p1.

reprisals, which can perpetuate conflict.[18] The Prosecutor underscored this at the confirmation of charges hearing in the *Al Mahdi* case when she quoted the words of the Minister of Culture of Mali, who had called the destruction: '... an attack on the lifeblood of our souls, on the very quintessence of our cultural values. Their purpose was to destroy our past ... our identity and, indeed, our dignity ...'[19]

10. Although some scholars have pointed out that the destruction of monuments and cultural objects often fails to fulfil its intended effect of dissolving a national or community sense of cultural identity—as it may introduce a tougher and more resentful element of victimhood and provide a society with a lasting grievance around which to rally—the hurt and fear such destruction can cause nevertheless must not be undervalued.[20] The fact that the implicit, if not explicit, intent of systematically destroying cultural property is to cause fear and hurt to a community must also be taken into account.

11. When a well-known building or work of art is destroyed by violence, the injury done is usually to a community's sense of continuity. A deep sense of insecurity and alarm is aroused when a gap appears in a familiar landscape or narrative. This is a wound in time, the disappearance of some familiar object, whose sight has always granted a reassuring feeling that some things are changeless whatever happens to the mortals around them.[21] This 'break' in a community's sense of continuity was precisely the sentiment echoed in the oral submissions of the Legal Representative for Victims in the *Al Mahdi* case, when he stated: "The link between those who are alive and the saints is through the keys of the mausoleums who are handed over – which are handed over to their guardians, and that link is broken today. All the physical persons who I today represent before you did indeed have a key, a symbolic key which is the link between

[18] Bowker et al. n. 13.
[19] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi , 1 March 2016.
[20] It is now widely accepted that the area bombing of German cities in the Second World War, though flattening whole districts and killing tens of thousands, did not break down popular solidarity and in some ways reinforced it. See Ascherson n.16, p22.
[21] Ascherson ibid., p23-24.

the living and the spirits. This key is a relay, a link between one generation which leads on to another and all of that is linked to the existence of the mausoleums."[22]

II. The Impact of the Harm on Individual Victims and Communities

12. The damage and destruction of cultural property during armed conflict is often a way to target a community's identity. This can have clear repercussions on individuals and communities' connection to their cultural property and identity. As held by the ICTY in the *Prlić* case, involving the shelling of the Mostar Bridge, while targeting the bridge could be justified under military necessity, its destruction had a 'very significant psychological impact on the Muslim population of Mostar', making it disproportionate and a war crime.[23] In this section we discuss the impact of the destruction of cultural property on individuals and communities. We first outline how destruction of cultural property has been well documented and embodied in human rights and international criminal law through the elements of the crimes of torture, ill treatment, persecution, genocide and looting. We then move onto identifying the multilevel impact of the destruction of cultural property on individual victims and communities.

A. The link between destruction of cultural property and other crimes such as torture, ill treatment and persecution

i. Destruction of cultural property through the lens of torture/ill treatment

13. If the destruction of cultural, religious or heritage property results in severe pain and suffering for one or more persons and particularly when such pain has been inflicted with a discriminatory or intimidation purpose – as appear to be the case in the case at hand – the law and jurisprudence applicable to reparation for torture and other ill treatment may become relevant.

14. Some bodies have considered and found that destruction of property constituted torture or other ill treatment as set out below:

<u>African Commission on Human and People's Rights</u>

15. In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v.*

[22] Transcript, 24 August 2016, ICC-01/12-01/15-T-6-ENG, p26.
[23] *Prlić et al.* (IT-04-74), Judgment 29 May 2013, para.1583-1584.

Sudan, a case which related to gross, massive and systematic violations of human rights by the Republic of Sudan against the indigenous Black African tribes in the Darfur region (Western Sudan), the complainants submitted that 'forced evictions and destruction of housing constituted cruel or inhuman treatment prohibited by Article 5 of the Charter'. The African Commission concluded that '[t]orture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for discriminatory treatment of persons or groups of person who are subjected to the torture by the State or non-state actors at the time of exercising control over such person or persons. The purpose of torture is to control populations by destroying individuals, their leaders and frightening entire communities.'[24]

16. The African Commission also recalled previous findings that 'the term "cruel, inhuman and degrading punishment or treatment" is to be interpreted so as to extend the widest possible protection against abuse, whether physical or mental' and that 'personal suffering and indignity can take many forms, and will depend on the particular circumstances of each communication brought before the African Commission'[25] In this case, the African Commission concluded that 'forced evictions and destruction of housing carried out by non-state actors amounts to cruel, inhuman and degrading treatment or punishment'.[26]

European Court of Human Rights

17. The European Court of Human Rights has also ruled that in some circumstances, destruction of property may amount to cruel and inhuman treatment.[27] In doing so, the

[24] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Application No 279/03-296/05, 27 May 2009, para.159-60. Emphasis ours.
[25] Ibid, para.158.
[26] Ibid, para.159.
[27] *Selçuk and Asker v. Turkey* , ECHR: the case dealt with allegations that the applicants' property had been destroyed by Turkish security forces. The Complainants were both Turkish citizens of Kurdish origin living in the village of Islamköy. In the morning of 16th June 1993, a large force of gendarmes arrived in Islamköy and set fire to the houses and other properties of the said Complainants. The European Court of Human Rights arrived at the conclusion, that the destruction of homes and property was cruel and inhuman treatment.

Court has stressed that assessment of the minimum level of severity to reach the level of ill treatment was relative and that it depended 'on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.'[28]

18. In *Selcuk and Asker v. Turkey*, a case in which buildings, houses and belongings were set on fire by Turkish officers, in the context of disturbances between the security forces and the members of the PKK, the ECtHR found that the destruction amounted to ill-treatment. In doing so, it considered in particular the circumstances of the destruction of the applicants' home (burning in the applicants' presence and preventing them from putting out the fire) and found 'the burning of the applicants' homes in their presence to be acts of violence and deliberate destruction in utter disregard for their safety and welfare'. It also noted the 'traumatic circumstances surrounding the burning of' the applicant's house which put him and his wife in danger.[29] Noting the age of the applicants and their loss of homes and property, the Court also highlighted the fact that 'the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants who had to 'stand by and watch the burning of their homes'. The Court concluded that '[b]earing in mind in particular the manner in which the applicants' homes were destroyed […] and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3'.[30]

19. The Court made a similar finding in *Bilgin v. Turkey*, which concerned the destruction of the victim's house and other possessions by Turkish security forces.[31] The Court in both cases ordered reparation for the following types of harm, on the basis of equity:

    a. Pecuniary damage with regards to the house and outbuildings as well as loss of income following the applicants' inability to farm as a result of the destruction. The costs of finding alternative accommodation were also considered as part of

[28] ECHR, *Bilgin v. Turkey*, Appl no. 23819/94, 16 November 2000, para.101; *Selçuk and Asker v. Turkey*, 24 April 1998, Reports 1998-II, p909, para.75-76.
[29] *Selçuk and Asker v. Turkey*, 24 April 1998, Reports 1998-II, para.74.
[30] Ibid, para.78.
[31] *Bilgin v. Turkey*, Application No. 23819/94, 16 November 2000.

the award for pecuniary damage.

b. Non-pecuniary damage due to the seriousness of the violations found for the amount of GBP 10,000.

ii. Destruction of heritage as evidence of genocide

20. Destruction of cultural property and heritage can also support evidencing the elements of the crime of genocide. The ICTY in *Krstić* held that while the Genocide Convention 1948 does not provide for destruction of cultural property to evidence the *actus reus* of genocide, it does support the 'intent' (*dolus specialis*) for genocide against a group.[32] The International Court of Justice has supported this position in the *Genocide Convention* (*Bosnia v Serbia*) case.[33] Lemkin identified attacks on a group's culture as part of *mens rea* of genocide as targeting the destruction of the individual's and group's identity, such as destruction of books, art, property and language.[34] More recently the Special Rapporteur in the field of cultural rights found that 'the destruction of cultural property with discriminatory intent can be charged as a crime against humanity and the intentional destruction of cultural and religious property and symbols can also be considered as evidence of intent to destroy a group within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide.'[35]

21. The destruction of the Temple of the Tooth Relic in Sri Lanka is a notable example of heritage being deliberately targeted during a conflict in an attempt to destroy the identity of a group. It was an event of national as well as international significance, and called for the direct involvement of conservation professionals whose conventional roles were challenged. The Temple of the Tooth Relic is the most powerful national, religious and cultural symbol of the identity of Singhalese Buddhists, who form the majority

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[32] *Krstić*, Case IT-98–33-T, Trial Chamber, Judgment of 2 Aug. 2001, para.580.

[33] Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, para.344.

[34] Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation - Analysis of Government - Proposals for Redress*, The Lawbook Exchange, (2nd ed.) (2008), p84-85.

[35] HRC, Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, 3 February 2016 para.64.

(69%) of the population in Sri Lanka.[36] Because the Singhalese Buddhist community, who are strongly connected to the Temple of the Tooth Relic and for whom it was originally built, considered the destruction as a moment of great tragedy and one that seriously affected their identity, its recovery became one of the top priorities.[37]

22. The final text of the Genocide Convention is silent on the question of reparations for victims of genocide. By contrast, the issue was so central to Lemkin's efforts to criminalise genocide in international law that his book, *Axis Rule in Occupied Europe*, was subtitled 'proposals for redress'. In it he provided a detailed scheme for return of property including cultural property.[38] The Secretariat draft had included Article XIII (Reparations for Victims of Genocide), which provided that, when a government commits genocide or fails to prevent genocide by a part of its populace, it would grant redress to the survivors of the victim group 'of a nature and in an amount' determined by the United Nations. The Secretariat noted that the draft provision represented 'an application of the principle that populations are to a certain extent answerable for crimes committed by their governments which they have condoned or which they have simply allowed their governments to commit'.[39] It suggested that reparations could include compensation to dependants and restitution of seized property. In addition, it advised that groups would benefit from reconstruction of monuments, libraries, universities, and churches and compensation for their collective needs.[40]

iii. Destruction of heritage as persecution

23. Attacks on cultural property can also satisfy the elements of the crime against humanity of persecution. The ICTY found that destruction of cultural property could amount to persecution when committed as part of a campaign against a particular population

[36] Gamini Wijesuriya, The restoration of the Temple of the Tooth Relic in Sri Lanka: a post-conflict cultural response to loss of identity, in ICCROM, *Cultural Heritage in Postwar Recovery* (n. 9), 87-98.
[37] Ibid., p90.
[38] Lemkin n.34.
[39] Draft Convention on the Crime of Genocide, UN Economic and Social Council, 26 June 1947, E/447, p47.
[40] Ibid. p49. See Ana Filipa Vrdoljak, Genocide and Restitution: Ensuring Each Group's Contribution to Humanity, *European Journal of International Law* 22(1) (2011) 17-47, p43.

based in particular on religious grounds.[41] In *Karadžić*, which considered, inter alia, the looting and destruction of Bosnian Muslim and Bosnian Croat villages during which multiple mosques, catholic churches and other cultural and sacred monuments were destroyed by Serb forces, the ICTY ruled that 'depending on the nature and the extent of the destruction and if committed with discriminatory intent, the destruction of property can be of equal gravity to other crimes listed under Article 5 and as such may constitute persecution as a crime against humanity.'[42] The Chamber concluded that 'incidents of wanton destruction of private and public property, including cultural monuments and sacred sites, constitute acts of persecution as a crime against humanity'.[43]

iv. Looting and plunder

24. The notion of cultural property damage embraces not only its physical destruction, but also acts of plunder likely to lead to its illegal export and/or sale. When a site is looted, not only is the object itself lost, but the context of that object is forever lost as well. It means that our ability to reconstruct and understand the past is irreparably harmed and our knowledge about ourselves is diminished.[44] Looting and plunder can often be distinguished from wholesale destruction of cultural property in that they are often either motivated or result in private gain. However, their consequence is analogous, in that they can erase all of a community's proprietary abilities and relationship to that cultural heritage.

B. The multilevel impact of the destruction of cultural property on affected communities and individual victims

25. Destruction of cultural heritage relates not only to the tangible heritage destroyed, but also to the intangible heritage destroyed as a result. The Special Rapporteur in the field of cultural rights stressed that

> '[c]ultural heritage includes not only tangible heritage composed of sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value, but

[41] ICTY, *Dordevic*, IT-05-87/1-T, 23 February 2011.
[42] ICTY, *Karadžić*, IT-95-5/18-T, 24 March 2016, para.531.
[43] Ibid., para.2559.
[44] Patty Gerstenblith, Enforcement by Domestic Courts: Criminal Law and Forfeiture in the Recovery of Cultural Objects, in F. Francioni and J. Gordley eds., *Enforcing International Cultural Heritage Law*, (Oxford University Press, 2013, p.), 150-174, p150.

also intangible heritage made up of traditions, customs and practices, aesthetic and spiritual beliefs, vernacular or other languages, artistic expressions and folklore. Both of these categories should be understood in broad and holistic terms. For example, tangible heritage includes not only buildings and ruins, but also scientific collections, archives, manuscripts and libraries, which are critical in preserving all aspects of cultural life, such as education, as well as artistic and scientific knowledge and freedom.'[45]

The distinction is relevant in the case at hand in light of the fact that the structures destroyed carried values not only as symbols of culture and/or religion, but as places to which rites, rituals and beliefs were attached.

i. The destruction of cultural property from a human rights perspective

26. As expressed by Gerstenblith, 'Seeing 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.'[46] The destruction of cultural property can violate multiple rights including the right to culture, religion, property and non-discrimination. Careful consideration of who the victims of each of these violations are in the context of each case may prove useful to determine the prejudice suffered and appropriate entitlements to reparation.

27. Parallels may be drawn with jurisprudence relating to the rights of indigenous people and cases relating to loss of their communal property. For example, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, which related to depriving the Endorois people from access to land for commercial purposes, the African Commission considered in turn each of the rights to practice religion, property and culture and the multilevel impact that the deprivation of the land had on the community. Complainants highlighted that the land surrounding Lake Bogoria provided both economic and health benefits, but also 'was central to the

[45] HRC, Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, 3 February 2016 para.49.
[46] Patty Gerstenblith, The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People? *John Marshall Review of Intellectual Property Law* (2016) 15(336), p389.

Endorois religious and traditional practices'.[47] The Commission emphasised that the land at issue was considered 'sacred grounds' and the Endorois people had 'always used these locations for key cultural and religious ceremonies, such as weddings, funerals, circumcisions, and traditional initiations'.[48] It also considered the deprivation of access to their land in the context of the violation of the right to property and the impact that the deprivation of that right entailed. In particular the Commission found that 'the 'right to property' included not only the right to have access to one's property and not to have one's property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.'[49] The African Commission referred to ECtHR jurisprudence recognising that 'property rights' could also include the economic resources and rights over the common land of the applicants'.[50]

28. Finally, the Commission considered the deprivation of access to land as a violation of the right to culture highlighting that the complainants had defined culture as 'the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups' and that

> 'the Endorois have suffered violations of their cultural rights on two counts. In the first instance, the community has faced systematic restrictions on access to sites, such as the banks of Lake Bogoria, which are of central significance for cultural rites and celebrations. The community's attempts to access their historic land for these purposes was described as "trespassing" and met with intimidation and detention. Secondly, and separately, the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.'[51]

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[47] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya,* African Commission, Appl. No. 276/03, 25 November 2009, para.6.
[48] Ibid, paras.77-80.
[49] Ibid, para.186. Emphasis ours.
[50] Ibid, para.186.
[51] Ibid, para.115-116.

ii. Rights holders of cultural rights

29. Cultural rights (and cultural property by extension) are usually said to belong to a variety of rights holders, from individuals to communities and groups to humanity as a whole. The right to culture is recognised as belonging both to the individual and communities.[52] As expressed by the Special Rapporteur in the field of cultural rights:

> Cultural rights protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They may also be considered as protecting access to cultural heritage and resources that allow such identification and development processes to take place.[53]

30. The importance of cultural heritage can thus be understood at various levels. As explained by the Special Rapporteur in the field of cultural rights, '[c]ultural heritage is significant in the present, both as a message from the past and as a pathway to the future. Viewed from a human rights perspective, it 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'[54] and 'is to be understood as the resources enabling the cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations'.[55] The Special Rapporteur highlighted that while 'specific aspects of heritage may have particular resonance for and connections to particular human groups […]all of humanity has a link to such objects, which represent the "cultural heritage of all [hu]mankind," in

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[52] African Commission, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, launched at its 50th ordinary session held in Banjul, the Gambia from 24 October to 7 November 2011. The principles set out at para.73, that: 'The right to take part in cultural life vests in the individual and should be protected as such by states parties. It is integral to the way of life of individuals and communities, including promotion and preservation of their culture, heritage and institutions. It refers not only to the enjoyment of cultural activities and access to materials but to participation, policy-making and artistic freedom.'

[53] HRC, Report of the Special Rapporteur in the field of cultural rights, A/HRC/14/36, para.9. Emphasis ours.

[54] HRC, Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, 3 February 2016, para.47.

[55] Ibid.

the words of the preamble to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (1954 Hague Convention).'[56]

31. Since cultural heritage has a symbolic value to the community associated to it, its destruction is, in and of itself, the harm that is suffered by the victim community. With regards to destruction that occurred in Timbuktu, the African Commission has for example underscored the fact that the sacred monuments of Timbuktu were 'a symbol of the greatness of Africa', that they were 'an eloquent testimony to the significant role played by Africa in the history of humanity' and that 'although found in Mali, they instil in every African a sense of existence and pride.'[57] The Commission went further to state that 'the libraries of Timbuktu [were] an ancient heritage of Africa's past and constitute an important part of African civilization.'[58] The Prosecutor in her submission on sentencing stressed that 'The destruction in this case was particularly grave, moreover, because the attackers targeted buildings of such significance that all but one were listed on UNESCO's World Heritage List. As the Director of UNESCO aptly noted in the context of these very destructions in Mali: 'when a World Heritage Site is destroyed […] it is the whole of humanity that suffers from the deprivation of a part of itself.' However she added that 'the targeted buildings were also of great significance to the people of Timbuktu and Mali as a whole.'[59]

32. The value of heritage for local communities and populations in addition to humanity as a whole has also been recognised. The former Special Rapporteur in the field of cultural rights stated in 2012, that '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.'[60] Similarly, in the *Jokic* case before the ICTY, which related to the destruction of

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[56] Ibid., para.48.
[57] African Commission, Press Release on the Destruction of Cultural and Ancient Monuments in the Malian City of Timbuktu, 10 July 2012, available at http://www.achpr.org/press/2012/07/d115/.
[58] Ibid., emphasis ours.
[59] *Prosecutor v. Al Mahdi*, Public redacted version of "Prosecution's submissions on sentencing", 22 July 2016, ICC-01/12-01/15-139-Conf , 21 August 2016, p7-8.
[60] Referred to in HRC, Report of the Special Rapporteur in the field of cultural rights, A/HRC/31/59, 3 February 2016, para.48.

the Old Town of Dubrovnik, it was noted that the attack was against 'the cultural heritage of humankind.'[61] However it was also noted that the old town was 'a "living city" (as submitted by the Prosecution) and the existence of its population was intimately intertwined with its ancient heritage.' [62] The Chamber concluded that '[r]estoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.'[63]

33. Cultural heritage enables cultural identification and cultural development of individuals and groups,[64] it becomes a fundamental resource of other human rights particularly rights to freedom of expression and religion.[65] In addition to the curtailment of the exercise of basic civil rights, destruction of cultural property can be a form of 'cultural cleansing' where cultural identity is denied through systematic and intentional destruction of cultural property.[66] As a result of these actions communities and individuals are denied their inability to access, share, practice and participate in their culture.[67]

34. In the *Moiwana Community* case a tribal village was attacked by government forces and destroyed in a counter-insurgency campaign. Expert witness Thomas Polimé found that the destruction of 'their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and sense of well-being. Without regular commune with these lands and sites, they are unable to practice and enjoy their cultural and religious traditions, further detracting from their personal and collective security and sense of well being'[68]

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[61] ICTY, *Jokic*, IT-01-42/1-S, 18 March 2004 para.51.
[62] Ibid.
[63] Ibid, para.52.
[64] Karima Bennoune. Report of the Special Rapporteur in the field of Cultural Rights. (A/HRC/31/59) (3 February 2016, para.47.
[65] ibid, para.51.
[66] UNESCO, Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict. http://en.unesco.org/system/files/unesco_clt_strategy_en.pdf
[67] Ibid., para.3.
[68] *Moiwana Community*, para.73.

35. Judge Cançado Trindade in his separate opinion in the *Croatia v Serbia* case at the ICJ, involving the shelling by Serb forces on the UNESCO World Heritage town of Dubrovnik, stated that 'this form of destruction is indeed related to physical and biological destruction, as individuals living in groups cannot prescind from their cultural values, and, in any circumstances (even in isolation), from their spiritual beliefs. Life itself, and the beliefs that help people face the mysteries surrounding it, go together. The right to life and the right to cultural identity go together, they are ineluctably intermingled. Physical and biological destruction is interrelated with the destruction of a group's identity as part of its life, its living conditions.'[69]

iii. The impact of the destruction of cultural property on individual victims and the community of Timbuktu

36. During the hearing of 24 August 2016, the Legal Representative of Victims emphasised the victims' sense of shame at being powerless to stop the destruction of the mausoleums.[70] He also referred to the destruction of the mausoleums as impacting the ability to exercise victims' religion, since ancestral worship and the syncretisation of Islam with local animistic beliefs conferred particular symbolic and religious value on the destroyed mausoleums.[71] The destruction of the cultural property here therefore encompasses the violation of an individual's fundamental right to practice religion freely. The pattern is also visible in Cambodia, where Khmer Rouge officials have been indicted for targeting groups such as the Buddhists, Cham and Vietnamese in an attempt to abolish ethnic and religious differences. They did so not only by banning religion and disrobing monks, but also by destroying Buddhist statues, and converting monasteries and Cham mosques into meeting halls, detention centres, dining halls, pig farms and warehouses.[72]

37. Mosques and mausoleums are an integral part of religious life in Timbuktu, they are seen as common heritage for the community, and are used for prayer and worship.

[69] Dissenting Opinion of Judge A. A. Cançado Trindade, *Croatia v Serbia,* para.418.
[70] ICC, *Prosecutor v. Al Mahdi*, Transcript, ICC-01/12-01/15-T-6-ENG, p20-21.
[71] Ibid., p22.
[72] ECCC, Closing order (indictment) in Case 002, 15 September 2010, p321.

Timbuktu is an emblematic city at the heart of Mali's cultural heritage. The destroyed mausoleums are part of Timbuktu's rich cultural history and its role in the expansion of Islam. They reflected their commitment to Islam and had a psychological role in the lives of the people who believed they were protected by them. The people of Timbuktu collectively ensured that the mausoleums remained in good condition through symbolic and physical maintenance events and activities involving the entire community. Not only were they religious buildings, they had symbolic and emotional value for the inhabitants and it has been admitted by Mr Al Mahdi that they were the direct target of the attacks. This increases the personal gravity of the crimes committed as they were aimed at 'breaking the soul of the people of Timbuktu'.[73]

38. With the exception of the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, all these buildings had the status of protected UNESCO World Heritage sites.[74] UNESCO's designation of these buildings reflects their special importance to international cultural heritage, noting that 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern.'[75] The entire international community is affected by the destruction, although the harm of the victims who live in Timbuktu and who ritually worshiped and prayed at the buildings is particularly acute.

39. Ascherson suggests that although the destruction of cultural property of this nature can affect both the cultural and collective identity of a community, the lasting damage of the destruction is most evident in individual identities.[76] The destruction can be characterised as a form of 'de facto discrimination' against moderate Muslims in Mali, as

[73] P-431's testimony, ICC-01/12-01/15-T-5-Red-ENG, p89, line 6, to p90, line 13.
[74] Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 33; UNESCO's World Heritage Convention Nomination Documentation, MLI-OTP-0004-0321; UNESCO's World heritage sites in Mali, MLI-OTP-0013- 3630, 3715-26; Report of the World Heritage Committee, MLI-OTP-0006-3298, 3314; UNESCO's international experts meeting for the safeguarding of Mali's cultural heritage, MLI-OTP-0006-3459; P-151 testimony, ICC-01/12-01/15-T-5-Red-ENG, p. 53, line 17, to p. 55, line 23; Statement by P-151, MLI-OTP-0029-0843- R01, 0861.
[75] Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, preamble.
[76] Ascherson n.16.

the intention of Ansar Dine was to show the community that world heritage is an alien concept to a religion that forbids praying on tombs and asking for blessings.[77] As one Timbuktu resident stated the destruction of the mausoleums and mosques was an attempt to not only 'break their heritage and culture', but also take away memories that they can share with the children in the community.[78] As such, the actions of Ansar Dine were a form of denial of the identity, beliefs, history and dignity of the communities in Timbuktu.

III. Appropriate Reparation Measures for Individual and Collective Victims

40. In the present case, those that have suffered (in different ways) from the destruction of cultural property may include local individuals and groups living in/around the sites, specific religious or cultural communities to which the sites bore special significance, and more diffuse communities as they relate to 'citizens of Mali', 'Africa' or 'humanity' as a whole. Whatever reparative measures are ordered in the *Al Mahdi* case should be done on the basis of and following consultations at the local level with the affected communities of Timbuktu and, more broadly, the government and people of Mali, and at the international level, with entities benefitting from the specialised technical knowledge, skills and resources on the preservation and restoration of historical cultural heritage sites.

A. Restorative Measures for Damaged or Destroyed Cultural Property

41. In this section we discuss the state of affairs in Timbuktu regarding the cultural property and the experience of other legal foras in reconstructing the damage and destruction caused to the cultural property. The first sub-section outlines forms of reconstructive reparations with the second sub-section suggesting relevant practices to ensure effective and victim-inclusive processes.

42. The majority of cultural property that Mr Al Mahdi pled guilty to destroying has already been restored or reconstructed. The United Nations Educational, Scientific and Cultural

[77] Sebastian Green Martinez, Destruction of Cultural Heritage in Northern Mali, A Crime Against Humanity? *Journal of International Criminal Justice*, 13(5) (2015) 1073-1097.
[78] Human Rights Watch, Mali: Islamist Armed Groups Spread Fear in North, 25 September 2012 https://www.hrw.org/news/2012/09/25/mali-islamist-armed-groups-spread-fear-north

Organisation (UNESCO), in conjunction the Government of Mali, launched a project in 2014 to reconstruct and rehabilitate those destroyed cultural heritage sites that were part of the Timbuktu World Heritage Site. The initial stage of the project saw the reconstruction of Sheik Baber Baba Idjé and Sheik Mahamane Al Fullani mausoleums.[79] The reconstruction of the mausoleums of Sheikh Sidi Ben Amar, Sheikh Abdoul Kasim Al Taouati and Sheikh Sidi El Mikk, as well as Alpha Moya, Sidi Mahmoud, El Moktar and El Boukkou has also been completed.[80] In total, 14 mausoleums have been reconstructed. The gate of the Sidi Yahia Mosque was restored in the final phase of the project.[81] In addition to the rehabilitation of the principal museum in Timbuktu,[82] safeguarding of manuscripts[83] and the rehabilitation of traditional houses has also occurred.[84] That said the rest of this sub-section will outline additional guidance on restitution and compensation that may be complemented with further reparations to individuals and the community as detailed further below.

i. Restitution

43. Cultural destruction is nearly always followed by a debate as to whether the destroyed heritage should be restored or replaced with something new and different. Proponents of both options see their preferred method as restoring the damage caused, although clearly in diametrically opposing ways. This dilemma has been debated in many cases of post-war reconstruction of cultural property since the end of the Second World War.[85] In many post-war situations, there is evidence of a popular concern to restore immediately

[79] UNESCO, The First Stage in the Rehabilitation of Cultural Heritage of Timbuktu (Mali) is Complete, *UNESCO News*, Paris, 14 April 2014.
[80] UNESCO 'Masons at Work in Timbuktu for the Final Reconstruction Phase of the Mausoleums, *UNESCO News*, Paris, 24 February 2014.
[81] UNESCO, UNESCO Welcomes the Restoration of Sacred Gate of Sidi Yahia in Timbuktu, *UNESCO News*, Paris, 20 September 2016.
[82] Chrisitan Mashard, Heritage Protection in Afghanistan and Mali, in W. Logan, M. Nic Craith, U. Kockel (eds.), *A Companion to Heritage Studies* (John Wiley and Sons, 2015) 290-294, p290.
[83] Center for the Study of Manuscript Cultures 'International Project: Safeguarding the Manuscripts of Timbuktu' <https://www.manuscript-cultures.uni-hamburg.de/timbuktu/index_e.html> accessed 18 November 2016.
[84] United Cities and Local Governments (UCLG), Cultural heritage and reinvigoration of socio-economic activities in Timbuktu: Project Note, (May 2016) p2 <http://agenda21culture.net/award/images/yootheme/award/2nd-edition/cat_city2016/winners/fichas/TOMBOUCTOU_ENG.pdf> accessed 18 November 2016.
[85] Sultan Barakat, Postwar reconstruction and the recovery of cultural heritage: critical lessons from the last fifteen years', in ICCROM, *Cultural Heritage in Postwar Recovery*, 26-39, p34.

war-damaged heritage and to revive traditions that before the war had been obsolescent. This concern seems to answer to a need to re-establish the familiar and the cherished following a phase of violent disruption of normal life.[86]

44. The Afghan government formed after the end of Taliban rule declared that the giant Buddhas in Bamiyan would be and must be rebuilt for their historical, not religious, value. The values of the statues to the Afghan community are further evident in the following statement: 'Reconstruction won't have the same historical value (...) But it's a positive step for the country and could bring thousands of tourists' (Statement of the Deputy Minister of Culture). However, in contrast to the Temple of the Tooth Relic, in Sri Lanka, the Buddhas of Bamiyan (a) no longer had a function in everyday Afghan society (as places of pilgrimage or objects of religious meaning, for instance), (b) they were not directly connected to the local community and its daily life, and (c) the thread of continuity had not carried through to modern Afghan society, in the sense that the statues did not have a continuous daily function from the time of their construction to the point of their destruction. As a result, the destruction of the statues had little or no impact on the contemporary Afghan community. Because of this, the recovery work has received low priority within the country. On the other hand, the affected Buddhist community in countries like Sri Lanka, Thailand and Japan expressed deep interest in protecting the statues before destruction and also at the recovery stage.[87]

45. Common acts of vandalism can also illustrate how communities will naturally tend to want to restore cultural property or objects with special significance to their original state. Recently former Nazi concentration camps were vandalised and subject to thefts. At the Dachau camp, for instance, the "Arbeit macht frei" gate was stolen. The German authorities not only ordered the reconstruction of the sign, but the blacksmith who was entrusted with the task decided to employ methods commonly used in 1936, to ensure

[86] Stanley-Price n.15, p1.
[87] Wijesuriya n.36, p94-95.

that the reproduction would be as close to the original as possible.[88]

46. There are no authoritative guidelines for the restoration of cultural property in conflict or post-conflict recovery. It has been recognised that guidelines for pre- and post-crisis measures as well as the exchange of best practices need to be developed and facilitated.[89] This places the Court in a unique position to contribute to this debate.

47. Available restoration guidelines are primarily formulated on architectural and museum conservation practice. The Venice Charter requires the integrity of the monument not to be distorted and for interference to be minimal. The Charter has a starting point of a technical process,[90] rather than one situated in meaning or symbolism.[91] In presupposing that the original form is the most authentic, the Venice Charter does not provide for additions or changes caused by the conflict and therefore limits the space for these to be recognised and acknowledged.[92] The reconstruction of cultural heritage has been limited to physical and tangible dimensions and integrity, rather than an understanding of the property within its cultural context. This has divorced it from social and economic recovery, in which the cultural dimension can be utilized for broader aims in societal recovery[93] and recognition that 'rehabilitation of cultural heritage has an important cultural dimension, which can strengthen intercultural dialogue, humanitarian action, security strategies and peacebuilding.'[94]

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[88] Erik Kirschbaum, Germany restores 'Arbeit macht frei' gate after Nazi original stolen, *Reuters*, 16 April 2015, available at: http://www.reuters.com/article/us-germany-dachau-idUSKBN0N71RI20150416

[89] Council of Europe Parliamentary Assembly *Recommendation 2071(2015) Cultural heritage in crisis and post-crisis situations*, 22 May 2015.

[90] International Council on Monuments and Sites (ICOMOS) The Venice Charter for the Conservation and Restoration of Monuments and Sites (31 May 1964) adopted 1965.

[91] Marie Louise Stig Sørensen and Dacia Viejo-Rose 'Introduction' in M. L. Stig Sørensen and D. Viejo-Rose (eds.).), *War and Cultural Heritage: Biographies of Place* (Cambridge University Press, 2015), 1-17.

[92] Ibid.

[93] Ibid.

[94] UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199.

48. Recent guidelines, authoritative documents[95] and practice[96] represent a move towards placing people and human values at the centre of cultural heritage interventions and reconstruction after conflict. The Krakow Charter provides that reconstruction of an entire building destroyed by armed conflict or natural disaster is acceptable if there are exceptional social or cultural motives that are related to the identity of the entire community. [97] Reconstruction should be based on precise and indisputable documentation.[98]

49. Restitution, particularly if it involves cultural heritage, is considered the primary remedy for destroyed, damaged or stolen cultural property. It is only when restitution is impossible or inadequate that other remedies are considered. In the *Banja Luka Mosques* case at the Human Rights Chamber for Bosnia and Herzegovina, the Chamber found that there was an ongoing violation of freedom of religion because the relevant authorities had persistently refused permission for reconstruction after the war, and ordered that such permission be granted. In a similar vein, the Human Rights Chamber ordered the removal of business facilities from the site of a destroyed mosque and the repeal of an impugning law prohibiting burials in the Muslim Town Cemetery.[99] In these cases the HRC did not have jurisdiction over the original violations of destruction or damage of religious buildings during the war, so could only order reparations for the ongoing violations.

50. While restitution is the 'preferred' remedy, it is often not feasible in cases involving

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[95] Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro Convention).

[96] International Center for the Preservation and Restoration of Cultural Property, First Aid to Cultural Heritage in Times of Crisis: Framework Document, (2016) p4 <http://www.iccrom.org/wp-content/uploads/1_FAC-2016_Framework-document.pdf> accessed 16 November 2016; UNESCO Final Report and Action Plan for the Rehabilitation of Cultural Heritage and Safeguarding of Ancient Manuscripts in Mali, 18 February 2013, p13 (UNESCO Action Plan).

[97] International Conference on Conservation The Charter of Krakow - Principles for Conservation and Restoration of Built Heritage (2000) <http://smartheritage.com/wp-content/uploads/2015/03/KRAKOV-CHARTER-2000.pdf> accessed 13 November 2016.

[98] Ibid.

[99] HRCBiH, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*, Case no. CH/96/29, Decision on the admissibility and merits, delivered on 11 June 1999 (mosques in Banja Luka), pp.209-213. See Vrdoljak n.40, p44.

human rights violations or mass crimes. Restitution-in-kind has been ordered where the item cannot be returned, because it has been destroyed, lost, or it may impact negatively on the cultural or religious heritage of the group against whom the restitution order is made. The Human Rights Chamber of Bosnia and Herzegovina declined to sanction the removal of an Orthodox Church constructed on the site of a destroyed mosque. Instead, it ordered restitution-in-kind by requiring the Republika Srpska to make a parcel of land available to the Islamic Community and permit reconstruction of the mosque on the alternative site.[100]

51. The domestic case law on plundered artefacts has most commonly ordered restitution, or the return of the object to its original owners and its original site. For example, the seminal case in US law in this regard is that of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, in which the Greek-Orthodox Church of Cyprus filed an action in the US State of Indiana to recover Byzantine mosaics that were stolen from a church in northern Cyprus and subsequently passed on through various sales, to the defendant, an American art collector. The Court both in first instance and on appeal found that the defendant had never acquired good title or the right to possess the mosaics.[101] The court held notably:

> The UNESCO Convention and the Cultural Property Implementation Act constitute an effort to instil respect for the cultural property and heritage of all peoples. The mosaics before us are of great intrinsic beauty. They are the virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court.[102]

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[100] HRCBiH, *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska,* Case no. CH/98/1062, delivered on 9 November 2000 (Zvornik mosques), p117-123. See Vrdoljak, ibid, p45.
[101] *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 917 F. 2d 278 (1990); *see* also Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law, Law Library of Congress, 2009 (available at: https://www.loc.gov/law/help/cultural-property-destruction/cyprus-destruction-of-cultural-property.pdf)
[102] *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg*, 297.

ii. Reconstruction Process

52. Participation of victims' groups must be a prerequisite for reconstruction and rehabilitation. There is a need to link livelihoods to the recovery of cultural heritage, for example, creating positive relationships by employing locals in recovery activities.[103] Building on local capacity, initiatives and responses while harnessing local materials, skills and knowledge can contribute to the wider restoration of dignity, confidence and faith in local capacities, rather than simply relegating the local community to passive recipients.[104] Consideration of local customs, practices and discourse on the restoration of cultural life is critical. It should be acknowledged that cultural heritage is more than tangible manifestations. Instead it assumes a complex role: transmitter of the past, while at the same time forging post-conflict identity within the wider context of upheaval and uncertainty. A community's ability to articulate their needs and set their priorities is imperative for the continuity of cultural heritage and its rehabilitation and evolution after crisis. Therefore, it is not possible to articulate a one-size-fits-all solution.

53. Communities in collaboration should identify what cultural resources should be prioritised and how important community organisations falling under the definition of a victim under Rule 85(b), such as religious bodies, charitable organisations and guardians of cultural resources, can play a role, whilst ensure effective gender representation.[105] Care should be taken to include a plurality of voices from the community, in order to avoid dominant voices excluding alternative views. The Faro Convention outlines the importance of establishing processes for conciliation that deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities.[106] The setting up of participatory structures, such as local cultural heritage forums, which are based on the principles of open dialogue, transparency and accountability to develop local cultural heritage plans and engage in wide public

[103] Barakat n. 85, p31.
[104] Ibid., p33.
[105] World Bank, Cultural Heritage Conservation in *Safer Homes, Stronger Communities: A Handbook for Reconstructing after Natural Disasters* (World Bank, 2010), p174. Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparations 2007.
[106] Article 7, Faro Convention.

consultation to identify priorities may be an appropriate participatory structure.[107] By way of example local cultural heritage forums in Kosovo, which included representatives from central and local institutions and civil society, engaged communities in a participatory process, and resulted in the selection of numerous projects for restoration of sites, urban regeneration and cultural tourism.[108] Both UNESCO and the Malian government have prioritised community engagement in Mali[109] and have engaged in interactions with Imams of the World Heritage mosques, the chief masons and the families responsible for the management of the mausoleums.[110]

54. Irrespective of the manner of participation, situations where national and international actors have failed to consult with, seek out and build on local initiatives, have resulted in local people feeling disconnected from the protection and reconstruction of heritage. This has been evidenced for example by community reactions to the international reconstruction of Mostar bridge in Bosnia and Herzegovina, where rebuilding the bridge has had little impact on reconciliation, and where local communities preferred to construct their own cultural symbols.[111] It is crucial for reconstruction and protection to consider local priorities through ongoing victim participation in designing appropriate reparations.[112]

55. The concept of participation is inextricably intertwined with the broader themes that govern successful post-conflict reconstruction, namely vision, reconciliation and justice,

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[107] Council of Europe Committee on Culture, Science, Education and Media, Report by Rapporteur on cultural heritage in crisis and post-crisis situations, 9 December 2014, 4 AS/Cult (2014) 36 rev.
[108] Ibid.
[109] UNESCO Action Plan, 22; United Cities and Local Governments (UCLG), Cultural heritage and reinvigoration of socio-economic activities in Timbuktu: Project Note, May 2016, p2.
[110] UNESCO World Heritage Committee 'State of Conservation of the Property inscribed on the List of World Heritage in Danger' (16 May 2014) WHC-14/38.COM/7A.Add, p32.
[111] Dacia Viejo-Rose, Reconstructing Heritage in the Aftermath of Civil War: Re-Visioning the Nation and the Implications of International Involvement, *Journal of Intervention and Statebuilding*, 7(2) (2013) 125-148, p132-133.
[112] Mariana Lostal and Emma Cunlife, Submission to the Study on the International Destruction of Cultural Heritage Study on the Intentional Destruction of Cultural Heritage: The Aftermath of Destruction of Cultural Heritage: Factoring in Cultural Rights in Post-Conflict Recovery Processes, (9 June 2016) 4 <http://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/M.Lostal_E.Cunliffe.pdf> accessed 14 November 2016; *citing* Dacia Viejo-Rose *Reconstructing Spain: Cultural Heritage and Memory after Civil War* (Sussex Academic Press, 2011).

equity, reconstruction and development, and capacity.[113] It is necessary to achieve a shared vision of reconstruction priorities, objectives and strategies as a starting point, allowing community actors to take the lead in decision making processes,[114] while ensuring the transparency of the aims of reconstruction projects as well as the meanings that are being promoted through the sites.[115]

56. Reconstruction of cultural property is not only the restoration of the physical structures, but also the 'parallel process of re-imagining the country's past, re-codifying its value system and formulating the resulting narratives.'[116] It should then come as no surprise that cultural heritage, which are often public spaces, can be used to bridge the divides of conflict, but may also crystallize divisions.[117] As Viejo-Rose warns 'reconstruction is guided by a desire to shape a value system, planting symbols in the landscape that will communicate it.'[118] Reconstruction and rehabilitation can take part of a corrective dimension not only to restore the status quo, but to promote change. The process can help forge the creation of a new identity for a community or the retrieval of identity: the community that occupied an area may be broken up or removed, particularly in the case of conflict zones. For reconstruction to be an effective part of reconciliation processes, tensions at all levels must to be taken into account in the design of intervention, whether religiously based or otherwise. New tensions may need to be mitigated as part of these processes.[119]

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[113] Sultan Barakat 'Seven Pillars for Post-War Reconstruction' in Barakat (ed) *After the Conflict: Reconstruction and Development in the Aftermath of War* (2005, Tauris) 249-270.
[114] Ibid, 251.
[115] Cambridge University Cultural Heritage and Reconstruction of Identities after Conflict Project '48 Month Publishable Summary Report' (February 2012) 4 (CRIC Project Summary Report) <http://www.cric.arch.cam.ac.uk/fileadmin/user_upload/Downloads/CRIC_publishable_summary_3.pdf> accessed 14 November 2016.
[116] Viejo-Rose n.111, p127.
[117] UNESCO, Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict, (November 2015) para.3 and 24 (UNESCO Strategy) <https://en.unesco.org/sites/default/files/unesco_clt_strategy_en.pdf> accessed 18 November 2016
[118] Viejo-Rose n.111, p142.
[119] Barakat n.113, p267-70.

57. In a post-trauma search for identity, objects or buildings that were previously undervalued can become symbolic: the identification of what people want and what they value is critical.[120] Care must be taken that reconstruction is used for restoration and reconstruction of built cultural heritage and raising awareness of its 'common value' rather than for division.[121] UNESCO has recognised the importance of cultural and heritage reconstruction as a force for mutual recognition, dialogue and reconciliation.

58. Monitoring of and long-term engagement with cultural heritage reconstruction projects is necessary to ensure greater integration of reconstructed sites with locales and communities.[122] Reconstruction cannot be seen in isolation; the restoration, maintenance and promotion of heritage and its enshrined values is ongoing, and goes on beyond those engaged professionally to the community.[123]

59. Reconstruction and rehabilitation projects must not exacerbate inequalities between communities. Restriction of financial support has resulted in the interpretation of cultural heritage to cultural property solely in the form of buildings and townscapes of recognised historic interests, where they can attract investment or promote tourism.[124] Value judgements leading to the selective recognition and rehabilitation of cultural heritage have historically aggravated existing inequalities in affected areas, which in turn may undermine the reparation process.[125] Past institutional responses have centred on iconic or monumental heritage, at the detriment of the identity and needs of the people and the community, which may have changed post conflict.[126] There is a need to avoid 'undesirable symbolic attachment' or the 'creation of an exclusive sense of

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[120] ICOMOS, Post-Trauma Re-Construction: Volume 1, 4 March 2016, p22 <http://openarchive.icomos.org/1707/1/ICOMOS-Post-Trauma_Reconstruction_Proceedings-VOL1-ENGok.pdf> accessed 18 November 2016.
[121] CRIC Project Summary Report, p4.
[122] Ibid.
[123] Ibid.
[124] Barakat n.85, p32.
[125] International Center for the Preservation and Restoration of Cultural Property, First Aid to Cultural Heritage in Times of Crisis: Framework Document, (2016), p4.
[126] Ibid, p11.

ownership' and in a similar vein, refrain from creating associations between cultural heritage and the establishment of truth and claims.[127]

60. The Council of Europe has recognised that reconstruction of cultural heritage is a development challenge.[128] UNESCO has also emphasised the importance of cultural heritage in sustainable development.[129] Local communities must develop a sense of ownership, responsibility and power to decide which projects affect them to ensure true sustainability and the capacity for self-reliance.[130] This self-reliance is often eroded and undermined by violent conflict, and therefore must be consciously reclaimed.[131] Reconstruction and rehabilitation of cultural property provides opportunities not only for access to culture and cultural practice, but also the restoration of livelihoods, dignity and self-determination for individuals and communities.

B. Compensation

61. Although compensation is seen as inappropriate for destruction of cultural property by cultural property experts,[132] it has often been claimed by states in the aftermath of the damage or destruction of cultural property.[133] At the International Court of Justice in the case of *Croatia v. Serbia,* Croatia in its claim for damage caused to cultural property and heritage, including historic and religious sites, argued that restitution was inappropriate as it would not re-establish the situation before the destruction and so claimed compensation instead.[134]

62. The issue of appropriate reparations also arose at the Eritrea-Ethiopia Claims Commission with the Stela of Matara, a 2,500-year-old obelisk that Ethiopian forces had

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[127] CRIC Project Summary Report, p4.
[128] Council of Europe Parliamentary Assembly *Recommendation 2071(2015) Cultural heritage in crisis and post-crisis situations,* 22 May 2015, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21785&lang=en> accessed 12 November 2016
[129] UNESCO Strategy, para.3 and 6.
[130] Barakat n.113, p263.
[131] Ibid.
[132] 5C/PRG/6, 2 March 1950, Annex I, para.3.
[133] Article 3, Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.
[134] Croatia memorial, Volume 1, 1 March 2001, para.8.81.

established a camp beside and was later destroyed by explosives at its base. Eritrea's request for an apology from Ethiopia was rejected as the Commission's Decision No. 3 established that compensation is the appropriate remedy for valid claims, 'except where other remedies can be shown to be in accordance with international practice and the Commission determines that another remedy could be reasonable and appropriate.'[135] While Eritrea claimed US$8,000,000 mirroring the amount Ethiopia had spent trying to recover the Obelisk of Axum from Rome, the Commission found this to be an inappropriate measure for compensation and awarded US$50,000 reflecting 'the amounts expended to attempt to restore the Stela, plus an additional amount to reflect, in part, the unique cultural significance of the Stela'.[136] In a later decision on the destruction and damage caused to 164 Ethiopian churches, mosques and associated buildings by looting and shelling by Eritrean forces the Commission awarded US$4,500,000 signifying the physical harm caused and seriousness of the damage to religious institutions.[137] Accordingly compensation should be measured as not just the cost of reconstruction, but also reflect the moral damage caused to damaged or destroyed cultural property.

63. Compensation will be ordered if the damage cannot be made good by restitution and the damage is 'economically assessable'.[138] Compensation must be 'appropriate and proportional' to the gravity of the harm in each case. Its purpose is corrective rather than punitive. In the *Srebrenica* cases, the Human Rights Chamber of Bosnia and Herzegovina ordered the Republika Srpska to pay 4,000,000KM (Bosnia and Herzegovina convertible mark) compensation to the Foundation of the Srebrenica-Potocari Memorial and Cemetery to enable families to bury the deceased according to their traditional religious beliefs and facilitate collective memory of the victims of the massacres.[139] The modest

[135] Partial award for Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28 April 2004, para.107-114.
[136] Final Award – Eritrea's Damages Claims, 17 August 2009, para.221-223.
[137] Final Award – Ethiopia's Damages Claims, 17 August 2009, para.383-386.
[138] *Factory at Chorzow*, para.125; Principle 20, 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, A/RES/60/147, 16 December 2005.
[139] *Selimović and Others v. Republika Srpska*, Decision on Admissibility and Merits, CH/01/8365 (HRC BiH), 7 March 2003, para.217.

quantum collectively awarded was based only on the right of the families to know the truth, as violations of the deceased's rights fell outside the Chamber's jurisdiction. This award could also be viewed as rehabilitation designed to 'address massive trauma that can be life-long or even multigenerational' and 'restore the dignity and reputation of the victims'.[140]

64. The Inter-American Court of Human Rights held in *Gutierrez-Soler v. Colombia* that 'non-pecuniary damage may include distress, suffering, tampering with the victim's core values, and changes of a non-pecuniary nature in the person's everyday life.'[141] Similarly, it held in *Cantoral-Benavides v. Peru* that 'non-pecuniary damages might include the pain and suffering caused to the direct victims and to their loved ones, discredit to things that are very important for persons, other adverse consequences that cannot be measured in monetary terms, and disruption of the lifestyle of the victim or his family.'[142]

65. Some of the victims participating before the Court have indicated a preference for compensation as the appropriate measure of reparations.[143] The VLR Mr Kassongo discussed how the destruction and damage to the mausoleums has impacted upon the community in Timbuktu causing them shame and suffering through their powerlessness to stop such violence and the harm it has cause to their spiritual belief and connection to the cultural heritage.[144]

66. Some of the community in Timbuktu have lost income from the decline of tourism and pilgrimage to Timbuktu;[145] though this was a not large amount of money, but a meagre income.[146] Loss of tourism is not recognised as a basis for reparations. The Eritrea-Ethiopia Claims Commission denied compensation for lost tourism as being too

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[140] Vrdoljak n.40, p46.
[141] *Gutiérrez-Soler v. Colombia*, (Merits, Reparations and Costs), Series C No 132, 12 September 2005, para.82.
[142] *Cantoral- Benavides v. Peru* (Reparations and Costs), Series C no. 88, 3 December 2001, para.53.
[143] Annexes 1-5, ICC-01/12-01/15-142.
[144] ICC-01/12-01/15-T-6-ENG, 24 August 2016, p21.
[145] ICC-01/12-01/15-T-6-ENG, 24 August 2016, p20-21.
[146] ICC-01/12-01/15-T-6-ENG, 24 August 2016, p32-33.

speculative and unsupported in the claim, but did not definitely deny the possibility.[147] Similarly the UN Iraqi-Kuwait Claims Commission (UNCC) excluded tourism as a heading for compensation for the same reasons.[148]

67. Alternatives to individual compensation could be considered such as support for locally owned community tourism initiatives. For example, since 2003 ICCROM has been running a programme 'Living Heritage Sites' to maintain community continuity with cultural heritage sites, while at the same time meeting certain objectives through 'the creation of tools necessary to develop a community-based approach to conservation and management, promotion of traditional knowledge systems in conservation practices and increased attention paid to living heritage issues in training programmes.'[149] As is discussed further below, the creation of a development fund aimed at supporting particular cultural activities has also been deemed an appropriate reparation measure to repair harm suffered by community by some Courts. Such a development fund was for exemple established by the Inter-American Court of Human Rights in the case of *Plan de Sanchez v. Guatemala*, relating to the genocidal massacre of 278 Maya-Achí. A development fund amongst other reparations was set up to support the study and dissemination of Maya-Achí culture to ensure the continuance of the cultural identity of the group.[150] Such collective reparations can be beneficial to victims and assist in reducing the psychological, moral and economic harm caused. Such awards may also reduce friction by avoiding the creation of a hierarchy of victims and ensuring members of the communities are treated equally.[151]

C. Collective and symbolic measures

68. The Court may wish to collectively award reparations to eligible victims. When decision-makers have awarded collective reparations, they have taken into account a variety of

[147] Final Award Ethiopia's Damages Claims, Volume XXVI pp. 631-770, 17 August 2009, para.461.
[148] UN Doc S/AC.26/1992/15, para.5. See Matthew Matheson, *International Civil Tribunals and Armed Conflict*, (Brill 2012), p235.
[149] As part of ICCROM Integrated Territorial and Urban Conservation (ITUC) activities. Gamini Wijesuriya, *Living Heritage: A Summary*, ICCROM.
[150] *Plan de Sanchez v. Guatemala,* para.110. See similarly *Moiwana Community*, para.213-217.
[151] Luke Moffett, Reparative complementarity: ensuring an effective remedy for victims in the reparations regime of the International Criminal Court, *The International Journal of Human Rights* 17(3) 378.

factors. These include for example the collective nature of the harm suffered, the impact the harm has had on the community, cultural aspects relevant to the case as well as the particular facts of the case. For example, in *SERAC and CESR v. Nigeria,* the African Commission noted that the violations 'not only persecuted individuals in Ogoniland but also the whole of the Ogoni community as a whole,' and ordered collective forms of reparations in addition to compensation to the individual victims.[152]

69. In a series of cases concerning indigenous communities, the Inter-American Court of Human Rights has ordered various forms of collective reparations. For example, the *Moiwana Community v. Suriname* case[153] concerned an attack by the Suriname armed forces, resulting in the killing of over 40 men, women and children and the destruction of the Moiwana village. This led to the displacement of survivors who were unable to return to their traditional way of life. '[G]iven that the victims of the present case are members of the N'djuka culture, […] the individual reparations to be awarded must be supplemented by communal measures […] to the community as a whole',[154] the Inter-American Court ordered the Government to establish a development fund for projects for the benefit of the community upon its return. The Inter-American Court took the same approach in *Plan de Sanchez.* It referred to the collective nature of the harm when awarding collective measures of reparation, which included symbolic measures and a request that the State provide funds to maintain and improve the chapel used by survivors to commemorate those who died, as well as the implementation of development programmes for the affected communities.[155] In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, which related to the State's failure to demarcate communal land, to protect the indigenous people's right to own their ancestral land and natural resources, and to guarantee access to an effective remedy, the Inter-American Court ordered reparations including state investment in works or services of collective

[152] African Commission, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Appl. No. 155/96, para.67.
[153] See e.g. *Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs), Series C No. 124, 15 June 2005.
[154] Ibid, para.194.
[155] *Case of Plan de Sánchez Massacre v. Guatemala* (Merits), Series C no. 105, 29 April 2004, para.104 and 110.

interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission.[156]

70. In *Sawhoyamaxa Indigenous Community v. Paraguay*, which related to the division and sale of indigenous territories by Paraguay, the Inter-American Court also stressed that violation to the community's right to property in this case deprived the indigenous Community 'not only of the material possession of their lands but also from the fundamental basis to develop their culture, their spiritual live, their integrity and their economic survival'.[157] The Court underlined that the loss of the lands had an impact on the community 'not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity'.[158] The Court ordered non-pecuniary damages in the form of a 1 million USD community development fund in the lands to be made over to the members of the Community, which would be 'used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community.'[159]

71. Some relevant examples of appropriate reparation measures may also be derived from what has been deemed adequate to repair violations of religious freedom and beliefs. The UN Special Rapporteur on freedom of religion and belief has stressed that measures aimed at the prevention of recurrence were appropriate, as well as initiatives in the field taken by intergovernmental and non-governmental organizations to contribute to those efforts.[160] Promotion, through education, of a culture of tolerance and respect for the diversity of religions and for religious sites, which represent an important aspect of the

[156] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Reparations and Costs), Series C no. 79, para.167.
[157] *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations and Costs), Series C no. 146, para.113-a.
[158] Ibid., para.118.
[159] Ibid., para.224.
[160] UNGA, Interim report of the Special Rapporteur of the Commission on Human Rights on the elimination of all forms of intolerance and of discrimination based on religion or belief, UN Doc A/56/253, 31 July 2001, para.27.

collective heritage of mankind, have also been referred to[161] as well as inter-religion initiatives, civil society and media initiatives.[162]

i. Memorialisation

72. Memorialisation has emerged as an important feature of post-conflict societies, countries emerging from violent conflict, and transitional justice. Memorialisation as the various processes and forms of collective remembrance is one of the many ways of addressing the past that make up transitional justice.[163] Memorialisation goes to the core of the question of how a nation, or a people, chooses to remember and to preserve their memory of events, which that may shape their individual and/or national identity.

73. The importance of memorialisation is clear from the results of a survey of victims of conflict-related violence which suggested that for the victims surveyed, memorialisation initiatives were the second most important form of state reparation after financial compensation.[164] Yet memorialisation remain underdeveloped as a form of reparation. As a result memory sites fall between 'the cracks of existing policies for historic preservation, transitional justice, democratic governance, urban planning, and human rights.'[165] Unlike other mechanisms for addressing the past that are subject to public scrutiny, few nations or communities have developed corresponding expectations or standards of accountability for memorialisation.

74. The Centre for Research, Documentation and Publication recommended that in the case of Kosovo, a legal framework for constructing future memorials must be established, which included guidance as to who is responsible for the construction of memorials in Kosovo and who is responsible for the protection and maintenance of the memorials.[166]

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[161] Ibid.
[162] HRC, Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, UN Doc A/HRC/28/66, 29 December 2014.
[163] Judy Barsalou and Victoria Baxter, The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice, in *Stabilization and Reconstruction*, No. 5, 2007.
[164] Ernesto Kiza, Corene Rathgeber, and Holger-C. Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes Toward Addressing Atrocities*, Hamburg, Germany: Hamburg Institute for Social Research, June 2006.
[165] Barsalou and Baxter n.163.
[166] Jude Sweeney, *Post-War Memorialisation and Dealing with the Past in the Republic of Kosovo*, CRDP, 2015.

The report also emphasised the importance of including survivors of violence in the process to enhance local ownership. Another important recommendation was the establishment of links between memorial sites and education programmes, in order to encourage a critical dialogue and harness the potential to educate about war and conflict.[167] Impunity Watch has established eight principles on memorialisation: Context; Critical Self-Reflection; Participation; Complementarity; Process; Multiple Narratives; Youth; and Politicisation.[168]

75. The UN Special Rapporteur in the field of cultural rights, Farida Shaheed, addressed memorialisation processes of the events of the past in post-conflict and divided societies in 2014. She highlighted that while the legal aspect of reparations has attracted considerable interest, memorialisation is rarely integrated into broader strategies for building democracy and post-conflict transitional strategies.[169] She noted that memorial dynamics are always political processes and concluded that an essential element for successful memorialisation is collaboration between authorities, citizens and civil society, in particular those who have been directly affected by past events.[170] The Special Rapporteur recommended that states support victims or families of victims of mass or grave human right violations. She recommended that goals assigned to memorials should be debated and decided on by a case-by-case basis. The Special Rapporteur also recommended that a compendium be prepared on good memorialisation practices, highlighting difficulties encountered and results achieved.[171]

76. The creation of a plaque or monument has sometimes been usedto mark cataclysms, such as the destruction of cultural property that attacks the identity of a group. During the drafting of the Genocide Convention some delegates proposed that appropriate redress for victimised members of a group should include compensation or pension, restitution, or special benefits to the survivors such as houses or scholarships.

[167] Ibid.
[168] Impunity Watch, Policy Brief: Guiding Principles of Memorialisation, 2013.
[169] Farida Shaheed, UN GA, Report of the Special Rapporteur in the Field of Cultural Rights, *Memorialisation Processes*, 2014.
[170] Ibid, para.99.
[171] Ibid, para.101.

Importantly for the group such redress should look to the 'reconstitution of the moral, artistic and cultural inheritance of the group (reconstruction of monuments, libraries, universities, churches, etc., and compensation to the group for its collective needs).[172] Such monuments, memorials or plaques, if designed in consultation with victims are considered important in helping to memorialise and remind society of what happened and prevent its repetition.[173]

77. Memorialisation initiatives should nevertheless be considered with caution, and their capacity to serve as positive measures of satisfaction and non-recurrence may depend on the particular context. Reporting on Bosnia and Herzegovina, the UN Special Rapporteur in the field of cultural right, Farida Rasheed, noted as follows:[174]

> 88. The issue of memorials has caused much controversy in the country.[175] Memorialization activities are "characterized by a (mono)-ethnic approach, an insufficient institutional coordination, the lack of adequate and programmatic regulations, and the lack of conceptual understanding of the issue of memorialization in the context of transitional justice".[176] One major concern raised by stakeholders related to the frequently encountered "credit and blame" approach.
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> 89. Memory entrepreneurs are diverse: numerous associations and private actors erect their own memorials, on private or public land, with or without prior authorization, and with or without financial support from the authorities. Authorities at all levels of government also intervene, depending on the national/ethnic, political and ideological content of the memorial activity. The international community, too, has been very active in this context.
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> 90. The building of new memorials dedicated to the 1992-1995 war has a deep impact on the country's cultural landscape in ways that frequently clash with transitional justice principles. First, memorials are commonly used to mark one group's dominance over specific territories. Some memorials have been erected at places of return or at places where other communities suffered. For example, tensions were exacerbated by the construction of an Orthodox church on a disputed

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[172] E/447, p49.
[173] *Moiwana Community*, para.218.
[174] UN HRC, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, UN Doc A/HRC/25/49/Add.1, 3 March 2014.
[175] A/HRC/16/48/Add.1, para.48.
[176] Dragan M. Popović, *The Notion of Memorialisation and A New Approach to Memorialisation Practice in Bosnia and Herzegovina*, UNDP, 2013, p6.

location near the Srebrenica-Potočari Memorial Centre,[177] where mass graves have been discovered.

91. Second, the memorialization process in the country is "characterized by the creation of new and deletion of old narratives" in "a relatively organized way", to show that the old narratives were inappropriate even in the past and did not meet the needs of the community as a whole or some parts thereof and, in particular, that "they do not correspond to the needs of the current appearance of the community as a result of the 1992-1995 armed conflict".[178]

92. The absence of a memorial may be equally problematic. For example, the Omarska camp in Prijedor, run by Serbian forces during the war and the site of mass murders and torture, remains unmarked, despite requests by survivors. The site is today a mining complex owned by Arcelor Mittal, which allows victims to conduct commemorative activities on the site for three hours every year on 6 August. The Special Rapporteur was informed that, while Bosnian and Croat members of the State Presidency had participated in these commemorations in 2012, no Serbian member had ever attended. By contrast, a memorial to fallen Serbian soldiers has been established in front of the camp. Furthermore, the site has been used as the filming location for a recent historical Serbian film production, which made no mention of the events of 1992-1995 and is seen by many as contributing to the denial of the traumatic events in the camp. According to interlocutors, victims and their families fear to speak up except in closed circles.

93. Memorialization processes are hindered as commemorative activities are sometimes rendered very difficult, for example around Srebrenica,[179] although interlocutors reported that the situation has improved.

94. The memorialization of those who risked their lives to save people from the other groups appear to be minimal, although interesting private initiatives have been undertaken to that end.[180]

ii. Acknowledgement and Apologies

78. While an acknowledgment or apology will never bring back the dead or necessarily heal the pain of survivors, it can be used to confront the past and attempt to repair community relations. Declarations or expressions of remorse which acknowledge the

[177] S/2013/646, annex, para.59.
[178] Popović n.176, p30.
[179] S/2013/646, para.60-61.
[180] Svetlana Broz, *Good People in an Evil Time* (New York, Other Press, 2004).

perpetrator's responsibility and the harm they caused to victims can be important components in legitimising the official and public nature of reparations for victims.[181] As noted by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence Pablo de Grieff, 'in order for something to count as reparation, as a justice measure, it has to be accompanied by an acknowledgement of responsibility.'[182] Failure to include measures of acknowledgment can lead to other reparations being seen as insincere or inadequate by victims,[183] or as an attempt to buy-off victims.[184]

79. Cohen identifies a number of 'modes of acknowledgement', which include 'truth commissions, criminal trials, compensation, commemoration and memorialisation, apology, reconciliation and reconstruction'.[185] Acknowledgement is a process, and may include a variety of elements in order to address the criminal liability of a perpetrator, as well as the needs of victims.[186] Mr Al Mahdi has pled guilty, which is a form of acknowledgement of what he has done. This may be of benefit to victims, as he has chosen to tell the truth from the start. However, his guilty plea may be perceived by some victims as a way for him to receive a reduced sentence, rather than a full expression of remorse and acknowledgement. Thus now that his sentence has been determined, further admissions of acknowledgment, that go beyond simply acknowledging that he committed the acts in question may be viewed by victims as

[181] David C. Gray, No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice, *Washington University Law Review* 87 (2009) 1043-1103, p1071.
[182] Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para.4.
[183] International Center for Transitional Justice (ICTJ), Canada: Submission to the Universal Periodic Review of the UN Human Rights Council Fourth Session, (2008).
[184] La Agrupacion de Familiares de Detenidos Desaparecidos (1991) Resumen de actividades año 1991. English translation in Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*; Edward Tawil, *Property Rights in Kosovo: A Haunting Legacy of a Society in Transition*, International Center for Transitional Justice (2009).
[185] Stan Cohen (2001) *States of Denial: Knowing About Atrocities and Suffering*. Cambridge: Polity, p227-240.
[186] Joanne Quinn *The Politics of Acknowledgement: Truth Commissions in Uganda and Haiti*, (UBC Press 2010), p17-18.

having greater legitimacy and weight, particularly if they include acknowledgement of the harm done to victims, and some form of apology.[187]

80. An apology constitutes a remorseful acknowledgment of responsibility for past wrongdoing, and may play an important role in addressing the moral and psychological needs of victims, especially through their contribution to the restoration of victims' dignity and self-respect.[188] The value of apologies as a means of remedying victims' moral harm is recognised in the UN Basic Principles of Reparation, when apologies include both acknowledgment of the facts and acceptance of responsibility.[189] Since the 1990s, there has been growing interest in the role of apologies as a means of promoting reconciliation, and analysis has been conducted into those apologies that have been deemed acceptable,[190] and those that have been rejected.[191] While the acceptance or otherwise of an apology will depend upon the local context, a number of relevant factors have been determined, which *may* influence the impact an apology has, with desirable tenets including:

- Timeliness;[192]
- Explicit statements of apology and regret;[193]

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[187] Kieran McEvoy, *Healing Through Remembering: Apologies, Acknowledgement and Dealing With the Past in and About Northern Ireland, a Discussion Document*, (August 2015) p6.
[188] John B. Hatch, *Race and Reconciliation: Redressing Wounds of Injustice* (Lexington Books 2010), p189; and Federico Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008), p119.
[189] Principle 22(e), A/RES/60/147.
[190] E.g. Stefaans Coetzee's apology for his part in a 1996 bombing in South Africa, J. Brankovic, Responsabilidad y Reconciliación Nacional en Sudáfrica, 2 Ediciones InfoJus: Derechos Humanos 4 (2013) 55; Adriaan Vlok's apology to the Reverend Frank Chikane for atrocities committed during the apartheid era, Mia Swart, Sorry Seems to be the Hardest Word: Apology as a Form of Symbolic Reparation, 24 *South African Journal on Human Rights* 50-70 (2008), p51; David Cameron's apology for Bloody Sunday, House of Commons Debate, Column 739-742, 15 June 2010. Available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100615/debtext/100615-0004.htm
[191] E.g. Kaing Guek Eav alias Duch's apologies for the atrocities committed in S-21, Angel Ryono, Exploring the Role of Apology in Cambodia's Reconciliation Process, in B. Charbonneau and G. Parent, *Peacebuilding, Memory and Reconciliation: Bridging Top-Down and Bottom Up Approaches* (Routledge, 2011) 110-129; F.W. De Klerk's apology to the South African Truth and Reconciliation Commission, Trudy Govier and Wilhelm Verwoerd, The Promise and Pitfalls of Apology, *Journal of Social Philosophy* 33(1) (2002) 67-82.
[192] Clyde Ancarno, Press Representations of Successful Public Apologies in Britain and France, 3 *University of Reading Language Studies Working Papers* (2011) p38.
[193] Hatch n.188.

- An acceptance of personal responsibility;[194]
- The avoidance of offensive explanations or excuses;[195]
- Sincerity;[196]
- Willingness to make amends and promises to avoid future transgressions.[197]

81. Through apology, a perpetrator can symbolically and publicly affirm victims' harm and acknowledge the criminal nature of the acts perpetrated against them. However, if the content of an apology is deemed insincere or insufficient, or if the delivery is not accessible and meaningful to victims, then apologies can fail to make a positive impact on victims. While Mr Al Mahdi has already made statements of apology during the Court's hearings, the VLRs have made clear that the victims do not accept his apology and do not forgive him.[198] They question the timeliness of his apology, the location of his apology and the remorsefulness of his apology: 'The victims say forgiveness has been asked for in the wrong place. Why is he doing this only here?'[199] It is therefore worth considering the factors (including location) of Mr Al Mahdi's statement which may have contributed to its rejection.

82. Apologies that are viewed as being in furtherance of a deal, or as potentially bringing benefits to the apologiser, are likely to be rejected by victims. As Ancarno notes, 'Public figures perceived to be using apologies to limit damage are therefore negatively framed.'[200] This was evidenced in December 2015 by survivors' rejection of Japan's apology to South Korea for the behaviour of Japanese soldiers during the Second World War. This rejection was largely due to the fact that South Korea was required to agree that the matter was now resolved, and to consider removing a statue which

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[194] M.R. Marrus, Official apologies and the quest for historical justice, *Journal of Human Rights* 6(1) (2007) 75-105.
[195] Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, Stanford, 1991), p17.
[196] Michael Cunningham, Saying sorry: the politics of apology, *The Political Quarterly* 70(3) (1999) 285-293.
[197] Marrus, n.194.
[198] ICC-01/12-01/15-T-6-ENG, 24 August 2016, p30-31.
[199] ICC-01/12-01/15-T-6-ENG, 24 August 2016, p30-31.
[200] Clyde Ancarno, When are public apologies 'successful'? Focus on British and French apology press uptakes, *Journal of Pragmatics* 84 (2015) 139-153, p146.

commemorated comfort women.[201] Within international criminal law, lessons can be taken from the case of *Prosecutor v. Plavšić*,[202] when Biljana Plavšić initially pled guilty and apologised to the ICTY for her actions, only to retract her apology after she had been sentenced to what was criticised as a 'mild' jail term.[203] Such incidents can be extremely damaging for victims, not only because the defendant had issued a false apology, but because she had been rewarded with leniency. With this in mind, apologies which are distanced from conviction and sentence may be viewed as having greater sincerity.

83. While Mr Al Mahdi accepted the charges against him are 'accurate and correct,'[204] he also distanced himself from his behaviour and did not fully acknowledge agency in the attacks. This was evidenced by his descriptions of himself as a 'lost son who lost his way', his attempts to place blame onto Al-Qaeda and Ansar Dine, and his statement that 'It is also my hope that the years I will spend in prison will be a source of purging the evil spirits that had overtaken me'.[205] Daye contends that 'an apology requires an unqualified acknowledgment and a painful embracing of the deeds'.[206] Historical apologies are difficult in this respect, and some argue inherently flawed, because 'the apologizer bears no responsibility'.[207] An 'emphasis on regret' in apologies tends to be better received by victims,[208] while failing to use the words of apology can lead to rejection. For example, Tony Blair was criticised for his apology for slavery in 2006, in which he failed use the words 'I'm sorry', and instead simply expressed sorrow.[209] David Cameron was also criticised for his Bloody Sunday apology for minimising the

[201] David Tolbert, Japan's Apology to South Korea Shows What Public Apologies Should (Not) Do, *Huffington Post*, 29th January 2016; Justin McCurry, 'Former Sex Slaves Reject Japan and South Korea's Comfort Women Accord, *The Guardian*, 26th January 2016.
[202] *The Prosecutor v. Biljana Plavšić*, IT-00-39 & 40/1, (February 2003).
[203] Oliver Diggelmann, International Criminal Tribunals and Reconciliation: Reflections on the Role of Remorse and Apology, *Journal of International Criminal Justice*, (*forthcoming* 2016), p10.
[204] ICC-01/12-01/15-T-4-Red-ENG, p8, line 12.
[205] ICC-01/12-01/15-T-4-Red-ENG, p9, line 13-14.
[206] Sanderijn Cels, Interpreting Political Apologies: The Neglected Role of Performance, *Political Psychology* 36(3) (2015) 351-360, p352 citing Russell Daye, *Political Forgiveness: Lessons from South Africa*, (Orbis Books 2004), p65.
[207] Ancarno n.200, p148.
[208] Ibid., p145.
[209] Ibid., p147.

responsibility taken, and for creating 'a distance between the government and the soldiers who are "immediately responsible"'.[210]

84. During his trial, Mr Al Mahdi claimed that he acted in accordance with his beliefs, but that it was wrong to do so 'from a legal and political viewpoint'.[211] This suggests that he does not believe that his actions were morally wrong, but understands that they were illegal. Such statements may be interpreted as not indicating sincerity or remorse, but merely regret at being caught. As Combs notes, '…given the rabid racist and nationalistic ideology that fuels much international crime, it is perhaps too optimistic to expect that many offenders will be able to sincerely regret their crimes…'[212] Furthermore, while Mr Al Mahdi's previous statements of apology refer to the damage he has caused to the victims, he also focuses on his own pain in having to plead guilty, and his sadness in contemplating a lengthy jail term. As Diggelmann states, 'The key element for reconciliation is the attempt to appreciate the victim's pain.'[213] Cels suggests that a meaningful apology must include 'acknowledgement of [victims'] pain and the assurance of their safety in the future'.[214] Indeed, promises of non-repetition could form a valuable component of an apology, as they may allow victims to progress and move on from the wrongdoing without fear. In his apology, Mr Al Mahdi promised that he would never commit such a crime again, stating 'I would like to make them a solemn promise that this was the first and the last wrongful act I will ever commit'.[215] It is up to the victims to decide the sincerity of such acknowledgements of responsibility and apologies as meaningful and effective.

85. Apologies which are preceded by consultation with victim communities have been shown to have greater effectiveness, as 'the act of apology becomes meaningful in the

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[210] Andrew McNeil, Evanthia Lyons and Samuel Pehrson, Reconstructing apology: David Cameron's Bloody Sunday apology in the press, *British Journal of Social Psychology* 53(4) (2014) 656-674, p661.
[211] Ruth Maclean, '"I am sorry": Islamist apologises for destroying Timbuktu mausoleums', *The Guardian* (London, 22 August 2016, <https://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction> accessed 14 November 2016
[212] Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach*, (Stanford University Press, 2007), p145.
[213] Diggelmann n.203, p7.
[214] Cels n.206, p353-354 from A. Lazare, *On apology* (OUP 2004)
[215] Transcript, ICC-01/12-01/15-T-4-Red-ENG, p8, line 20-21.

interplay with the victims'.[216] In 2010, David Cameron's apology for Bloody Sunday was preceded by consultation with victim groups as to what the statement should contain. Although the apology was not universally accepted, Mr Cameron's consultation with victim campaigners was well received.[217] Similarly, Gordon Brown's apology for the UK government's role in the Child Migrants Programme included interaction and engagement with victims, as well as a response from a victims' representative.[218] This interplay between apologiser and victims allowed for a sense of closure for some victims.[219] In relation to apologies by direct perpetrators, the reconciliation that occurred between Stefaans Coetzee and the victims of his bomb attack in South Africa has in part been attributed to the dialogue which occurred between Coetzee and his victims.[220]

86. While the content of an apology is important, the delivery is also a crucial consideration; attention must be paid to the 'casting, staging, scripting and acting of a public apology'.[221] Cels notes that 'a public apology can include more meaningful aspects than just spoken words'.[222] Mr Al Mahdi delivered his apology in the courtroom. The solemnity of a courtroom setting can have value, and may be deemed acceptable to the broader international community whom the Court has identified as victims due to the important cultural value of the buildings destroyed.[223]

87. However, the victims viewed the location of Mr Al Mahdi's apology as problematic. An apology delivered outside the courtroom would distance the statement from the one given to the Court and may be seen as more acceptable. Modes of distribution have also been explored by courts in which declarations of apology were made. For example, in Cambodia apologies and acknowledgements of responsibility by Kaing Guek Eav have been made available by the Extraordinary Chambers in the Courts of Cambodia as part

[216] Cels n.206, p353-354.
[217] McEvoy, n.187.
[218] Cels n.206, p.353
[219] Ibid. n.206, p.353
[220] Stefaans Coetzee's apology for his part in a 1996 bombing in South Africa, J. Brankovic, Responsabilidad y Reconciliación Nacional en Sudáfrica, 2 *Ediciones InfoJus: Derechos Humanos* 4 (2013).
[221] Cels n.206, p351, 356-357.
[222] Ibid., p355.
[223] Judgment, ICC-01/12-01/15-171, para.80.

of their reparations award.[224] The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has also in the past recommended letters of apologies to victims as a means of providing direct acknowledgment of suffering, which may assist in addressing their moral and psychological harm.[225] Given that only a small number of victims are participating in the *Al Mahdi* case, this may be feasible, but may miss the wider impact of his crimes on the community and Mali more generally.

Conclusion

88. Reparations in the *Al Mahdi* case offers the Court the prospect of articulating how property, people and heritage are connected through culture and appropriate measures to address their destruction. Although the *Al Mahdi* case has exemplified the importance of protecting cultural property and deterring those who engage in its destruction, reparations give a new hope that while not all cultural property can be restored, people and culture can rise from the ashes and debris to continue their heritage for future generations. The ICC is uniquely positioned to bring together experts that can establish good practice for states and international organisations that connects the restoration of physical structures with the remedying of individual and communal harm.

[224] Available here: http://www.eccc.gov.kh/en/video/apology

[225] Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para.33.



Signed by Luke Moffett,
Director of the Queen's University Belfast Human Rights Centre



Signed by Carla Ferstman
Director of the Redress Trust

2nd December 2016

At Belfast and London