

<a> REPARATIONS FOR CULTURAL HERITAGE DESTRUCTION AT THE ICC AND THE LIMITS OF HUMAN RIGHTS

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Abstract:

This paper takes stock of the precedent the *Al Mahdi* case created both in the field of cultural heritage and that of reparations at the ICC. It notes that, despite the favourable environment to employ a human rights approach vis-à-vis destruction of cultural heritage, the *Al Mahdi* reparations order glossed over human rights instruments, reports and commentaries. By accident or design, this nevertheless represents a precedent in the reparative legal framework of the Court. What could be the reasons behind this silence? And, should this precedent be followed? I will argue that there are indeed good reasons for this silence ranging from judicial economy, ICC jurisdictional limits, to fair trial considerations. “What human rights gives you is human rights” (Lupin, 2022) and one needs to be aware not only of their power and possibilities, but also of their limitations and undesirable implications.

 INTRODUCTION

The International Criminal Court (ICC or Court) prosecuted and convicted - after he entered a guilty plea - Ahmad Al Faqi Al Mahdi (Mr. Al Mahdi) in 2016 for his involvement in the destruction of cultural and religious heritage in Timbuktu (Mali) during an armed conflict in the north of the country in 2012. The destruction was characterized as a war crime against cultural heritage¹ and it represented the first time in the history of international criminal justice that a case had revolved exclusively around such charge. When the *Al Mahdi* case moved on to the reparations phase, the judges had to identify the victims and harm provoked by the destruction of cultural heritage, that is, a crime against property. This had never been done before at the judicial level and the Trial Chamber was thus operating in a significant vacuum. In addition, *Al Mahdi* was only the third case to issue a reparations order. The provisions concerning reparations at the ICC are very scarce and very “sketchy”.² This implies that the Court’s reparative legal

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¹ The expression of war crime against cultural heritage will be used as a shorthand for the war crime of ‘[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objects’ (art. 8(2)(b)(ix) and art. 8(2)(e)(iv)) of the *Rome Statute of the International Criminal Court*, 37 ILM 1002 (1998), 2187 UNTS 90 [ICC Statute]. The terms ‘cultural property’ and ‘cultural heritage’ are used interchangeably.

² Mahmoud Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers, 2014), p. 620.

framework is progressively developing through case-law and, the earlier the case, the greater its shaping value.

This paper takes stock of the precedent the *Al Mahdi* case created both in the field of cultural heritage and that of reparations at the ICC. It notes that, despite the favourable environment to employ a human rights approach vis-à-vis the destruction of cultural heritage,³ the *Al Mahdi* reparations order glossed over human rights. By accident or design, this silence nevertheless represents a precedent in the reparative legal framework of the Court. How could this be? And, should this precedent be followed?

Mr. Al Mahdi regarded his participation in the demolition of historical buildings as a way “of eradicating superstition [and] heresy”⁴ on the side of the population who used them for worshipping purposes. Persons from Timbuktu described the destruction as an event that brought devastation, humiliation, shock, pain and a sense of despair.⁵ Aware of the human dimension of cultural heritage, the *Al Mahdi* Trial Chamber stated in the reparations order:

‘Because of their purpose and symbolism, most cultural property and cultural heritage are unique and of sentimental value. As a result, they are not fungible or readily replaceable. The destruction of international cultural heritage thus “carries a message of terror and helplessness; it destroys part of humanity’s shared memory and collective consciousness; and it renders humanity unable to transmit its values and knowledge to future generations”. It is an irreplaceable loss that negates humanity’.⁶

The Human Rights Council established a special procedure in the field of cultural rights in 2009 to, *inter alia*, better understand the role that heritage plays for every human and society.⁷ Particularly since then, literature and reports have abounded exploring the human rights dimension of cultural heritage⁸ - this book being one more example of this

³ Human Rights Council, “Report of the Special Rapporteur in the field of cultural rights” (3 February 2016) A/HRC/31/59, para. 69 [2016 Annual Report of the Special Rapporteur in the field of cultural rights].

⁴ ICC – Trial Chamber VIII, *Prosecutor v. Al Mahdi*, Judgment and sentence (27 September 2016) ICC-01/12-01/15-171, para. 31 [Al Mahdi Judgment and Sentence].

⁵ ICC – Trial Chamber VIII, *Prosecutor v. Al Mahdi*, Reparations Order (17 August 2017), ICC-01/12-01/15-236, [Al Mahdi Reparations Order], para. 85.

⁶ Al Mahdi Reparations Order, para. 22.

⁷ Human Rights Council, “Independent Expert in the field of cultural rights”, Resolution 10/23 (26 March 2009). See Nolwenn Guibert’s chapter, page 1, generally on the establishment of this mandate.

⁸ See e.g. Helaine Silverman, D.F. Ruggles (eds.), *Cultural Heritage and Human Rights*, (Springer, 2007); Yvonne Donders, “A Right to Cultural Identity in UNESCO” in *Cultural Human Rights* edited by Francesco Francioni and Martin Scheining (Brill | Nijhoff, 2008): 317-340; Symposium of the European Journal of International Law on “The Human Dimension of International Cultural Heritage Law”, 22:1 (2011); Patty Gersenblith, ‘The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?’, *Journal Marshall Review of Intellectual Property Law* 15 (2016): 336-393; Elisa Novic, *The Concept of Cultural Genocide* (Oxford University Press, 2016); Andrzej Jakubowski (ed.), *Cultural Rights as Collective Rights*, (Brill | Nijhoff, 2016); Kristin Hausler, “The UN Security Council, the Human Rights Council, and the Protection of Cultural Heritage: A Matter of Peace and Security, Human Rights, or Both?” in Anne-Marie Carstens and Elizabeth Warner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press, 2020): 202-222; Vanessa Tümsmeyer, “Bridging the Gap Between International Human Rights and International Cultural Heritage Law Instruments: A Functions Approach” in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (Oxford University Press, 2020): 319-342. For reports from the special procedure in the field of cultural rights see, most notably, Human Rights Council, Report of the independent expert in the field

trend.⁹ Coinciding with the era of discovery of cultural rights, there were explicit calls to infuse the *Al Mahdi* proceedings with human rights reasoning, back then, including from myself.¹⁰

However, the *Al Mahdi* reparations order makes only a passing reference to “the human right to cultural life”¹¹ and does not mention nominally the human right to access one’s own culture, freedom of religion or belief, etc. Quite strikingly, the reparations order does not include a single reference to human rights instruments such as the Universal Declaration of Human Rights (UDHR),¹² the International Covenant on Civil and Political Rights (ICCPR)¹³ or the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁴ In other words, in a judicial decision that clearly understood the human value of cultural heritage and was operating within a notable lack of precedent, references to cultural rights are notoriously absent.

The *Al Mahdi* proceedings have attracted a number of works examining the trial, judgment, reparations order, and lessons learned.¹⁵ Yet, none of these commentaries have addressed the overall lack of human rights language in the reparations order.¹⁶ Given the

of cultural rights, Farida Shaheed (21 March 2011) A/HRC/17/38 [First report of the Special Rapporteur in the field of cultural rights] and the 2016 Annual Report of the Special Rapporteur in the field of cultural rights.

⁹ See Nolwenn Guibert’s chapter in this book **XXX**.

¹⁰ ICC – *Prosecutor v. Al Mahdi*, Reparations Phase, K. Bennoune - First Expert Report (27 April 2017) ICC-01/12-01/15-214-AnxI-Red3, p. 37 [K. Bennoune Expert Report]; ICC – *Prosecutor v. Al Mahdi*, Reparations Phase, M. Lostal - Second Expert Report (28 April 2017, amended on 3 May 2017) ICC-01/12-01/15-214-AnxII-Red2, paras. 54-59. [M. Lostal Expert Report].

¹¹ *Al Mahdi* Reparations Order, para. 14.

¹² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁴ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. See the *Al Mahdi* Reparations Order, footnote 28 citing different legal instruments except human rights ones.

¹⁵ See e.g., Paige Casaly, “Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law,” *Journal of International Criminal Justice* 14:5 (2016): 1199–1220; Milena Sterio, “Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case”, *Case Western Reserve Journal of International Law* 45 (2017): 63-73; William A. Schabas, “Al Mahdi Has Been Convicted of a Crime He Did Not Commit”, *Case Western Reserve Journal of International Law* 45 (2017): 75-102; Marina Lostal, “The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC”, *Inter Gentes - The McGill Journal of International Law & Legal Pluralism* 1:2 (2017): 45-58; Francesca Capone, “An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage”, *Journal of International Criminal Justice* 16:3 (2018): 645–661; Mark A. Drumbl, “From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property”, *Journal of International Criminal Justice* 17:1 (2019): 77–99. Luke Moffett, Dacia Viejo Rose & Robin Hickey, “Shifting the paradigm on cultural property and heritage in international law and armed conflict: time to talk about reparations”, *International Journal of Heritage Studies*, 26:7 (2020): 619-634; Oumar Ba, “Contested Meanings: Timbuktu and the Prosecution of Destruction of Cultural Heritage as War Crimes”, *African Studies Review* 63:4 (2020): 743–762.

¹⁶ Cf. Haydee J. Dijkstal, “Destruction of Cultural Heritage before the ICC: the Influence of Human Rights on Reparations Proceedings for Victims and the Accused”, *Journal of International Criminal Justice* 17:2 (2019): 391–412, pp. 398-399; and Haydee J. Dijkstal, “The ICC and Human Rights: the Crime against Destruction of Cultural Heritage as Part of a Trend Towards Greater Human Rights Influence”, *Indiana International & Comparative Law Review* 31:3 (2021): 379-408, pp. 390-393.

importance that the *Al Mahdi* case is set to have both in the field of cultural heritage and that of reparations at the ICC, I focus my attention on the lack of human rights language, explore possible reasons behind this and discuss whether this silent precedent should be observed in future cases. I will argue that there are indeed good reasons - ranging from judicial economy, jurisdictional limits to fair trial rights - why using human rights language and frameworks in a reparations order could become problematic.

The paper first provides a brief background to the conflict in Timbuktu and the role of Mr. Al Mahdi. Second, it explains ICC reparations in a nutshell, their purpose, the role of the reparations order and applicable legal framework. Third, it examines the connection between cultural heritage and human rights, the calls to adopt a human rights lens in the *Al Mahdi* reparations process, and the extent to which such approach was absent in the reparations order. Fourth, the chapter assesses this silence and provides four reasons why framing harm as a human rights breach and resorting to human rights discourses would have been, respectively, legally problematic and unnecessary. In short, this chapter's contribution is to offer a counternarrative to the seemingly ever-positive influence of human rights in cultural heritage issues, and a word of caution against using human rights frameworks to assess victimhood and harm in ICC reparations orders.

** THE CONFLICT IN TIMBUKTU AND THE ROLE OF MR. AL MAHDI**

The north of Mali extends through a very vast and semi-desertic area, much larger than the rest of the country, that comprises the cities of Timbuktu, Gao and Kidal. This area is also home to the Tuareg people, who refer to this land as the Azawad. When Mali became independent in 1960, “the post-colonial state system ... accepted colonial boundaries with almost sacrosanct respect”¹⁷ and, contrary to what the French had promised, the Azawad remained absorbed within the territory of the State. Yet, the north has “remained mostly excluded from national development policies and [has been] characterised by a persistent lack of essential infrastructures and economic opportunities”,¹⁸ giving rise to several Tuareg uprisings.

Timbuktu is today plagued by widespread poverty, constant droughts and safety concerns. This is in contrast with the city's Golden Era, between the 11th and 16th centuries¹⁹ when it became a vibrant academic and religious hotspot.²⁰ Several mosques reflected the town's grandeur, of which three remain today -Sankoré, Dkingareyber and Sidi Yahia, as well as a number of mausoleums built for the city's erudites, the 333 Saints. In part because of the role that its cultural and spiritual heritage played in the spread of Islam at

¹⁷ Emizet F. Kisangani, “The Tuaregs' Rebellions in Mali and Niger and the U.S. Global War on Terror”, *International Journal on World Peace* 29:1 (2012): 59-97, p. 64.

¹⁸ Climate Diplomacy, “Tuareg Rebellions in Mali and Niger in the 1990s” available at <https://climate-diplomacy.org/case-studies/tuareg-rebellions-mali-and-niger-1990s>.

¹⁹ Richard L. Smith, “The Image of Timbuktu in Europe before Caillié”, *Proceedings of the Meeting of the French Colonial Historical Society* 8 (1985): 12-22, p. 16.

²⁰ International Council on Monuments and Sites, “World Heritage List”, n° 119 Rev' (July 1988), p. 1.

an early period, Timbuktu was inscribed on the World Heritage List of the United Nations Educational Scientific and Cultural Organization (UNESCO) in 1988.²¹

In 2011, the political and military organization known as the National Movement for the Liberation of the Azawad (MNLA, for its acronym in French) was founded, and soon after it mounted an attack against the Bamako government, demanding the Azawad's full independence.²² The MNLA envisaged a secular Azawad.²³ However, in order to increase their military might, the MNLA forged an alliance with radical groups that identified with a harsh reading of Sharia law. Once the latter had gained control over the north, the MNLA was expelled from the area.²⁴

One of these radical groups was the *Ansar Dine* ("defenders of the faith") which, soon after arriving in Timbuktu, recruited Mr. Al Mahdi as the head of the *Hesbah*, a morality police tasked with ensuring the promotion of virtue and the prevention of vice.²⁵ Mr. Al Mahdi is an ethnic Tuareg who was born in the broader region of Timbuktu around 1975. He worked as a civil servant in the government's education department where he was known for being favourable to a strict interpretation of Islamic law.²⁶

The *Ansar Dine* took issue with the use that locals made of the mausoleums. The people from Timbuktu, as well as pilgrims, would regularly visit them to ask for the Saints' divine intervention in matters such as family or health, or to thank them for their miracles. The mausoleums and their Saints were a source of comfort, feeling of safety and psychological well-being.²⁷ In this context, fourteen mausoleums were destroyed, and many of the city's manuscripts burned.²⁸

Mr. Al Mahdi was prosecuted for his involvement in the destruction of nine of those mausoleums,²⁹ and the door of the Sidi Yahia mosque (the protected buildings). He pled guilty to the charge and was sentenced to nine years imprisonment, now reduced to seven.³⁰ After his conviction in 2016, the case moved forward to the reparations phase.

²¹ World Heritage Centre, "Timbuktu: Brief synthesis - Outstanding Universal Value", <https://whc.unesco.org/en/list/119/>, last accessed on 4 November 2021.

²² David Zounmenou, "The National Movement for the Liberation of Azawad factor in the Mali crisis", *African Security Review* 22:3 (2013): 167-174, p. 170.

²³ Anon., "An unholy alliance; Secession in Mali", 403 *The Economist* 8787 (June 2, 2012).

²⁴ Anon., "Tuareg rebels driven out of Timbuktu" (29 June 2012) available at <https://www.aljazeera.com/news/2012/6/29/tuareg-rebels-driven-out-of-timbuktu>.

²⁵ Al Mahdi Judgment and Sentence, para. 31.

²⁶ AFP, "Ahmad Al-Faqi Al-Mahdi, Islamic Enforcer of Timbuktu" (19 August 2016) available at <https://www.justiceinfo.net/en/other/28796-ahmad-al-faqi-al-mahdi-islamic-enforcer-of-timbuktu.html>.

²⁷ ICC – *Prosecutor v. Al Mahdi*, Reparations Phase, Third Expert Report (1 May 2017) ICC-01/12-01/15-214-AnxIII-Red2, p. 147 [Third Expert Report].

²⁸ Rose Eveleth, "Library Full of Precious Manuscripts Burned in Timbuktu", *Smithsonian Magazine* (28 January 2013) <https://www.smithsonianmag.com/smart-news/library-full-of-precious-manuscripts-burned-in-timbuktu-7219200/>. Note, however, that the war crime against cultural heritage in the ICC Statute excludes movable objects from its definition.

²⁹ Anon., "Timbuktu mausoleums in Mali rebuilt after destruction", *BBC News* (19 July 2015) available at <https://www.bbc.com/news/world-africa-33587325>.

³⁰ Al Mahdi Judgment and Sentence, para. 109. ICC – Appeals Chamber, *Prosecutor v. Al Mahdi*, Public Redacted Version of the Decision on the review concerning reduction of sentence of Mr. Ahmad Al Faqi Al Mahdi (25 November 2021) ICC-01/12-01/15-434-Red3.

 ICC REPARATIONS IN A NUTSHELL

The reparations phase at the ICC begins once a conviction has been entered against the accused.³¹ Reparations seek to “oblige those responsible for serious crimes to repair the harm they have caused”.³² They can be of individual or collective nature, and often take the form of restitution, compensation, symbolic measures and guarantees of non-repetition.³³

The ‘reparations order’ represents a watershed moment where the trial chamber sets the general parameters of who will be entitled to reparations, why and how. To this end, the reparations order needs to name the victims of the case or, in the alternative, lay down the eligibility criteria to identify them at the implementation stage; single out the harm caused by the convicted person’s crime(s); establish whether reparations will be individual and/or collective in character and the specific modalities that they will adopt (e.g. restitution, compensation); and set the amount of monetary liability for which the convicted person would be responsible.³⁴ After the trial chamber issues the reparations order, the implementation stage begins. Here, the Trust Fund for Victims would normally concretize the reparations order through an implementation plan, as well as raise funds to complement the monetary liability of the convicted if he is found to be indigent.

The legal framework governing reparations is not the product of a pre-established well-thought-of set of rules but the result of “diplomatic pragmatism”³⁵ exercised late in the Rome negotiation process.³⁶ Articles 75 and 79 of the ICC Statute concerning the right of victims to reparations are rather imprecise and their development was mostly left to jurisprudential production, where principles play a leading role.³⁷ Thus, the first case to reach the reparations stage – *Lubanga* - gave rise to the ICC’s initial set of reparations principles.³⁸ Their content borrowed heavily from the UN 2005 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

³¹ Article 75, ICC Statute.

³² ICC – Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, [Amended] Order for Reparations (3 March 2015) ICC-01/04-01/06-3129-AnxA, para. 2.

³³ Luke Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2017), pp. 36-37; see also, Christoph Safferling, G. Petrossian, *Victims Before the International Criminal Court* (Springer, Cham, 2021), pp. 276-278.

³⁴ On the minimum elements that a reparations order must contain, see ICC – Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (3 March 2015) ICC-01/04-01/06-3129, para. 32.

³⁵ M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (Martinus Nijhoff Publishers, 2014), p. 620.

³⁶ Fanny Benedetti, Karine Bonneau and John L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994–1998* (Brill | Nijhoff, 2014), pp. 156-159.

³⁷ Article 75(1) of the ICC Statute says: “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation”. The rest of the norms concerning reparations are located in rules 94-99 of the ICC Rules of Procedure and Evidence (RPE), and in regulations 50(b) and 54-72 of the Regulations of the Trust Fund for Victims (TFV Regulations).

³⁸ ICC – Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, [Amended] Order for Reparations (3 March 2015) ICC-01/04-01/06-3129-AnxA [Lubanga reparations principles].

Law (UN 2005 Basic Principles),³⁹ and covered matters such as the definition of harm, causation, principles of dignity, non-discrimination and non-stigmatisation. These principles were adopted without changes in the subsequent reparations cases of *Katanga* and *Al Mahdi*,⁴⁰ but were ‘adapted and expanded’ in the *Ntaganda* case.⁴¹ The ICC reparations principles identify three types of harm (moral, physical and economic). Earlier in the jurisprudence of the ICC, there was also an indication that the substantial deprivation of a right could, in itself, constitute a separate form of harm.⁴²

In 2017, when the *Al Mahdi* Trial Chamber had to deliver the reparations order, that is, when it had to identify victims, harm, remedies and monetary liability in connection with the destruction of cultural property, it had to operate in the absence of a germane precedent. The ICC case-law on reparations was limited to two cases which, in turn, involved a different region (the Democratic Republic of the Congo) and crimes (i.e. conscription of children under the age of 15 for *Lubanga* and murder, attacks on civilians and pillage for *Katanga*). The International Criminal Tribunal for the Former Yugoslavia (ICTY) had entered convictions concerning the destruction of cultural property,⁴³ but the tribunal lacked a reparations component. The Inter-American Court of Human Rights (IACtHR) features a strong reparations component but engages the responsibility of States for human rights breaches, not of individuals for international crimes. While it heard cases with a cultural component, it had done so on the basis of attacks against persons of certain communities, not their tangible cultural property as such.⁴⁴ The *Al*

³⁹ UN Commission on Human Rights, Resolution 2005/35 on 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 (19 April 2005) E/CN.4/RES/2005/35, adopted by the General Assembly resolution 60/47 on 16 December 2005.

⁴⁰ ICC – Trial Chamber II, *Prosecutor v. Germain Katanga*, Reparations Order (24 March 2017) ICC-01/04-01/07-3728-tENG, paras. 29-30; *Al Mahdi* Reparations Order, paras. 25-26.

⁴¹ ICC – Trial Chamber VI, *Prosecutor v. Bosco Ntaganda*, Reparations Order (8 March 2021) ICC-01/04-02/06-2659, para. 29 [Ntaganda Reparations Order].

⁴² ICC – Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Public Decision on Victims’ Participation (18 January 2008) ICC-01/04-01/06-1119, para. 92: “in accordance with Principle 8 of the Basic Principles [UN 2005 Basic Principles], a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or *substantial impairment of his or her fundamental rights*” (emphasis added). See also ICC – Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008 (11 July 2008) ICC-01/04-01/06-1432, paras. 1, 32-39 stating that harm to natural persons can be direct or indirect, so long as it is suffered personally by the victim; and Héloïse Dumont, “Requirements for Victim Participation” in *Victim Participation in International Criminal Justice* edited by Kinga Tibori-Szabó and Megan Hirst (T.M.C. Asser Press, 2017): 45-80, p. 56.

⁴³ E.g. ICTY – Trial Chamber, *Prosecutor v. Kordic and Cerkez*, Judgment (26 February 2001) IT-95-14/2-T, para. 207; ICTY – Trial Chamber, *Prosecutor v. Miodrag Jokić*, Trial Judgment (18 March 2004) IT-01-42/1-S, paras. 23-58; ICTY – Trial Chamber II, *Prosecutor v. Pavle Strugar*, Trial Judgment (31 January 2005) IT-01-42-T, paras. 290-330.

⁴⁴ See e.g. , IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Reparations (19 November 2004) para. 87(b), where it was noted that ‘the death of the women and the elders, oral transmitters of the Maya-Achí culture, caused a cultural vacuum’; and IACtHR, *Indigenous Communities Members of the Lhaka Honhat Association vs. Argentina*, Judgment and Reparations (6 February 2020), paras 274-289 where land encroachment resulted in a breach of the human right of the affected indigenous communities to participate in cultural life, and their cultural identity.

Mahdi Trial Chamber requested the advice of four appointed experts,⁴⁵ one of whom was the then Special Rapporteur in the field of Cultural Rights, another one was myself, and the identity of the other two remain confidential.

Therefore, when the *Al Mahdi* reparations order was issued in August 2017, it filled a void in the map of jurisprudence concerning both reparations and cultural heritage destruction. It identified four concentric groups of victims arising from the destruction of the protected buildings, namely: the international community as a whole, Malian nationals, the community of Timbuktu, and certain individuals with a more direct relationship with said buildings. It acknowledged physical harm caused to the monuments, economic loss, and moral harm to all mentioned groups. For the latter category, taking note of the jurisprudence of the IACtHR,⁴⁶ it singled out “disruption of culture”⁴⁷ as a discrete form of moral harm. It ordered maintenance measures and guarantees of non-repetition for the protected buildings, which had already been restored by UNESCO; a symbolic euro to UNESCO and to the Malian government to recognize the harm caused, respectively, to the international community and the Malian nationals; collective measures of economic and psychological character to the population of Timbuktu, with the possibility of collective symbolic measures; and monetary compensation to a select number of individuals.⁴⁸

Mr. Al Mahdi’s liability was set at EUR 2.7 million, corresponding to 97,000 for the harm occasioned to the protected buildings; 2.12 million for consequential economic loss; and 481,000 for moral harm.⁴⁹ The implementation plan of the Trust Fund for Victims to concretize the *Al Mahdi* reparations order was eventually fully approved by the Trial Chamber and, at the time of writing, its execution is underway.⁵⁰

** THE CONNECTION BETWEEN CULTURAL HERITAGE DESTRUCTION AND HUMAN RIGHTS**

⁴⁵ The appointment of experts to assist in determining the scope, extend of any damage, loss and injury to victims is foreseen in Rule 97(2) of the ICC Rules of Procedure and Evidence. See also, Trial Chamber VIII, *Prosecutor v. Al Mahdi*, Public redacted version of “Decision Appointing Reparations Experts and Partly Amending Reparations Calendar” (19 January 2017) ICC-01/12-01/15-203-Red, para. 1. The appointment led to three separate reports, referred in full in footnotes 10 and 27, K. Bennoune Expert Report; M. Lostal Expert Report; and the Third Expert Report.

⁴⁶ *Al Mahdi* Reparations Order, footnote 134 referring to IACtHR, *Plan de Sánchez Massacre v. Guatemala*, Judgment on Reparations (19 November 2004), paras. 77, 85-88; and IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Judgment on the Merits, Reparations and Costs (17 June 2005) paras. 154, 203.

⁴⁷ *Al Mahdi* Reparations Order, paras. 85 and 90.

⁴⁸ *Al Mahdi* Reparations Order, paras. 54, 67, 83, 89, 90. To see how these measures were concretized with specific projects, see ICC - TFV, *Prosecutor v. Al Mahdi*, Lesser Public redacted version of “Updated Implementation Plan” submitted on 2 November 2018 ICC-01/12-01/15-291-Conf-Exp (14 October 2019) ICC-01/12-01/15-291-Red3, pp. 24-30.

⁴⁹ *Al Mahdi* Reparations Order, paras 118, 128, 133-134.

⁵⁰ See milestones and progress here: <https://trustfundforvictims.org/what-we-do/reparation-orders/al-mahdi>. For an account of the challenges faced during the implementation phase of *Al Mahdi*, see Marina Lostal, “Implementing Reparations in the *Al Mahdi* Case: A Story of Monumental Challenges in Timbuktu”, *Journal of International Criminal Justice* 19:4 (2021): 831-853.

The intentional destruction of cultural and spiritual heritage seldom happens in isolation from other serious breaches of international law. If anything, they can constitute an early sign of the eruption of violence and a symptom of widespread human rights abuses connected to a people's identity. As Viejo-Rose and Killean note, these sorts of attacks against cultural heritage, "have been a common weapon of war. Such violence is often associated with direct violence against individuals who identify with religious, ethnic, national and racial groups."⁵¹ Think, for example, of the broader contexts in which the regular destruction of places of worship during the Yugoslav war took place, the destruction of the Buddhas of Bamiyan (Afghanistan) by the Taliban in 2001, or the iconoclastic campaign of the Islamic State over Iraq and Syria.⁵² Timbuktu was likewise engulfed in a larger scenario of despair and chaos in the form of rape, torture, mutilations, looting, passing of sentences before the Islamic court without due process and leading to severe punishments.⁵³

For the past two decades, it has also been long-established that, by itself, the destruction of cultural heritage often amounts to a violation of human rights. The Human Rights Council expressed grave concern over the continuing acts of intentional destruction of cultural heritage across the world occurring then and noted that these episodes could constitute violations of fundamental principles of human rights law.⁵⁴ From 2001 onwards, the ICTY recognized in various judgments that the crime against humanity of persecution, which consists of depriving a group of their fundamental rights, can be committed through the methodic destruction of their cultural or religious icons.⁵⁵ Prompted by the detonation of the Buddhas of Bamiyan, UNESCO adopted the 2003 Declaration concerning the Intentional Destruction of Cultural Heritage where it stated that these acts 'may have adverse consequences on human dignity and human rights'.⁵⁶ However, it remained unclear what rights are affected when cultural heritage is interfered with.

The right of everyone to take part in cultural life was recognized in article 27 of the UDHR and repeated in article 15(1)(a) of ICESCR. Article 27 of the ICCPR includes the right of minorities to "enjoy their own culture, to profess and practise their own religion, or to use their own language." The meaning of the expression 'cultural rights' was nebulous and,

⁵¹ Dacia Viejo Rose, Rachel Killean, "Destruction of Heritage as a Strategy of Mass Violence: Assessing Harm to Inform Meaningful Measures of Repair", p. 1, in *The Arab Regional Centre for World Heritage: Conference on Integrated Reconstruction and Post-Trauma Impact on Communities and Socio-economic: Proceedings*.

⁵² See UNSC Resolution 2199 (12 February 2015) paras. 15-17; see also UNSC Resolution 2347 (24 March 2017), preamble and para. 8; and, for a commentary, Kristin Hausler, "Cultural heritage and the Security Council: Why Resolution 2347 matters", *Questions of International Law* (March 2018).

⁵³ See e.g., ICC - Office of the Prosecutor, "Situation in Mali: Article 53(1) Report", (16 January 2013) paras. 46-75.

⁵⁴ Human Rights Council, Resolution 6/11. *Protection of cultural heritage as an important component of the promotion and protection of cultural rights* (2007), paras. 3-4.

⁵⁵ See e.g. ICTY – Trial Chamber, *Prosecutor v. Kordic and Cerkez*, Judgment (26 February 2001) IT-95-14/2-T, para. 207; Moreover, the ICTY established that such destruction of cultural property can be used to prove the intent to commit genocide, see ICTY – Trial Chamber I, *Prosecutor v. Krstić*, Judgment (2 August 2001) IT-98-33-T, para. 580.

⁵⁶ Convention on the Safeguarding of Intangible Cultural Heritage, United Nations Educational, Scientific and Cultural Organization (17 October 2003) 2368 UNTS preamble, fifth recital.

until recently, they were considered underdeveloped in comparison with other human rights.⁵⁷ A turning point took place in 2009 when the Special Rapporteur in the field of cultural rights was established⁵⁸ and the UN Committee on Economic, Social and Cultural Rights (CESCR) published General Comment n. 21 on the right of everyone to take part in cultural life.⁵⁹ According to the latter document, ‘culture’ remains a multifaceted concept that refers, not exclusively, to:

“ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions.”⁶⁰

Progressively, ‘cultural rights’ have begun to acquire their own autonomous meaning. They encompass, on the one hand, human rights that directly refer to culture, such as right to take part in cultural life, the right of minorities to enjoy their own culture, profess and practice their own religion, or use their own language;⁶¹ and, on the other, rights with a cultural dimension, such as the right to education, freedom of expression, freedom of association with others, freedom of religion, or self-determination.⁶² The right of everyone to take part in cultural life is likewise connected to the right to enjoy the benefits of scientific progress and its applications, and the protection of authors of the moral and material interests resulting from their production.⁶³ At its very core, respect for cultural rights is a window to realize equality and non-discrimination of groups and individuals. Likewise, targeting cultural rights is a gateway to harassing and discriminating communities and their members.

The Special Rapporteur in the field of cultural rights dedicated a thematic report in 2016 to setting out a human rights approach to the intentional destruction of cultural heritage.⁶⁴ She pointed at the need to go beyond the physical preservation of objects so as to: include the individuals and communities concerned; focus on prevention; ensure accountability; incorporate cultural heritage in peacebuilding and reconciliation efforts; consult with the people that have a particular connection to the heritage at hand; and support cultural

⁵⁷ See Human Rights Council, Report of the independent expert in the field of cultural rights, Farida Shaheed (21 March 2011) A/HRC/17/38 [2011 Annual Report of the Special Rapporteur in the field of cultural rights], para. 3 citing Patrice Meyer-Bisch, *Les droits culturels, une catégorie sous-développée des droits de l’homme*, Actes du VIII^e Colloque interdisciplinaire sur les droits de l’homme à l’Université de Fribourg (Editions Universitaires Fribourg, Suisse, 1993).

⁵⁸ Human Rights Council, “Independent Expert in the field of cultural rights”, Resolution 10/23 (26 March 2009).

⁵⁹ UN Committee on Economic, Social and Cultural Rights, General Comment no. 21 “Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)” (21 December 2009) E/C.12/GC/21 [CESCR General Comment 21].

⁶⁰ CESCR General Comment 21, para. 13.

⁶¹ UDHR, article 27, ICESCR, article 15(1)(a), and ICCPR, article 27.

⁶² CESCR General Comment 21, para. 2; 2011 Annual Report of the Special Rapporteur in the field of cultural rights, paras. 4-8; Yvonne Donders, “Foundations of Collective Cultural Rights in International Human Rights Law” in *Cultural Rights as Collective Rights* edited by Andrzej Jakubowski (Brill | Nijhoff, 2016); pp. 85-112; see also Nolwenn Guibert’s chapter in this book xxx.

⁶³ CESCR General Comment 21, para. 2.

⁶⁴ UNGA, “Cultural rights”, *Report of the Special Rapporteur in the field of cultural rights* (9 August 2016), A/71/317 [Special Rapporteur thematic report on cultural rights].

heritage defenders.⁶⁵ The report stated that, despite the many human rights-related implications of the intentional destruction of cultural heritage, the international community rarely addresses this matter as a question of human rights.⁶⁶ The report took issue with attacks against cultural property which, as it happened in Timbuktu, aim to target cultural diversity, historical memory, evidence of presence of minorities, religions and other peoples in general.⁶⁷ Indeed, what happened in Mali was not an episode of aseptic iconoclasm -if such a thing exists at all - but an act of destruction with religious discriminatory motives. The *Ansar Dine* initially carried out a campaign to explain what should and should not be done in relation to the protected buildings. Undeterred, the population in Timbuktu continued to profess their faith and perform their rites, which prompted the radical group's decision to destroy the mausoleums and the Sidi Yahia door.⁶⁸

A year later, the Special Rapporteur's report to the *Al Mahdi* Trial Chamber as an appointed expert remarked that the destruction of the protected buildings in Timbuktu had an impact on the population's freedom of religion, the right to take part in cultural life, and the right to access and enjoy cultural heritage.⁶⁹ My expert report explicitly identified the deprivation of four types of human rights (*viz.* right to access culture, freedom of expression, freedom of religion and the right to education) as a distinct form of moral harm.⁷⁰

Despite this favourable environment to resort to human rights reasoning, nowhere in the judgment and sentence and nowhere in the reparations order did the Trial Chamber label Mr. Al Mahdi's actions as a breach of human rights.⁷¹ What is more, it did not even refer to the UDHR, the ICCPR or the ICESCR. It only commented in passing that the international community had recognized "in various legal instruments the importance of the human right to cultural life and its physical embodiments".⁷² However, in the corresponding footnote, it only referred to IHL instruments and Security Council resolutions.⁷³

The *Al Mahdi* Trial Chamber did not discuss why it did not resort to human rights discourses and frameworks to speak about the impact of the destruction of Timbuktu's cultural heritage. In the following section I assess the two ways in which human rights could have made an appearance in the reparations order. Far from considering it a missed opportunity, the six years since my initial involvement with this case has led me to reflect

⁶⁵ *Ibid.*, paras. 52-75.

⁶⁶ *Ibid.*, para. 52.

⁶⁷ *Ibid.*, para. 33.

⁶⁸ *Al Mahdi* Judgement and Sentence, para. 81.

⁶⁹ K. Bennoune Expert Report pp. 28 and 39.

⁷⁰ M. Lostal Expert Report, para. 54.

⁷¹ See *contra* Haydee J. Dijkstal, "Destruction of Cultural Heritage before the ICC: the Influence of Human Rights on Reparations Proceedings for Victims and the Accused", *Journal of International Criminal Justice* 17:2 (2019): 391-412, p. 399 stating that "[t]he reparations order took even stronger strides in identifying violations of fundamental human rights in the crimes by directly acknowledging the human rights affected".

⁷² *Al Mahdi* Reparations Order, para. 14.

⁷³ *Ibid.*, footnote 28.

and identify a number of reasons why “human righting” the reparations order would not have been particularly appropriate or useful.

** ASSESSING THE SILENCE OF THE AL MAHDI CASE: THE LIMITS OF HUMAN RIGHTS**

There are two principal ways in which the Court could have engaged with human rights in the *Al Mahdi* reparations order. First, to frame the harm caused to victims as a human rights breach. In fact, the early jurisprudence of the Court entertained the impairment of fundamental rights as a discrete form of moral harm.⁷⁴ Second, as a rhetorical tool to underscore the human link existing between heritage and peoples.⁷⁵ This section analyzes both possibilities and argues that, with the exception of cases involving persecution, qualifying the harm caused to victims as a violation of human rights would be problematic. This is because it would (1) increase the juridification of victimhood; (2) stretch the bounds of the material jurisdiction of the Court; (3) and clash with the goal of reparations and the fair trial rights of the accused. Furthermore (4) importing human rights discourses to highlight the human dimension of cultural heritage would have been unproblematic, but probably unnecessary. This is because, in the *Al Mahdi* example, the human aspect of cultural heritage exists regardless of its recognition in human rights law. In short, this section conveys that one must remain critical of the value of adding human rights frameworks to a Court’s decision.

<c> Increasing the juridification of victimhood

Natural persons as well as certain organisations and institutions can qualify as victims before the ICC.⁷⁶ Their right to obtain reparations would depend on fulfilling these criteria:

- a. “their identity as a natural person, or its creation or registration as a legal entity, must be established;
- b. they must have suffered or sustained harm;
- c. the crime from which the harm arises must be one for which the defendant was convicted; and
- d. there must be a direct causal nexus between the crime and the harm”⁷⁷

When examining the essence of what it is to be a victim before the ICC, Kendall and Nouwen speak about “juridified” victimhood. They refer to the phenomenon where the status of victim at the ICC is subject to a number of events and legal tests, rather than to

⁷⁴ ICC – Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on victims' participation (18 January 2008) ICC-01/04-01/06-1119, para. 92.

⁷⁵ See making a similar distinction Haydee J. Dijkstal, “The ICC and Human Rights: The Crime against Destruction of Cultural Heritage as Part of a Trend Towards Greater Human Rights Influence”, *Indiana International & Comparative Law Review* 31:3 (2021): 379-408, p. 379.

⁷⁶ See rule 85 of the Rules of Procedure and Evidence of the ICC. According to paragraph (b), legal persons refer to “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

⁷⁷ Ntaganda Reparations Order, para. 31.

the reality of being wronged by a crime.⁷⁸ This is to say that there are certain hoops that a person needs to go through to be legally recognized as a victim entitled to reparations, many of which are linked to extraneous factors. This includes the selection of incidents within a situation that ends up being investigated, the choice of persons to arrest, , their eventual apprehension and transfer to The Hague, the list of charges levelled against them, and the ability to prove their commission beyond any reasonable doubt.⁷⁹ Each one of these steps represents an exercise of exclusion at which end sits a narrow group of “juridified” victims.

However, once these victims are discerned from all others that could have been, one last thing remains to be proven to receive reparations: that the crime for which the person was convicted caused them *harm*. In other words, after a conviction has been entered, the ultimate factor enabling a victim to claim reparations at the ICC is the occurrence of harm alone. By contrast, human rights courts need to establish that the rights of victims were breached in order to award reparations. A victim in the IACtHR is a “person *whose rights have been violated*, according to a judgment pronounced by the Court.”⁸⁰ Remedies and fair compensation are owed to the injured party in order to respond to “the consequences of the measure or situation that constituted the breach of such right or freedom.”⁸¹ For example, when the IACtHR heard cases connected to the disruption of culture, it could only look into the existence of harm after establishing human rights breaches, such as freedom of conscience and religion, freedom of thought and expression and freedom of association.⁸² By contrast, the *Al Mahdi* Trial Chamber did not have to establish a breach of rights to award reparations.

In short, at the ICC, one’s status as a victim eligible for reparations follows from the assessment of a factual phenomenon (i.e. the existence of harm), not from the assessment of a legal issue (i.e. the breach of a right). Making determinations of human rights breaches in an ICC reparations order would increase the juridification of victimhood. This sort of legal assessment would, on top of being superfluous, add a complication: that of having to examine whether the human right in question was derogated in times of emergency.

“Cultural rights” is an umbrella concept that encompasses different rights with a cultural dimension. Some of them, such as freedom of expression and association, may be lawfully derogated from in armed conflict.⁸³ War crimes can only exist in the context or

⁷⁸ See in general Sara Kendall and Sarah Nouwen. “Representational practices at the International Criminal Court: the gap between juridified and abstract victimhood,” *Law and Contemporary Problems* 76:3/4 (2013): 235–62.

⁷⁹ *Ibid*, pp. 244-253.

⁸⁰ Rule 2(33), Rules of Procedure of the IACtHR (emphasis added).

⁸¹ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica* (22 November 1969) article 63(1).

⁸² See e.g. IACtHR, Judgment on the Merits, *Plan de Sánchez Massacre v. Guatemala* (29 April 2004) (ser. C) no. 105, para. 47.

⁸³ Art. 4 ICCPR in conjunction with articles 19 and 22. The contours of derogation of rights enshrined in ICESCR are more blur but existing, see Amrei Müller, “The Relationship between Economic, Social and Cultural Rights and International Humanitarian Law”, in *Limitations to and Derogations from Economic, Social and Cultural Rights* (Brill | Nijhoff, 2013) pp. 111-148.

in association with an armed conflict, hence the label *war crimes*.⁸⁴ As a result, the premise of war crimes - the occurrence of an armed conflict - may be the very reason why some human rights would not be operative at the relevant time. Therefore, on occasion, trying to label war crimes as human rights violations could lead to a definitional *harakiri*.

In sum, the existence of human rights breaches is immaterial to one's claim to reparations at the ICC. Establishing such breaches would only further juridify the process of reparations by adding legal reasoning that is both unnecessary and, as far as war crimes are concerned, potentially self-defeating.

<c> The jurisdictional limits of the ICC

If the ICC were to establish violations of human rights, where would it make such findings? One option would be in the judgment pursuant to article 74 establishing whether the accused is guilty. However, this avenue would be highly inappropriate because the ICC is not a human rights court. Making findings on human rights violations would confuse the purpose of the proceedings before the ICC, which is to determine the responsibility of persons for international crimes. Such judgment would seem *ultra vires* given that the ICC lacks material jurisdiction over human rights claims *per se*. The material jurisdiction of the ICC -specified in Article 5(1) of its Statute- remains restricted to genocide, crimes against humanity, war crimes and the crime of aggression. Moreover, the ICC is only concerned with the criminal responsibility of individuals, whereas international human rights claims have so far engaged the responsibility of States.

Establishing the breach of a human right would fall within the remit of the ICC only when the charges would include persecution as a crime against humanity. Persecution is a crime committed "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law".⁸⁵ For this crime to exist, the perpetrator must have "severely deprived ... one or more persons of fundamental rights."⁸⁶ In other words, the violation of a fundamental right⁸⁷ is an inherent aspect of persecution, a crime over which the ICC does have material jurisdiction. The *Al Mahdi* case did not extend the charges to persecution despite the discriminatory motives behind the destruction,⁸⁸ and the long tradition at the ICTY of entering convictions on this ground for the destruction of cultural heritage.⁸⁹ However, the ICC would be called to assess the existence of

⁸⁴ See ICC Elements of Crimes, Article 8.

⁸⁵ Article 7(1)(h), ICC Statute.

⁸⁶ Article 7(1)(h), element number 1, ICC Elements of Crimes.

⁸⁷ The ICC has stated the fundamental rights the violation of which may constitute persecution can be found, for example, "in the Universal Declaration of Human Rights..., the two UN Covenants on Human Rights, and other international instruments on international human rights, as well as the rights reflected in international humanitarian law", see ICC – Trial Chamber VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019) ICC-01/04-02/06-2359, para. 991.

⁸⁸ The discriminatory motives the destruction received relatively little attention and were only accounted for in considerations of gravity. See also Sebastián A. Green Martínez, "Destruction of Cultural Heritage in Northern Mali: A Crime against Humanity?", *Journal of International Criminal Justice* 13:5 (2016): pp. 1073-97.

⁸⁹ See e.g. ICTY-Trial Chamber II, *Prosecutor v. Radoslav Brđanin*, Judgment (1 September 2004) IT-99-36-T, para. 1050-3; ICTY - Trial Chamber II, *Milomir Stakić*, Judgment (31 July 2003) IT-99-36-T

deprivation of fundamental rights in connection with the destruction of cultural heritage in the case against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Mr. Al Hassan). Mr. Al Hassan was also an alleged member of the *Ansar Dine* and is currently standing trial for a more extensive list of charges (e.g. torture, rape, sexual slavery, other inhumane acts), including the destruction of the same protected buildings but both as a war crime and as a crime of persecution.⁹⁰

One may counterargue the point about the jurisdictional limits of the ICC saying that making findings on violations of cultural rights would not be problematic because the ICC Statute asks to incorporate human rights considerations in several provisions. Article 21(1)(b) states that, where appropriate, the Court shall apply “applicable treaties and the principles and rules of international law”, including international human rights ones; and Article 21(3) says that the application and interpretation of law by the Court “must be consistent with internationally recognized human rights”. However, these provisions have, respectively, a gap-filling and interpretative aid function.⁹¹ Concerning article 21(1)(b), the Court would only need to apply human rights instruments failing its own Statute and rules. Article 21(3) has often come into play when the Court has had to articulate the rights of the accused, the standard of admissibility of evidence, the interpretation of certain crimes, or the manner in which reparations need to be implemented (e.g. without discrimination, respecting the dignity of the victims).⁹²

By means of example, in the case against Mr. Lubanga, the Trial Chamber resorted to the 1989 UN Convention on the Rights of the Child to shed light on the terms “conscripting, enlisting and using” children to participate actively in hostilities.⁹³ Nevertheless, Mr. Lubanga was found guilty of the crimes of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities on the basis of

paras. 811-813; see also, Serge Brammertz, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich. ‘Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY’ *Journal of International Criminal Justice*, 14:5 (2016): 1143-74, pp. 1152ff.

⁹⁰ ICC - Pre-Trial Chamber I, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (13 Nov 2019) ICC-01/12-01/18-461-Corr-Red, paras. 976-987 and p. 465, count 13.

⁹¹ See e.g., William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd Edition), p. 531; Dapo Akande, “Sources of International Criminal Law” *The Oxford Companion to International Criminal Justice* edited by Antonio Cassese (Oxford University Press, 2009), p. 47; Gudrun Hochmayr, “Applicable Law in Practice and Theory: Interpreting Article 21 of the ICC Statute”, *Journal of International Criminal Justice*, 12:4 (2014): 655–679.

⁹² See e.g. ICC – Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, (14 December 2006) ICC-01/04-01/06-772, paras. 36-39; ICC – Trial Chamber IX, *Prosecutor v. Dominic Ongwen*, Decision on Request for Disclosure and Related Orders Concerning Mr. Ongwen’s Family’, ICC-02/04-01/15-1444 (12 February 2019), paras. 22-26; ICC – Trial Chamber V, *Prosecutor v. Yekatom & Ngaïssona*, Public redacted version of Decision on Mr. Yekatom’s Restrictions on Contacts and Communications in Detention, ICC-01/14-01/18-485-Red (16 February 2021), para. 16.

⁹³ ICC – Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842 (14 March 2012), paras. 604-607.

Article 8(2)(e)(vii) of the Statute, not for violations of the rights of the child under a human rights instrument.

In sum, one thing is to adhere to human rights standards when reaching decisions, as Article 21 of the Statute requires, and a very different one is to adjudicate human rights violations altogether, which is outside the scope of jurisdiction of the ICC as defined in Article 5.⁹⁴

<c> **The right to a fair trial of the accused**

The reparations order would seem like the other candidate for the ICC to establish violations of human rights. This avenue, too, would be inappropriate because it would distort the focus of the proceedings and undermine the procedural rights of the accused, who is by this stage, a convicted person.

The premise of reparations at the ICC is the commission of an international crime, which would have already been established through a conviction.⁹⁵ Their goal is to re-establish the situation which would have existed if the wrongful act had not been committed.⁹⁶ Since the consequences of serious crimes against persons cannot really be wiped out as if they had never existed, reparations at the ICC focus on the next available option: to “relieve the suffering caused by serious crimes ... and enable the victims to recover their dignity”.⁹⁷ As put by the ICC Appeals Chamber:

“The Statute and the Rules of Procedure and Evidence introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims.”⁹⁸

Reparations represent a turning point in the logic of international criminal law. It is a phase that has victims at its centre, not the convicted person. When trial chambers move on to reparations, they are no longer exercising *ius punendi*. Therefore, establishing new violations of law in a reparations order would contradict this phase’s purpose.

In addition, there are procedural reasons why new violations of international law should not be determined in a reparations order. Entertaining such violations in a reparations order while the conviction/acquittal is on appeal⁹⁹ would compromise the credibility of

⁹⁴ Making an analogous point regarding substantive violations of international environmental law see Matthew Gillett, *Prosecuting Environmental Harm before the International Criminal Court* (Cambridge University Press, 2022), p. 47.

⁹⁵ Article 75(2), ICC Statute.

⁹⁶ *Ibid.*

⁹⁷ Ntaganda Reparations Order, para. 3.

⁹⁸ Lubanga reparations principles, para. 1. See also McCarthy who, writing before the Lubanga Principles were issued, had already found compelling reasons to explain that reparations are non-punitive, Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge University Press, 2012), pp. 75-78.

⁹⁹ This happened in *Ntaganda* where the reparations order preceded the judgment on appeal by 22 days.

the trial judgment and, if they exist, the integrity of the appeal proceedings.¹⁰⁰ If the conviction becomes final, adding human rights breaches in the reparations order would contradict the finality of judgments. It will also be in conflict with *ne bis in idem*, which “protects an individual who was once prosecuted for an offence from being further troubled upon the same grounds ... and being subject to punishment several times.”¹⁰¹ The horizontal dimension of *ne bis in idem*, or the prohibition to be tried twice for the same conduct by the same court, is recognised in Article 20(1) of the ICC Statute¹⁰² and has found expression in several human rights instruments.¹⁰³

Furthermore, using the reparations proceedings as a pseudo-human rights trial would clash with fair trial standards, which include the right to be proven guilty “beyond reasonable doubt”.¹⁰⁴ This is because in reparations proceedings, when victims are called to prove the harm they suffered and its causal link with the crime, trial chambers use standards less exacting than “beyond reasonable doubt”. Instead, they resort to the “balance of probabilities” plus the but/for test and “proximate cause” tests to assess evidence.¹⁰⁵ In some cases, the trial chamber may even resort to factual presumptions where the existence of harm would be assumed unless otherwise proven.¹⁰⁶

To summarize, reparations proceedings are not a forum to revisit the guilt of the already convicted. Doing so would defeat the finality of penal judgments and the rights of the accused to *ne bis in idem* and to a fair trial.

<c> Human rights as a rhetorical tool

The *Al Mahdi* case gave judicial recognition to the fact that the human and the material dimensions of cultural heritage are often two sides of the same coin, and that destruction of cultural objects is often aimed at breaking human spirit.¹⁰⁷ That is, behind the destruction of physical structures lies the loss of irreplaceable material that harbours historical data, symbolic values and, quite importantly, peoples’ identity and sense of belonging. The reparations order recognized culture heritage to encompass “resources enabling cultural identification and development processes of individuals and groups, which they [...] wish to transmit to future generations,”¹⁰⁸ and acknowledged that

¹⁰⁰ Immi Tallgren and Astrid Reisinger Coracini, “Article 20: Ne Bis in Idem”, in *The Rome Statute of the International Criminal Court: A Commentary*, edited by Otto Triffterer and Kai Ambos (Beck Hart · Nomos, 3rd ed., 2015): 901-931, p. 903.

¹⁰¹ *Ibid.*, p. 902.

¹⁰² Keilin Anderson, Adaena Sinclair-Blakemore, “*Ne bis in idem, nulla poena sine lege* and Domestic Prosecutions of International Crimes in the Aftermath of a Trial at the International Criminal Court”, *International Criminal Law Review* 21 (2021): 35-66, p. 43.

¹⁰³ See e.g. Article 14(7) ICCPR; Council of Europe, *Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, ETS 117, Article 4(I); *American Convention on Human Rights*, Article 8(4); and League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, Article 16.

¹⁰⁴ Articles 64(2) and 63(3), ICC Statute.

¹⁰⁵ Lubanga reparations principles, paras. 22 and 59.

¹⁰⁶ *Ibid.*, para. 141.

¹⁰⁷ See e.g., *Al Mahdi* reparations order, para. 19.

¹⁰⁸ *Ibid.*, para. 15.

“cultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future.”¹⁰⁹

The *Al Mahdi* Trial Chamber could have incorporated language from existing human rights instruments and reports that highlight the connection between culture and persons to add depth and authority to this type of statements. For instance, concerning the clear connection between culture, individuals and groups, the reparations order could have expressly recalled the right to participate in cultural life as acknowledged in article 27 of the UDHR. When elaborating on the concept of culture, it could have resorted to the CESCR when it stated that culture must not be seen “as a series of isolated manifestations or hermetic compartments”¹¹⁰ and that cultural activities, goods and services carry values, meaning and identity beyond their commercial expression.¹¹¹ At the same time, in my opinion, making references to phrases of human rights bodies and instruments would have only added an extra layer of words, but not so much an extra layer of meaning. This is because the prerogative of underscoring the human aspect of cultural heritage (i.e. the fact that humans may feel attached, represented, symbolized or connected to cultural heritage) is not the exclusive province of human rights. IHL instruments, UNESCO conventions and declarations, and UNSC resolutions – some of which were referred to in the reparations order-¹¹² have also highlighted this human aspect.

For example, the first international treaty for the protection of cultural property, the 1954 Hague Convention for the protection of cultural property in the event of armed conflict, already affirmed that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”¹¹³ The 2003 UNESCO Declaration concerning the intentional destruction of cultural heritage says that “cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion.”¹¹⁴ In 2017, the Security Council dedicated a resolution to cultural heritage in its entirety where it emphasized that “the unlawful destruction of cultural heritage [...] and the attempt to deny historical roots and cultural diversity in this context can fuel and exacerbate conflict and hamper post-conflict national reconciliation.”¹¹⁵

More importantly, the human aspect of cultural heritage exists regardless of whether it is framed in legal terms or not. In the *Al Mahdi* case, this was already palpable in the testimonies of victims when they expressed, for example, that they felt completely emotionally devastated by the destruction of the mausoleums.

¹⁰⁹ Ibid., para. 14.

¹¹⁰ CESCR General comment 21, para. 2.

¹¹¹ Ibid., para. 43.

¹¹² *Al Mahdi* reparations order, footnote 28.

¹¹³ Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (14 May 1954), preamble, second recital.

¹¹⁴ Declaration concerning the Intentional Destruction of Cultural Heritage, adopted at UNESCO General Conference 32nd (2003), preamble, fifth recital.

¹¹⁵ UN Security Council Resolution 2341 (24 March 2017), preamble, fifth recital.

“I have never suffered so deeply in my life [...] Mentally, I was devastated. I felt humiliated by the destruction. I am still suffering [...] I am still affected mentally”¹¹⁶

After all, being spiritually or emotionally attached to cultural heritage is a sociological phenomenon that the law simply aspires to capture in its rules. This attachment exists outside and regardless of human rights law. As such, mentioning human rights provisions would not have been legally problematic but, from a judicial economy perspective, probably unnecessary.

** CONCLUSION**

This book centres on the connection between art and human rights. The context in which the *Al Mahdi* reparations were taking shape presaged some degree of influence of human rights reasoning. On the one hand, there was a significant lack of precedent transposable to the unique characteristics of the *Al Mahdi* case. This is because it was the first international criminal case to revolve exclusively around the destruction of cultural property, as well as the first one called to identify the victims of such destruction and the nature of the harm suffered. On the other, there was an impetus to employ a human rights perspective in responding to the intentional destruction of cultural heritage, and a growing body of reports and commentaries on cultural rights. Yet, the links between cultural heritage, harm and human rights were conspicuous by their absence in the *Al Mahdi* reparations order. The Trial Chamber did not elaborate on whether this had been a conscious decision. Willingly or not, such silence is significant because it establishes a precedent, or, better put, a lack of precedent in the way the ICC frames its reparations.

After examining the possible justifications behind this silence, I have come to agree with the approach of the *Al Mahdi* Trial Chamber. In this chapter, I have argued that resorting to human rights comments and reports to highlight the human dimension of cultural heritage as a mere rhetorical tool would not have been legally inappropriate. At the same time, it would probably have failed to add a distinctive layer of meaning to what was already said in the reparations order. This is because the human connection with art and heritage has an autonomous existence outside human rights.

Beyond the realm of cultural heritage, the *Al Mahdi* case provides a window to test the broader validity of *not* incorporating human rights frameworks into reparations orders to label the harm caused to victims. This chapter has argued that employing a human rights lens should be avoided because this practice could become problematic at different levels: stopping to argue in the middle of a reparations order whether the conduct of the convicted person was a violation of human rights would further juridify the notion of victimhood without any clear identifiable advantage; it would also stretch the jurisdictional limits of the ICC beyond its bounds; and lastly, it would potentially violate several procedural human rights of the accused, including the right not to be convicted twice for the same conduct.

¹¹⁶ *Al Mahdi* reparations order, para. 85.

In short, “what human rights gives you is human rights,”¹¹⁷ and one needs to be aware not only of their power and possibilities, but also of their limitations and unwanted implications.

¹¹⁷ Dina Lupin, “Environmental Law, the Resort to Rights and Hermeneutical Injustice”, presentation at the seminar *International Law and Transformation: Environmental Justice* (19 - 20 May 2022) held at the University of Essex (UK).