

# Implementing Reparations in the *Al Mahdi* Case

A Story of Monumental Challenges in Timbuktu

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## Abstract

*The city of Timbuktu evokes remoteness and, since 2012, chaos and destruction. During an armed conflict in the north of Mali, radicals took over the city and destroyed several of its mausoleums. One of the perpetrators, Ahmad Al Faqi Al Mahdi, was convicted at the International Criminal Court (ICC) for his participation in the destruction of 10 religious and historic buildings. The unprecedented nature of the Al Mahdi case led to an equally unprecedented question at the reparations phase: who are the victims of cultural heritage destruction and how should their harm be addressed? Drawing from the author's personal involvement in the case as an appointed expert, this article is a journey into how this question was resolved and the practical challenges it posed during the implementation phase. These challenges, while specific to the Al Mahdi case, provide a framework to demonstrate the level of complexity involved in the implementation of reparations. The article focuses on three 'monumental' challenges: (i) whether 'unborn children' should be included in the pool of victims given that cultural heritage is meant to be preserved for the benefit of future generations; (ii) what place women ought to occupy in the implementation of reparations, despite the customary practices of side-lining them; and (iii) the decision of whether to memorialize events surrounding the crime. On the latter challenge, the article introduces the concept of 'restorative agency', a working principle that was adopted to ensure memorialization practices reflect the experience of victims. Incidentally, this article reveals some of the work of the Trust Fund for Victims, one of the ICC's least comprehended creations, and briefly discusses the role of experts during implementation moving forward.*

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# 1. Introduction

The case against Ahmad Al Faqi Al Mahdi (Mr Al Mahdi) before the International Criminal Court (ICC or the Court) is the first, and so far, the only one that has revolved exclusively around the war crime of intentionally directing attacks against religious and historic buildings, pursuant to Article 8(2)(e)(iv) of the Rome Statute. The affected properties were nine mausoleums and the door of the Sidi Yahia mosque (the protected buildings) in the world heritage town of Timbuktu (Mali). This meant that, once a conviction was entered against Mr Al Mahdi, the Court had to order and implement reparations on the basis of a bloodless crime. At that stage, the Court faced a question that had never been addressed before at the judicial level: who are the victims of cultural heritage destruction and how should their harm be repaired? Trial Chamber VIII navigated this uncharted territory and issued an order for reparations in August 2017<sup>1</sup> in which it determined that there had been four concentric groups of victims, from broader to narrower: (i) the international community; (ii) the Malian population; (iii) the local population of Timbuktu; and, within it, (iv) certain individuals with a more acute economic and/or moral connection to the destroyed protected buildings.<sup>2</sup>

There are a number of commentaries on the *Al Mahdi* case which, for instance, offer an overview of the criminal trial;<sup>3</sup> problematize certain aspects of the criminal prosecution;<sup>4</sup> assess the reparations order<sup>5</sup> or its reported human rights influence;<sup>6</sup> and delve into the layers of meaning of the notion ‘cultural property’ within the ICC.<sup>7</sup> On reparations alone, there is a fair amount of attention paid to the ICC,<sup>8</sup> and a growing frustration with what it has

- 1 Reparations Order, *Al Mahdi* (ICC-01/12-01/15-236), Trial Chamber VIII, 17 August 2017 (‘*Al Mahdi* Reparations Order’).
- 2 *Al Mahdi* Reparations Order, § 51.
- 3 P. Casaly, ‘Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law’, 14 *Journal of International Criminal Justice* (JICJ) (2016) 1199–1220; M. Sterio, ‘Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case’, 45 *Case Western Reserve Journal of International Law* (CWRJIL) (2017) 63–73.
- 4 W. Schabas, ‘Al Mahdi Has Been Convicted of a Crime He Did Not Commit’, 45 *CWRJIL* (2017) 75–102; M. Lostal, ‘The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC’, 1 *Inter Gentes - The McGill Journal of International Law & Legal Pluralism* (2017) 45–58.
- 5 F. Capone, ‘An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage’, 16 *JICJ* (2018) 645–661.
- 6 H.J. Dijkstal, ‘Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused’, 17 *JICJ* (2019) 391–412.
- 7 M.A. Drumbl, ‘From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property’, 17 *JICJ* (2019) 77–99.
- 8 C. McCarthy, *Reparations and Victims Support in the International Criminal Court* (Cambridge University Press, 2012); L. Moffett, *Justice for Victims before the International Criminal Court* (Routledge, 2014); L. Moffett, ‘Reparations for Victims at the International Criminal Court: A New Way Forward?’ 21 *The International Journal of Human Rights* (2017) 1204–1222; M. Goetz, ‘Victims’ Experiences of the International Criminal Court’s Reparations Mandate in the Democratic Republic of the Congo’, in C. Ferstman, and M. Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (2nd edn., Brill – Nijhoff, 2019)

achieved so far.<sup>9</sup> The existing literature has mostly focused on outputs, such as decisions, progress reports, numbers and timelines. However, it could not but overlook an important part of the process of implementing reparations to which the *Al Mahdi* case bears witness: the recurrence of theoretically complex questions with wide-reaching practical implications for the victims and for the future practice of the Court.

The reason why this aspect of reparations has not been discussed before is because the heavily confidential and/or redacted nature of proceedings at the implementation stage make it practically invisible. This article is, however, written by an academic who worked in the backstage of the reparations in the *Al Mahdi* case for several years<sup>10</sup> and witnessed how these issues, far from being anecdotal, constitute a constant element in the implementation of reparations. Without disclosing any confidential information, the article focuses on three challenges the *Al Mahdi* reparations posed, namely: (i) whether ‘un-born children’ should be included in the pool of victims resulting from the destruction given that cultural heritage law is premised on the idea that cultural heritage should be preserved for the benefit of future generations; (ii) what place women ought to occupy in the implementation of reparations despite the customary practices of side-lining them; and (iii) the decision of whether to memorialize or not to memorialize events surrounding the crime of destruction of cultural heritage. On the latter point, the article explains the concept of ‘restorative agency’, a working principle the Trust Fund for Victims (TFV) adopted aiming to impact the future of memorialization measures by making sure that such decisions are only based on the will of victims, not that of the Court, or of any other alien institution.

The contribution of this article lies in offering a more complete picture of the process that occurs before reparations are reflected into a decision, progress report, number or timeline. The challenges analysed in this paper, while specific to the *Al Mahdi* case, also provide a framework to highlight latent tensions in the Court’s reparative legal framework, the nature of the work carried out by the TFV — one of the Court’s least comprehended creations —<sup>11</sup> and reflect on the use of experts during the implementation of reparations.

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415–445; C. Ferstman, ‘Reparations at the ICC: the Need for a Human Rights Based Approach to Effectiveness’, in Ferstman and Goetz (eds), *ibid.*, 446–478; L. Moffett and C. Sandoval, ‘Tilting at Windmills: Reparations and the International Criminal Court’, 34 *Leiden Journal of International Law (LJIL)* (2021) 749–769.

9 See e.g. REDRESS, ‘No time to wait: realizing reparations for victims before the International Criminal Court’ (21 February 2019), available online at <https://redress.org/news/no-time-to-wait-realising-the-right-to-reparations-for-victims-before-the-international-criminal-court/> (visited 16 September 2021).

10 First, as an expert appointed by Trial Chamber VIII during the reparations proceedings in 2017 and, later on, assisting the TFV in the implementations phase between 2018 and 2020 as a ‘reparations expert’. This article is written in the author’s personal capacity.

11 Critical appraisals of the work of the Trust Fund for Victims have recently increased, see R.E. Rauxloh, ‘Good Intentions and Bad Consequences: The General Assistance Mandate of the Trust Fund for Victims of the ICC’, 34 *LJIL* (2020) 203–222; Moffett and Sandoval, *supra* note 8. Until then, most of the literature focused on the legal framework of the Trust Fund

Section 2 briefly describes the history of Timbuktu, the connection of the local population with the town's cultural heritage, and Mr Al Mahdi's role in its destruction. Section 3 briefly analyses who the Trial Chamber considered victims of the destruction of cultural heritage in the *Al Mahdi* case. Section 4 discusses three of the monumental challenges faced in designing the implementation of reparations in Timbuktu. The conclusion makes some observations on the nature of the challenges faced in the implementation of reparations, and the potential use of experts moving forward.

## 2. Timbuktu

### A. Brief Historical Overview

The fascinating history of Timbuktu means that the mere mention of its name evokes legends, remoteness and camel caravan expeditions. Among its many mysteries, one relates to its origin.<sup>12</sup> The dominant theory in written sources is that Timbuktu was established in the 11th century by a Tuareg tribe that wandered outside its base, leaving a servant to look after the children and possessions in this new location. The servant went by the name *Buktu*, or 'old woman' in the local language.<sup>13</sup> Merchants started to use this area as a storage depot,<sup>14</sup> which they called 'Tin-Buktu', that is, the place of *Buktu*.

From an improvised settlement, Timbuktu went on to become, as the saying goes, the 'Rome of the Sudan and the Mecca of the Sahara'.<sup>15</sup> By the 15th century, Timbuktu had entered its Golden Era. It served as a hotspot where merchants would meet and trade with books, gold from the West and salt from the East.<sup>16</sup> However, what rendered Timbuktu

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for Victims, see e.g. D. Donat-Cattin, 'Article 75', in O. Triffterer, and K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart/Nomos, 2018); see also, M. Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (Cambridge University Press, 2020), 126–149; or predated the practice of reparations, see e.g. P. De Greiff and M. Wierda, 'The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints', in K. de Feyter et al. (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights* (Intersentia, 2005); see also H. Rombouts, and S. Parmentier, 'The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims', 16 *International Review of Victimology* (2009) 149–182.

12 E.N. Saad, *Social History of Timbuktu: The Role of Muslim Scholars and Notables, 1400–1900* (Cambridge University Press, 1983), at 3.

13 A. Es Sadi, *Tarikh es Soudan* (Librairie d'Amérique et d'Orient, reprinted in 1981), at 36. The local language was probably Tamasheq or a dialect deriving from it.

14 *Ibid.*, see also, R.L. Smith, 'The Image of Timbuktu in Europe before Caillié', 8 *Proceedings of the Meeting of the French Colonial Historical Society* (1985) 12–22, at 13.

15 See e.g. Embassy of Mali in Canada, *Tombouctou*, available online at <https://ambamali.ca/en/tombouctou-2/> (visited on 12 September 2020).

16 R. Mansell Prothero, 'Heinrich Barth and the Western Sudan', 124 *The Geographical Journal* (1958) 326–337.

unique was not its wealth, which was by all accounts extraordinary,<sup>17</sup> but rather its intellectual and spiritual character.<sup>18</sup> Unlike other rich cities, Timbuktu was full of judges, doctors and imams who were paid by the king and where handwritten books were traded. It was home to the University of *Sankoré* and to more than a hundred *madrassas* attracting thousands of students and where '[s]cholars, engineers, and architects from various regions in Africa rubbed shoulders with wise men and marabouts'.<sup>19</sup> Many of these scholars, due to their acquired knowledge through study or divine inspiration, are considered Saints and are believed to be buried in the town's mausoleums, thus contributing to Timbuktu's reputation as the city of the 333 Saints.

News of Timbuktu reached North Africa and Europe through accounts of the 1324 pilgrimage of Mansa Musa, a Malian king. On his way to Mecca, he attracted much attention as he travelled through Egypt with a caravan of tens of thousands of camels, servants and soldiers dressed in silk and carrying what, until then, were unseen amounts of gold.<sup>20</sup> Hence, the rumours of an African 'El Dorado' began. In 1550, the rumours became legend through the writings of Leo Africanus.<sup>21</sup> It was believed that all gold in Africa originated from Timbuktu because, if not, what else could explain the blossoming of a trade centre in the middle of the Sahara?

Timbuktu began to suffer its demise — from which it never recovered — in 1591 with the fall of the Songhai Empire to the Moroccans.<sup>22</sup> However, news from Africa did not travel particularly fast back then and, for more than 200 years, Europeans continued to think of Timbuktu as a place where even the roofs were made out of gold. During this time, many explorers tried to reach the city, but all of them failed and many even perished in the attempt,<sup>23</sup> until 1828. In that year, René Caillié became the first European to make it back alive to break the disappointing news about Timbuktu.<sup>24</sup> He famously described his arrival to the city saying 'I looked around and found that the sight before me did not answer my

17 B.A. Tor, G. Berge, and E. Dugan, 'Myths of Timbuktu: From African El Dorado to Desertification', 34 *International Journal of Political Economy* (2004) 31–59.

18 Saad, *supra* note 12, at 18.

19 International Council on Monuments and Sites (ICOMOS), 'World Heritage List, n° 119 Rev' (July 1988), at 1.

20 Boston University Pardee School of Global Studies – African Studies Center, 'Kingdom of Mali Primary Sources', available online at [http://www.bu.edu/africa/outreach/teachingresources/history/k\\_o\\_mali/](http://www.bu.edu/africa/outreach/teachingresources/history/k_o_mali/) (visited on 20 November 2020).

21 G. Battista Ramusio, *Primo Volume delle Navigazioni et Viaggi, nel qual si contiene « La Descrizione dell'Africa »* (Venice, 1550), at 85: Timbuktu has 'great richness in plates and bars of gold, some of which weigh 1,300 pounds' (author's own translation).

22 See Smith, *supra* note 14, at 16.

23 *Ibid.*, at 17–18; T.A. Benjaminsen, G. Berge, and E. Dugan, 'Myths of Timbuktu: From African El Dorado to Desertification', 34 *International Journal of Political Economy* (2004) 31–59, at 32; see also Prothero, *supra* note 16, at 326.

24 See Smith, *supra* note 14, at 13 and 17–18.

expectations'.<sup>25</sup> Given the surprising level of inactivity he encountered,<sup>26</sup> his travel notes shifted focus to the daily life of the population, where he included descriptions and drawings of the city's sacred buildings. René Caillié thereby inadvertently suggested that, by then, what remained of Timbuktu's former grandeur was its culture and its heritage.<sup>27</sup> One of the reasons why Timbuktu was added to the World Heritage List in 1988, is precisely because its sacred buildings 'bear witness to the golden age of the intellectual and spiritual capital at the end of the Askia dynasty'.<sup>28</sup>

## B. Current Context

Timbuktu has three mosques — *Djingareber*, *Sidi Yahia* and *Sankoré* — as well as 16 mausoleums that represent world cultural heritage.<sup>29</sup> The daily customs of Timbuktu's residents — the population's beliefs and practices — are deeply intertwined with the buildings, rendering Timbuktu an example of a city where the tangible and intangible sides of heritage are interdependent. For example, it is believed that these buildings form a protective belt around the city which shields it from misfortune.<sup>30</sup> The fate of the sacred buildings have indeed, to some extent, mirrored that of its population. Timbuktu's world heritage sites are made of fragile materials that are regularly threatened by desertification, rare but violent bad weather and lack of management plans.<sup>31</sup> For the population, the weather brings periods of droughts and the socio-economic circumstances do not make it easy to thrive. Many are illiterate and live below the extreme poverty line,<sup>32</sup> a reality that is aggravated by a generalized feeling of neglect from the central Bamako administration. In 2012, following several upheavals against the central government with different groups demanding inclusion in the nation-building process, a secular armed group in the north (the *Mouvement national de libération de l'Azawad* or MNLA) demanded the full independence of the *Azawad*, which is how natives refer to the north of Mali. The conflict was later hijacked by radical armed groups, including the *Ansar Dine* ('defenders of the faith') where Mr Al Mahdi served as the chief of the *Hesbah*, a morality police in charge of repressing vice.

25 R. Caillié, *Travels through Central Africa to Timbuctoo and across the Great Desert, to Morocco, Performed in the years 1824-1828*, vol. 2, chapter XXI (Cambridge University Press, reprinted in 2014), at 49: 'I looked around and found that the sight before me, did not answer my expectations. I had formed a totally different idea of the grandeur and wealth of Timbuctoo.'

26 *Ibid.*, at 50.

27 *Ibid.*, at 71–76.

28 See ICOMOS, *supra* note 19, at 3.

29 *Ibid.*, at 37.

30 *Ibid.*

31 All of these circumstances granted them a place on the List of World Heritage in Danger between 1990 until 2005. See e.g. Decisions of the 29th Session of the World Heritage Committee (WHC-05/29.COM/22) UNESCO – World Heritage Committee, July 2005, at 20.

32 US Aid, 'Mali Country Profile' (February 2019), available online at [https://www.usaid.gov/sites/default/files/documents/1860/Country\\_Profile\\_Mali\\_-\\_Final\\_19.pdf](https://www.usaid.gov/sites/default/files/documents/1860/Country_Profile_Mali_-_Final_19.pdf), at 1–2 (visited 21 November 2020).

The morality police considered the worshipping of the Saints of Timbuktu a sign of polytheism and Mr Al Mahdi announced in June 2012 that several buildings were going to be demolished.<sup>33</sup> There were protests on the streets, a strategy that had saved the similar world heritage site of the Tomb of Askia (Gao, Mali),<sup>34</sup> but did not succeed in Timbuktu. Although 14 shrines were destroyed by the radicals, Mr Al Mahdi was personally involved in the destruction of nine mausoleums and the door of the *Sidi Yahia* mosque.<sup>35</sup> The latter deserves particular attention as it is emblematic of the rapport between the population of Timbuktu, its cultural heritage, and the fate of this city.

The *Sidi Yahia* mosque was built in 1440 for the Imam Sidi-Yahia-Et-Talesi.<sup>36</sup> It had always remained closed because, so the prophecy went, opening it would lead to doomsday. Chiding this customary belief as a mere superstition, Mr Al Mahdi declared:

We fear that these myths will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that this is the truth. So we decided to open it.<sup>37</sup>

What Mr Al Mahdi achieved, however, was to prove the exact opposite. As a local individual wisely observed to this author, chaos and the end of the world did in fact ensue in Timbuktu following the destruction of the *Sidi Yahia* door. This is because its destruction took place in a wider context of human rights abuses, war crimes and crimes against humanity in the form of rape, torture, mutilations, looting, passing of sentences before the Islamic court without due process and leading to severe punishments.<sup>38</sup> The fate of the *Sidi Yahia* door therefore stood, and stands, as an apocalyptic symbol of how radicals took over Timbuktu between 2012 and 2013.

Mr Al Mahdi was transferred to The Hague in 2015 and prosecuted before the ICC for his involvement in the war crime of '[i]ntentionally directing

33 Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016 ('*Al Mahdi* Judgment and Sentence'), § 37.

34 The Tomb of Askia is also a world heritage site. Direction Nationale du Patrimoine Culturel, *Rapport: Etat actuel de conservation du site du « Tombeau des Askia »* (Ministere de la Culture, Republique du Mali, 2014), at 2.

35 The current *Al Hassan* criminal proceedings contain a charge for the war crime of attacking buildings dedicated to religion and historical buildings (Art. 8(2)(e)(iv) ICCSt.) that fully coincides with the protected buildings for which Mr Al Mahdi was convicted. These are: (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (iv) the Sheikh Mouhamad El Mikki Mausoleum; (v) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vi) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (vii) the Sidi Yahia Mosque door; (viii) the Ahmed Fulane Mausoleum; (ix) the Bahaber Babadie Mausoleum; (x) the Sheikh Mohamed Mahmoud Al Arawani. 'Version publique expurgée - Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud' (ICC-01/12-01/18-461-Corr-Red), Pre-Trial Chamber I, 13 November 2019, § 528.

36 Es Sadi, *supra* note 13, at 39.

37 *Al Mahdi* Judgment and Sentence, § 38(viii).

38 See e.g. Office of the Prosecutor (OTP), 'Situation in Mali: Article 53(1) Report', 16 January 2013, §§ 46–75.

attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments ... provided they are not military objectives'.<sup>39</sup> He pled guilty and was sentenced to nine years of imprisonment which he is currently serving in Scotland. Following his conviction in 2016, the reparations phase began.

The *Al Mahdi* case bears witness to the fact that the implementation of reparations involves a series of complex processes before the actual moment of delivering awards. There is a significant amount of work away from the courtroom that goes unnoticed and that differs significantly from case to case. With few existing and remarkably different precedents (i.e. *Lubanga*, *Katanga*, *Al Mahdi* and, now, *Ntaganda*), there is little repetition in the implementation of reparations. In the *Al Mahdi* case, there was an additional layer of uniqueness due to the 'bloodless' nature of the crime of destruction of cultural heritage: who were the victims of such type of destruction? The next section examines the categories of victims identified by the Trial Chamber and the reasoning behind it.

### 3. Determining Victimhood in the *Al Mahdi* Case: Who Suffers Harm as a Result of Cultural Heritage Destruction?

When issuing a reparations order, a trial chamber can either directly identify victims by name or, in the alternative, set down the eligibility criteria for their identification at a later stage.<sup>40</sup>

Laying down the eligibility criteria to qualify as a direct victim is a more straightforward exercise when the crime has been directed against a person as such (e.g. murder, torture, conscription) or someone's property (e.g. pillage). For example, in the *Ntaganda* case, Trial Chamber VI established that those eligible for reparations would be the victims of the attacks (which, in turn, include murder, forcible transfer, rape etc.), former child soldiers, and children born out of rape and sexual slavery attributable to the convicted.<sup>41</sup> The task of actually locating and identifying all of these persons is an arduous and, perhaps even nearly impossible task.<sup>42</sup> However, establishing on paper who, in theory, these victims should be is unproblematic because the fact that a, say, woman has suffered harm as a result of being raped is undisputable. By

39 Art. 8(2)(e)(iv) ICCSt.

40 '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', *Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber, 3 March 2015, § 32.

41 Reparations Order, *Ntaganda* (ICC-01/04-02/06-2659), Trial Chamber VI, 8 March 2021 ('*Ntaganda* Reparations Order') §§ 108–124.

42 As Trial Chamber VI itself conceded, the 'exact number (of victims) may never be determined given the passage of time, the widespread and systematic nature of the crimes committed', see *Ntaganda* Reparations Order, § 8.



contrast, determining who suffers harm as a result of the destruction of a monument is not as self-evident.

The *Katanga* case had been the only one where reparations incorporated an aspect of crimes against objects (e.g. pillage of dwellings, houseware, cattle). However, this still did not provide much guidance to the *Al Mahdi* Trial Chamber because there would be a certain incongruence in comparing the loss of someone's hut with that of a cultural site of outstanding universal value.<sup>43</sup>

The Inter-American Court of Human Rights had acknowledged harm to a peoples' culture in several cases,<sup>44</sup> but such harm had ensued from attacks directed at persons, not at objects. For example, in the *Massacre of Plan Sánchez v. Guatemala* (2004), the Inter-American Court of Human Rights found that the massacres and scorched earth operations carried out against the *Achí* indigenous community led to the complete destruction of their culture and had caused a cultural vacuum.<sup>45</sup> Mr Al Mahdi, however, was convicted only for the destruction of cultural objects, an unparalleled circumstance in the realm of mass atrocities and international criminal justice. The precedent was thus not there, and there were no examples to draw from.

The *Al Mahdi* Trial Chamber received submissions and observations from four appointed independent experts, including this author's;<sup>46</sup> *amici curiae* submissions from five organizations including UNESCO;<sup>47</sup> the Prosecution,<sup>48</sup> the Defence team,<sup>49</sup> the legal representative of

43 Convention Concerning the Protection of the World Cultural and Natural Heritage ('World Heritage Convention'), preamble, sixth recital. All protected buildings mentioned in the *Al Mahdi* case, except one, are part of the World Heritage List.

44 'Preliminary Objections, Merits, Reparations and Costs', *Moiwana Community v. Suriname*, Inter-Am. Ct. H.R., 15 June 2005, § 86(18) and (20). In the *Lhaka* case, which is posterior to the *Al Mahdi* case, the Inter-American Court recognized the connection between the right of an indigenous people to enjoy their culture and their ability to make use of their ancestral land, and condemned Argentina for having violated the interrelated rights of the indigenous community to take part in its cultural life and to a healthy environment. See 'Merits, reparations and costs', *Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina*, Inter-Am. Ct. H.R., 6 February 2020, §§ 231–289.

45 Merits, Judgment, *Plan de Sánchez Massacre v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) no. 105, 29 April 2004, §§ 42(1) and 87. The attacks prevented them from continuing their ancestral traditions, performing the community's funeral rites, and broke the transmission of oral heritage to the newer generations, causing a cultural vacuum.

46 First Expert Report, *Al Mahdi* (ICC-01/12-01/15-214-AnxI-Red3), 27 April 2017; Second Expert Report, *Al Mahdi* (ICC-01/12-01/15-214-AnxII-Red2), 28 April 2020; and Third Joint Expert Report, *Al Mahdi* (ICC-01/12-01/15-214-AnxIII-Red2), 4 August 2017 ('Third Expert Report').

47 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, *Al Mahdi* (ICC-01/12-01/15-188), 2 December 2016; Joint observations of FIDH and AMDH on the reparations proceedings, *Al Mahdi* (ICC-01/12-01/15-189-tENG), 2 December 2016; UNESCO Amicus Curiae Observations, *Al Mahdi* (ICC-01/12-01/15-194), 2 December 2016.

48 Prosecution's Submissions on Reparations, *Al Mahdi* (ICC-01/12-01/15-192-Red), 2 December 2016.

49 General Defence observations on reparations, *Al Mahdi* (ICC-01/12-01/15-191-tENG), 2 December 2016; Final Submissions of the Defence for Mr Al Mahdi in Anticipation of the Order for Reparations, *Al Mahdi* (ICC-01/12-01/15-226-Conf-tENG).

victims,<sup>50</sup> the Registry and the Trust Fund for Victims.<sup>51</sup> After their own deliberations, Trial Chamber VIII issued the *Al Mahdi* reparations order on 17 August 2017 wherein it found four concentric groups of victims, from broader to narrower: (i) the international community and (ii) Malian nationals, (iii) Timbuktu's local population and, (iv) within it, certain individuals who bore a special relationship with the protected buildings.

As a side note, it appears that Mr Al Mahdi had a remarkably accurate idea of what groups his crime had affected. On occasion of his guilty plea, Mr Al Mahdi apologized stating:

I am really sorry, I am really remorseful and I regret all the damage that my actions have caused. I regret what I have caused to my family, my community in Timbuktu, what I have caused my home nation, Mali, and I'm really remorseful about what I had caused the international community as a whole.<sup>52</sup>

### A. *The International Community and the Malian Population at Large*

The *Al Mahdi* Trial Chamber found that the concept of 'outstanding universal value',<sup>53</sup> a definitional element of world heritage sites, was strongly tied to the international community that deems such sites important. It found that the destruction of cultural heritage:

[C]arries 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.<sup>54</sup>

Years earlier, the International Criminal Tribunal for the former Yugoslavia, passing judgment on the shelling of the world heritage site of Dubrovnik, had made similar remarks:

The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history. The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.<sup>55</sup>

The *Al Mahdi* judges then pointed to the population of Mali as the next victimized group, on account of the loss that their national heritage. Timbuktu was a national protected site and central to the history of Mali. As a Bamako-based woman once commented: '*Tombouctou est à voir, on ne*

50 Registry's observations pursuant to Trial Chamber VIII's Decision ICC-01/12-01/15-172 of 29 September 2016, *Al Mahdi* (ICC-01/12-01/15-193), 2 December 2016.

51 TFFV's Submissions on the reparations proceedings, *Al Mahdi* (ICC-01/12-01/15-187), 2 December 2016; and TFFV's Final Submissions on the reparations proceedings, *Al Mahdi* (ICC-01/12-01/15-225), 16 June 2017.

52 Transcript of Hearing, *Al Mahdi* (ICC-01/12-01/15-T-4-Red-ENG), 22 August 2016, at 8, lines 13–16.

53 Art. 1 of the World Heritage Convention.

54 *Al Mahdi* Reparations Order, § 22.

55 Judgment, *Jokić* (IT-01-42/1-S), Trial Chamber I, 18 March 2004, § 51.

*peut pas comprendre l'histoire du Mali sans Tombouctou*' (i.e. Timbuktu is to be seen, one cannot understand the history of Mali without Timbuktu).

Therefore, the Trial Chamber concluded that the destruction of the protected buildings in Timbuktu had affected the members of the international community and the Malian population. Both had suffered collective moral harm that ought to be acknowledged through the awarding of one symbolic euro to UNESCO, in representation of the international community; and another euro to the Malian government, acting on behalf of the national population.<sup>56</sup> The official ceremony to this effect was held on 30 March 2021.<sup>57</sup>

### **B. The Population of Timbuktu**

The tangible and intangible cultural heritage of Timbuktu are two sides of the same coin.<sup>58</sup> The mausoleums and mosques were an integral part of the population's shared beliefs and identity. '[J]ust as everywhere in the Islamic world, daily life [was] regulated by the times of prayer.'<sup>59</sup> Prior to the attack, the local population would visit the mausoleums to ask the Saints' divine intervention in (or thank them for) finding a job or a suitable spouse, conceiving a child, improving one's health etc.

Conversations with local individuals provided mixed information as to whether women were or not allowed inside the mausoleums. While a definitive answer was never given, it was once observed that only little girls or women of age may be allowed inside. This could be taken to indicate that women in the reproductive age are barred from accessing the interior of Timbuktu's sacred buildings, an interpretation which was consistent with some women's accounts that they prayed from the surroundings of the mausoleum or from home.

Regardless of gender, there was a certain uniformity in how locals described the way the destruction had affected them. They would speak of 'shattered faith', fear, shock, devastation and humiliation.<sup>60</sup> In their culture, resort to the Saints was a form of psychological well-being and that in the absence of that possibility, their mental health had deteriorated. As expressed in the combined report of two of the appointed experts:

All these rituals were suddenly broken and, from a psychological point of view, people no longer know who to commend themselves to. Thus, with each blow of the pickaxe that

<sup>56</sup> *Al Mahdi* Reparations Order, §§ 106–107.

<sup>57</sup> See e.g. 'ICC holds reparations ceremony for Timbuktu mausoleums', *ABC News*, 30 March 2021.

<sup>58</sup> According to the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage intangible cultural heritage means 'the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage'.

<sup>59</sup> Making this observation about neighbouring Djenné, see G. Mommersteeg, *In the city of Marabouts: Islamic Culture in West Africa* (Waveland Press, 2012), at 59.

<sup>60</sup> *Al Mahdi* Reparations Order, § 85.

destroyed these mausoleums, it was a blow to the heart which was brought to the people of Timbuktu. It was more than a humiliation, it was a physical attack on the very heart of the population.<sup>61</sup>

UNESCO managed to rebuild the mausoleums and the door of the Sidi Yahia mosque in 2015, which is rather laudable given the uncertain security situation of northern Mali. Yet, some locals did not equate the reconstruction with the reestablishment of their spiritual power.<sup>62</sup>

In addition to the disruption to their daily customs, since 2012, the town had been unable to celebrate the Mawlid festival that commemorated the birthday of the Islamic prophet and allowed the recreation of the atmosphere of the city at the height of its glory.<sup>63</sup> Likewise, the *Festival au Désert* has been continuously cancelled. The event, held yearly, was considered an expression of culture in Timbuktu where artists performed and business was made. This is to show that the destruction of Timbuktu's heritage brought about a general decline to both the spiritual and economic life of the city.

The *Al Mahdi* judges therefore established that the community of Timbuktu as a whole had suffered harm in the form of mental pain, anguish, the disruption of culture as well as generalized economic harm.<sup>64</sup> They ordered 'collective reparations through rehabilitation to address the emotional distress'<sup>65</sup> and 'collective reparations should be aimed at rehabilitating the community of Timbuktu in order to address the economic harm caused'.<sup>66</sup> Moreover, they also stated that such collective reparations could 'include symbolic measures — such as a memorial, commemoration or forgiveness ceremony — to give public recognition of the moral harm suffered by the Timbuktu community and those within it'.<sup>67</sup>

### *C. Certain Individuals with a Closer Connection to the Protected Buildings*

While the mausoleums and mosques played a central role in the living tissue of Timbuktu, there were certain individuals within the local population whose connection to the protected buildings was more intimate: those whose livelihoods depended on their existence prior to their destruction, and those who were the direct descendants of the Saints buried in them. Both groups were considered to have suffered a more acute level of, respectively, economic and moral harm, and are the only ones entitled to receive monetary individual compensation.<sup>68</sup>

61 Third Expert Report, at 146 (own translation from French).

62 *Ibid.*, at 147.

63 For an account of how this festival is celebrated in neighbouring Djenné, see Mommersteg, *supra* note 59, at 22.

64 *Al Mahdi* Reparations Order, § 76.

65 *Ibid.*, § 90.

66 *Ibid.*, § 83.

67 *Ibid.*, § 90.

68 *Al Mahdi* Reparations Order, §§ 83 and 89.

From the economic side of things, when the locals and pilgrims visited the mausoleums, they would leave donations. The money collected was divided by the family in charge of the protected building (i.e. the prominent family) to pay a living allowance to themselves for managing the site, and to provide a wage to those persons involved in the maintenance of the building.

The physical maintenance and rehabilitation of the mausoleums and mosques is essential due to Timbuktu's unforgiving weather, characterized by strong winds, desert storms and a three-month long rainy season lasting from June until September. In this context, the role performed by masons is key. Each building has a trusted mason whose ancestral techniques are handed down orally from father to son. Being a mason is therefore not only a reputable occupation, but also a form of unique intangible heritage: '[n]o one can touch a mausoleum or a mosque without them . . . . The *maçon* is the one who rebuilds and also the one who re-confers the buildings its sacred character.'<sup>69</sup>

Likewise, the guardians have an intimate link with the life of the mausoleums. They tend to be members of a prominent family, often its head, and they serve as keepers of the key. Given this customary connection to the buildings, the Court afforded them a factual presumption of exclusive economic dependence and granted them monetary compensation, as long as they could prove that they were indeed the mason or guardian of a given protected building.<sup>70</sup>

Aside from masons and guardians, the Court extended individual reparations to anyone who could establish an 'exclusive economic link'<sup>71</sup> by means of their profession. This would encompass owners and employees of businesses with purposes strictly linked to the existence of the protected buildings, such as the women who used to sell and lend jewellery around the mausoleums for special celebrations, and those who made a living out of selling holy sand from their soil. It would not cover owners of restaurants or lodgings for visitors because such businesses — while affected by their disappearance — could exist without the sites.

Requests to receive monetary compensation are done through individual applications<sup>72</sup> submitted with supporting evidence of the exclusive economic link. Registries and any sort of official record-keeping do not exist in Timbuktu. This documentary deficit is not exclusive to the situation in Mali and similar circumstances arose for the Court in relation to the Democratic Republic of Congo (DRC) with *Lubanga*, *Katanga* and *Ntaganda*. As a result, the Court has adopted a flexible approach whereby it admits alternative forms of proof as

69 C. Bozonnet, 'Les gens qui veulent détruire ne gagnent pas', *Goude News*, 21 June 2014, available online at <http://goude-news.overblog.com/2014/06/les-gens-qui-veulent-detruire-ne-gagnent-pas.html> (visited 23 November 2020).

70 Public redacted version of "Decision on Trust Fund for Victims' Draft Implementation Plan for Reparations", *Al Mahdi* (ICC-01/12-01/15-273-Red), Trial Chamber VIII, 12 July 2018, § 62 ('Decision on the DIP').

71 *Al Mahdi* Reparations Order § 81.

72 Decision on the DIP, §§ 30–49.

valid, such as systems of attestation and accounts corroborated by credible witnesses.<sup>73</sup>

From a psychological point of view, the direct descendants of the Saints were considered to have suffered a heightened degree of moral harm because the shrine and peace of their ancestors had been disrupted. They too are entitled to monetary compensation which needs to be requested through system of individual applications.<sup>74</sup> While the Saints buried in the mausoleums lived hundreds of years ago, their descendant lines persist and are widely recognized by the community. In other words, who is a descendant of each Saint is known and largely undisputed in the community of Timbuktu. The amount awarded to these individuals will remain confidential to avoid targeted attacks. However, it should be noted that, as instructed by Trial Chamber VIII, the sums are not symbolic but aim to represent an actual compensation for the harm suffered.<sup>75</sup>

Trial Chamber VIII directed the TFV to, under its oversight, draft and implement the reparations on the basis of the victim eligibility criteria and the measures identified in the reparations order. However, partly due to the unique character of this case and the fact that some issues are hard to anticipate, the implementation of reparations encountered three distinct challenges, two of which were connected to the individual reparations of direct descendants of the Saints. They are labelled 'monumental' challenges because they had one thing in common: the amount of theoretical thinking and reflection that they deserved was inversely proportionate to the urgency with which they had to be addressed. Not only was there time pressure to set the process in motion promptly, there was also pressure coming from knowing that reparations in *Al Mahdi* would set a precedent.

#### 4. Monumental Challenges

These challenges could not be left to improvisation. Drawing from this author's academic background, the Trust Fund for Victims adopted a strategy consisting in building a bridge with scholars. A diverse pool of academics specialized in psychology, anthropology, human rights, and the politics of cultural heritage management<sup>76</sup> generously donated their time and expertise. The way in which this author could navigate certain issues central to the implementation of reparations in *Al Mahdi* was largely enabled by the views and advice provided by these specialists. Their names, very unfortunately, cannot be recalled here

73 See e.g. Trust Fund for Victims, 'Public redacted version of "Trust Fund for Victims' submission of draft application form" ICC-01/12-01/15-289-Conf submitted on 26 October 2018', *Al Mahdi* (ICC-01/12-01/15-289-Red), 30 October 2018, § 45 ('TFV Submission of Draft Application Form'). See e.g. *Ntaganda* Reparations Order, §§ 136–139.

74 Decision on the DIP, §§ 30–49.

75 *Ibid.*, § 73.

76 Lesser public redacted version of "Updated Implementation Plan" submitted on 2 November 2018 ICC-01/12-01/15-291-Conf-Exp', *Al Mahdi* (ICC-01/12-01/15-291-Red3), Trust Fund for Victims, 14 October 2019, §§ 26 and 30 ('TFV Updated Implementation Plan').

for confidentiality and security reasons. However, the fact that their work and expertise existed should be credited and acknowledged.

### *A. First Monumental Challenge: the Unborn Generations*

The *Al Mahdi* reparations order had identified ‘those whose ancestors’ burial sites were damaged in the attack (such as the ‘descendants of the Saints’’) as one of the categories of victims entitled to compensation.<sup>77</sup> However, it did not specify a cut-off date of birth for such descendants to be included in the pool of victims. Laws for the protection of cultural heritage exist precisely based on the premise that cultural sites belong to humankind and ought to be preserved for their transmission to future generations.<sup>78</sup> The question thus arose: considering that this case only involved the loss of cultural heritage, should the concept of direct descendants of the Saints be extended to unborn generations of those families?

Around the time this issue was being discussed, an ICC decision in the *Katanga* case dealt with transgenerational transmission of trauma of children. The question arose in relation to children born after the attack perpetrated against Bogoro, for which Mr Katanga was found responsible. Trial Chamber II defined transgenerational harm as ‘a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter’<sup>79</sup> in a way that the trauma suffered by the parents influences the behaviour of their children.<sup>80</sup> The *Katanga* Trial Chamber ended up dismissing the claims of transgenerational harm because the causal nexus between psychological harm and the attack had not been established<sup>81</sup> as there could have been other unrelated events contributing to the trauma of the parents.<sup>82</sup>

By contrast, Mr Al Mahdi’s crime is the direct reason why future generations of direct descendants will not get to see their ancestors’ shrines. When Mr Al Mahdi, along with others, participated in the destruction, he forever impeded the possibility of passing this heritage on. Even though some sites had been rebuilt under the auspices of UNESCO in 2015, a reconstructed building is never the same as the original one.<sup>83</sup> Therefore, a strong argument could be made that Mr Al Mahdi’s actions caused harm to unborn children.

77 *Al Mahdi* Reparations Order, § 89.

78 See e.g. 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage World, Art. 4: ‘Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations.’

79 Public Redacted Version of Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, *Katanga* (ICC-01/04-01/07-3804-Red-ENG), Trial Chamber II, 19 July 2018, § 10.

80 *Ibid.*, § 11. Transgenerational harm as a category of harm has been included in the *Ntaganda* reparations principles, see *Ntaganda* Reparations Order, § 73.

81 *Ibid.*, § 56.

82 *Ibid.*, § 31.

83 D. Viejo-Rose and M.L. Stig Sørensen, ‘Cultural Heritage and Armed Conflict: New Questions for an Old Relationship’, in E. Waterton and S. Watson (eds), *The Palgrave Handbook of Contemporary Heritage Research* (Palgrave, 2015) 281–296, at 287.

Extending compensation to the unborn generations of descendants of the Saints could be defensible as far as cultural heritage considerations are concerned. But this decision could not be taken in a vacuum. In the broader context where this was being evaluated, there were arguments against extending compensation to future generations. First, unborn generations at large may stretch the limits of the ICC's definition of victims as 'natural persons' in Rule 85(a) of the Rules of Procedure and Evidence (RPE). While there are different schools of thought concerning what grants personhood (i.e. some of them emphasizing rational capabilities, and others, the fact of constituting a 'human being') they all seem to operate on the assumption that they must be existing and concrete beings.<sup>84</sup> This was in line with a decision by the ICC that states that the deceased cannot be considered 'natural persons'.<sup>85</sup> However, it should be noted that the *Ntaganda* reparations order, which was issued around two years after this discussion concerning *Al Mahdi* was being held, has recently labelled children born out of rape and sexual slavery as direct victims of Mr Ntaganda's crimes.<sup>86</sup> Does this mean that the *nasciturus*, as an unborn but concrete being, could qualify as a natural person in the sense of Rule 85(a) RPE? While this question did not come up as such in *Ntaganda* because these victims are now adults, it is not entirely clear when these children born out of rape and sexual slavery became direct victims: at the time of conception, at some point during the pregnancy, or when they were born? This development casts new doubts as to whether being unborn at the time of the commission of the crime is relevant to the understanding of 'natural person' pursuant to Rule 85(a) RPE.

Secondly, in a tightly knit population where the value of the community and sharing prevails over individualism and privacy, awarding monetary compensation for years on end to a selected group could provoke jealousy and communal tensions. The prolonged flux of income to children being born in the descendant families would be in stark contrast with the fixed time-length planned for the reparative programmes addressed to the wider population of Timbuktu (i.e. three years on average).<sup>87</sup> This disparity could contribute to the perception of these families as being privileged and ultimately, cause their alienation and that of their children from the community. Moreover, an argument can be made that, if Mr Al Mahdi caused harm to the future generations, certainly this was not limited to the unborn children of the descendants, but to those of the other pools of victims as well, which would require redefining the boundaries of the reparations order altogether.

84 C. Foster and J. Herring, *Identity, Personhood and the Law* (Springer, 2017), at 22–27.

85 Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, *Situation in Darfur - Sudan* (ICC-02/05-111-Corr), Pre-Trial Chamber I, 14 December 2007, § 36; see also H. Dumont, 'Requirements for Victim Participation', in K. Tibori-Szábo and M. Hirst (eds), *Victims Participation in International Criminal Justice: Practitioner's Guide* (T.M.C. Asser Press, 2017) 45–80, at 53–55.

86 *Ntaganda* Reparations Order, §§ 120–123.

87 TFV Updated Implementation Plan, §§ 49, 109 and 136.



After careful consideration of the principles in play and practical implications, the TFV opted for establishing a cut-off date coinciding with the time of the attack, that is, 11 July 2012.<sup>88</sup> Therefore, descendants of the Saints born after that date will not be eligible for individual compensation. Yet, along with all other children from Timbuktu or born outside within displaced families, they will be able to benefit from collective programmes even if born after the attack.

### ***B. Second Challenge: Women's Role in Compensation***

The task of identifying direct descendants of the Saints brought to the fore tensions that are latent in the ICC framework for reparations. The set of principles applicable to reparations (then, the *Lubanga* principles)<sup>89</sup> instruct the Court to avoid creating tensions within the community and, to the extent possible, to reflect customary practices in implementing reparations.<sup>90</sup> At the same time, a duty exists to address underlying injustices and avoid replicating structural discrimination.<sup>91</sup> These two values came into conflict in *Al Mahdi* because the Timbuktu community is customarily organized along very defined gender roles. Therein, the concept of descendancy is male-driven, whereby the female identity is absorbed by that of the man when she marries into *his* family. This meant that the ancestral links between Timbuktu women and the Saints had been eroded generation after generation. Should the duty to actively address discrimination prevail over that of avoiding tensions and respecting local practices? And, if so, how could these women-lines of descendancy be found in the absence of genealogical records?

The inequality of women in Timbuktu is part of a wider context. The Malian Constitution proclaims equality between men and women.<sup>92</sup> However, a closer look into Malian Family Law shows how women are largely under the authority of the male. For example, the husband is the head of the family, he 'chooses the place of residence where his wife is "obligated" to live'<sup>93</sup> and 'male children inherit twice the amount allotted to female children'.<sup>94</sup> In 2009, a reform of the Family Code which advanced women's rights was sent back to the Malian Parliament for a second

88 TFV Submission of Draft Application Form, § 43.

89 Note that these principles have been amended in the *Ntaganda* Reparations Order issued in March 2021. See *Ntaganda* Reparations Order, §§ 28–103.

90 Annex A to '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', *Lubanga* (ICC-01/04-01/06-3129-AnxA), Appeals Chamber, 3 March 2015 ('*Lubanga* Reparations Principles'), §§ 33 and 47.

91 *Ibid.*, § 17. The *Ntaganda* reparations principles reproduce these ideas concerning the need to avoid tensions, tackle discrimination, and respect customary practices in *Ntaganda* Reparations Order §§ 44 and 90.

92 Art. 2, 1992 Malian Constitution.

93 B.F. Soares, 'The Attempt to Reform Family Law in Mali', 49 *Die Welt des Islams* (2009) 398–428, at 407.

94 *Ibid.*, at 409.

reading following mass protests by a conservative religious sector.<sup>95</sup> The revised text undercut women's right to such an extent that, in 2018, the African Court on Human and Peoples' Rights ruled that the Code violated international human rights.<sup>96</sup>

The understanding of descendency lines in Timbuktu as being male-headed was the discriminatory practice that most touched upon the delivery of reparations and thus, had to be tackled. Legal and ethical arguments supported the conclusion that women had to be recipients of this award on an equal footing to men. Legally, the principle according to which local customs must be respected contains a caveat of doing so only whenever possible and unless the practice in question is discriminatory. Moreover, there is explicit wording concerning monetary compensation that requires that awards be delivered in a gender-inclusive manner.<sup>97</sup> Ethically, excluding female lines of descendency deriving from the Saint would have amounted to either accepting that women suffer less moral harm than men, or that their suffering counts less, both of which would have been indefensible. In addition, the United Nations Special Rapporteur in the field of cultural rights, Karima Bennouna, pursuant to her appointment as expert in the *Al Mahdi* case, cautioned that 'the struggle for women's rights is an essential component of the fight against all forms of extremism ... which is yet another reason ... to take a gender sensitive perspective to reparations in this case'.<sup>98</sup> As such, the *Al Mahdi* implementation of reparations followed her advice that '[t]he gender component [was] not optional'.<sup>99</sup>

Instead, the difficulty could have been in galvanizing the support of the heads of families and local intermediaries, who are almost exclusively male. They could have opposed the extension to female-based lines on account of, for example, being a secular foreign imposition or because of an (erroneous) impression that the sum of monetary award would be reduced proportionately to the increase of persons in the pool of victims entitled to compensation. An eventual rejection of the inclusion of women as recipients of these awards, could have thwarted the legitimacy of the entire process and the participation of certain segments of the local population. Moreover, in the absence of genealogical trees or any official family records, the cooperation of the male-lines of descendency was key to reach female-based lines. If the male heads of families had refused to answer questions such as 'do you have sisters, do you have aunts?',<sup>100</sup> the task of ensuring that reparations reached all relevant

95 International Federation for Human Rights, 'Mali's new Family Law: women's rights denied, discrimination upheld', 9 December 2011, available online at <https://www.fidh.org/en/region/Africa/mali/Mali-s-new-Family-Law-women-s> (visited 23 November 2020).

96 Judgment of 11 May 2018, *APDF and IHRDA v. Republic of Mali* (046/2016), African Court on Human and Peoples' Rights, §§ 78, 94, 95, 114, 115, 124 and 125. For a commentary on the judgment, see International Justice Resource Center, 'African Court finds Mali's family law violates human rights obligations', 29 May 2018.

97 *Lubanga* Reparations Principles, §§ 47 and 38.

98 First Expert Report, at 35.

99 *Ibid.*

100 TFV Submission of Draft Application Form, § 39.

recipients would have been daunting, and its implementation, socially complicated. Fortunately, it did not come to this. After numerous exchanges with intermediaries and heads of families, it was accepted that reparations are governed by certain legal principles that require a gender-inclusive approach, and cooperation ensued.

### C. Third Challenge: to Memorialize or Not Memorialize

The Trial Chamber deferred the decision of adopting memorialization measures to the TFV.<sup>101</sup> The significance of memorialization measures — or any symbolic measures for that matter<sup>102</sup> — is easily underestimated because, unlike compensation, they lack an instant monetary or tangible expression. For example, in the context of the Inter-American Court of Human Rights, it has been noted that ‘symbolic reparation, especially memorialization practices, lacks adequate conceptual elaboration, and its potential remains underutilized. This often results . . . in ineffective, even detrimental monuments’.<sup>103</sup>

Something similar could have happened in the *Al Mahdi* implementation since, motivated by the urge to deliver visible results, there were voices proposing an erection of a memorialization monument in Timbuktu. Cautions were conveyed that decisions around memorialization had to be approached with circumspection. This is because memorialization measures engage into a dialogue with the past where new meaning is constructed.<sup>104</sup> Co-existing groups may understand their message differently.<sup>105</sup> Moreover, at some point more or less distant in the future, memorialization sites can become the subject of contestation and conflict.<sup>106</sup> Thus, memorialization measures are as powerful as they are delicate, and any decision concerning their appropriateness had to be treated with extreme care. Here, consulting the matter with experts became essential.

Some of the consulted academics cautioned against a top-down approach where decisions would be taken in The Hague; otherwise, the project could be

101 *Al Mahdi* Reparations Order, § 90.

102 On the different types of symbolic reparations, see Symbolic Reparations Research Project, *Guidelines on the Use of Art in Symbolic Reparations* (2017) at 2, available online at [https://issuu.com/symbolicreparations/docs/srrp\\_guidelines-letterhead\\_engl\\_2\\_](https://issuu.com/symbolicreparations/docs/srrp_guidelines-letterhead_engl_2_) (visited 24 May 2021).

103 R.A. Greeley et al., ‘Repairing Symbolic Reparations: Assessing the Effectiveness of Memorialization in the InterAmerican System of Human Rights’, 14 *International Journal of Transitional Justice* (2020) 165–192, at 167.

104 E. Kamel-Ahmed, ‘What to Conserve? Heritage, Memory, and Management of Meanings’, 9 *International Journal of Architectural Research* (2015) 67–76, at 73.

105 D. Viejo-Rose, ‘Memorial Functions: Intent, Impact and the Right to Remember’, 4 *Memory Studies* (2011) 465–480, at 472.

106 L. Moffett, D. Viejo Rose and R. Hickey, ‘Shifting the Paradigm on Cultural Property and Heritage in International Law and Armed Conflict: Time to Talk about Reparations?’ 26 *International Journal of Heritage Studies* (2019) 1–17, at 9; see also, K. Hodgkin, and S. Radstone, ‘Introduction’, in K. Hodgkin, and S. Radstone (eds), *Contested Pasts: The Politics of Memory* (Routledge, 2003) 1–21.

rejected, accused of partiality and its meaning could be contested.<sup>107</sup> For example, the destruction of the Mostar bridge in the Balkan War (1993) stood as a symbol of the collapse in communication between the two peoples it connected, Bosniaks and Croats.<sup>108</sup> The way it was reconstructed was, however, the result of foreign intervention spearheaded by the World Bank and UNESCO. The 'international tender for the reconstruction works on the Old Bridge was won by the Turkish company'<sup>109</sup> and the preliminary project was prepared by a Florence-based studio.<sup>110</sup> The new bridge subsequently fell short of 'reconstructing, by extension, the links of trust and communication between the town's communities',<sup>111</sup> casting doubts about whether this reconstruction should have taken place and if so, how it should have been done.

Learning from these past lessons and the advice provided, the TFV developed the concept of 'restorative agency',<sup>112</sup> a principle that it has used since *Al Mahdi* to make sure that victims are given a platform to decide, not a decision. It entails a paradigm shift that tries to move away from the risk of 're-silencing victims negating their potential for agency and reproducing the sense of powerless',<sup>113</sup> and instead ensures that victims are 'integrated from the start in determining the nature, objectives and forms of symbolic reparations'.<sup>114</sup>

Under this principle, victims should be invited to become active actors in the shaping of any memorialization measure, and to decide what specific course of action (including non-memorialization) serves a higher restorative function for them. In sum, there is no emphasis on achieving a specific result, but on the existence of process that 'should transform the victim into an active participant and beneficiary'.<sup>115</sup>

The principle of restorative agency includes two dimensions: one formal, consisting of ensuring that the process provides a safe and inclusive space for the victims to hold discussions and take decisions; and one substantive, consisting of ensuring that the discussions they hold lead to reflect upon the traumatic event, and the type of presence and meaning victims would want to afford it for the future.

Applied to the *Al Mahdi* case, the formal aspect required taking into account that the community in Timbuktu is organized along very distinct lines of age

107 TFV Updated Implementation Plan, § 161.

108 D. Viejo-Rose, 'Reconstructing Heritage in the Aftermath of Civil War: Re-Visioning the Nation and the Implications of International Involvement', 7 *Journal of Intervention and Statebuilding* (2013) 125–148, at 113.

109 I. Colak, 'The Reconstruction of the Old Bridge in Mostar', 15 *DAAAM International Scientific Book* (2016) 151–162, at 157.

110 *Ibid.*

111 Viejo-Rose, *supra* note 108, at 113.

112 The 'restorative agency' principle seems to have been welcomed by recent literature specialized in heritage management, see C. Joy, *Heritage Justice* (Cambridge University Press, 2020), at 39–40.

113 K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', 22 *Social & Legal Studies* (2013) 489–513, at 498.

114 See Greeley et al., *supra* note 103, at 188.

115 Symbolic Reparations Research Project, *supra* note 112, at 4.

and gender. As a result, mixing all of members of this community into one sole discussion group would have effectively meant silencing some voices, most prominently that of women and the youth. Moreover, the source of contestation of memorialization measures does not often stem from 'conflicting accounts of what actually happened ... so much as [from] the question of who is entitled to speak for that past in the present'.<sup>116</sup> Therefore, the TFV proposed creating six memorialization committees corresponding to (i) young adult men; (ii) young adult women; (iii) elderly men; (iv) elderly women; (v) children; and (vi) the displaced population. Each committee is meant to independently deal with the substantive questions posed (see below). Then, a 'representative from each one of the groups would examine together in a supra-committee whether any of their proposals can be joined. If not, they would be implemented independently'.<sup>117</sup>

As to the substantive dimension of the principle, the committees are not meant to gather once in a solemn occasion to adopt a one-off decision. They are instead supposed to engage into conversation to discuss and decide on three discrete questions: *whether*, *what* and *how* to memorialize.<sup>118</sup>

*Whether* to memorialize should be the first key question to address. Both putting in place a memorialization measure and choosing not to do so are equally forms of action. Some groups may prefer some sort of wilful amnesia so as not to make the disruptive event a constant present in their lives. Past experiences have proved this. In the *Katanga* case, victims 'specifically rejected ... commemorative events, broadcasts of the trial, the erection of monuments'<sup>119</sup> on the grounds that they would be 'unsuitable or pointless, or could cause fresh trauma or exacerbate social unrest'.<sup>120</sup> Other groups may regard memorialization or any symbolic measures futile if there is not an instant return coming from it. For example, in *Ntaganda*, victims were not favourable to symbolic reparations unless they incorporated a 'practical purpose'.<sup>121</sup>

Deciding *what* to memorialize is central to the concrete message that victims want to convey. Past common traumatic events may trigger 'different associations and feelings'.<sup>122</sup> 'What' to memorialize entails prioritizing some memories and associations over others. For example, a group may want to commemorate the crime of destruction of cultural heritage and the feeling of helplessness and despair, whereas another may prefer to shift attention to the moment of reconstruction and focus on messages around community resilience.

*How* to memorialize entails discussing whether the measure should be tangible, non-tangible, specific in time, recurring or permanent. For example,

116 K. Hodgkin and S. Radstone, *supra* note 106, at 1.

117 TFV Updated Implementation Plan, § 162.

118 TFV Updated Implementation Plan, § 161.

119 Order for Reparations pursuant to Article 75 of the Statute, *Katanga* (ICC-01/04-01/07-3728-tENG), Trial Chamber II, 24 March 2017, § 301.

120 *Ibid.*

121 *Ntaganda* Reparations Order, § 9.

122 B.A. Misztal, *Theories of Social Remembering* (Mc-Graw Hill, 2003), at 11.

memorials carved ‘in stone are ... a Western tradition not globally shared’.<sup>123</sup> Carving a message in stone, naming a street, or erecting a statue, are also forms of memorialization that intend to be immutable and permanent. In contrast, groups may favour episodic forms of memorialization such as a one-off performance, a remembrance day, or an annual festival. Thus, how to memorialize is an important decision because it modulates the presence and intensity of the past in the present and future.

The role of the TFV in this scenario is meant to sit at the margin of the discussion and in no way should it be understood as being an actor involved in the actual discussion. Its role would be limited to examining the final proposals of the committees, if any, just ensure that they are connected to Mr Al Mahdi’s crime and stay within the budget of EUR 24,000 per committee.<sup>124</sup> In principle, there is no limit to how many times the committees can meet, as long as they stay within the given timeframe and budget.

## 5. Conclusion

Each reparations case comes with its own in-built uniqueness: different list of charges, different area, local customs and internal dynamics among the affected population. At this stage in the lifespan of reparations at the Court, there is little repetition and monotony in how reparations are implemented. The implementation process therefore comes with questions that are as theoretically complex as practically relevant. Quick answers and quick solutions, while very much needed, are not readily available and there is still a steep learning curve. This article provides three illustrative examples of how this played out in the *Al Mahdi* case, which had the added layer of complexity of involving cultural heritage destruction alone.

The strategy adopted in *Al Mahdi* involved seeking ad hoc expert knowledge to ensure that there was a thick framework of reference to propose informed measures to the Trial Chamber. However, the time is arriving where some scenarios are bound to re-appear and complex questions will not sound that foreign anymore. For example, there is a partial overlap in the conviction against *Lubanga* and *Ntaganda* for recruiting and conscripting child soldiers; the charges in the *Al Hassan* case include the destruction of the same protected buildings for which Mr Al Mahdi was convicted; the *Ntaganda* case is the first one with a pronounced gender component but, in all probability, not the last, and so forth. Knowing this, it would be advisable that the Court, and especially the TFV, make a conscious effort and take concrete steps to build an institutional memory around reparations of the issues encountered, the strategy adopted, and the lessons learnt along the way. The Independent Expert

<sup>123</sup> Moffett, Viejo Rose and Hickey, *supra* note 106, at 9.

<sup>124</sup> TFV Updated Implementation Plan, §§ 163 and 165.

Review of the ICC noticed the lack of guidelines on the reparations process and recommended the creation of a document for the sake of coherence and expediency.<sup>125</sup> A document of the sort (e.g. a reparations practice manual) would also ensure resorting to outside experts only when necessary. Otherwise, in the long run, there would be a risk of duplicating work, achieving disparate solutions, extending the process longer than necessary, and draining resources. Moreover, making this document public to the extent possible, would provide a platform to receive feedback and engage in discussions with wider audiences which, in exchange, would be made aware of the complexities beneath the surface of reparations.

The time of having it all figured out in the implementation of reparations has not yet come, and perhaps never will entirely, but keeping a record of these issues is a definitive step towards achieving better processes and better results. This article has tried to provide a modest initial contribution to this end.

125 Independent Expert Review of the International Criminal Court and the Rome Statute System, 'Final Report', 30 September 2020, § 927, available online at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf) (visited 24 September 2021).