

Enforcing Freedom of Religion or Belief in Cases Involving Attacks Against Buildings Dedicated to Religion: The *Al Mahdi* Case at the International Criminal Court^{†*}

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The international community has increasingly witnessed widespread and systematic attacks on buildings dedicated to religion in armed conflicts. Such violations of international law have deprived many individuals of places to express their beliefs within their communities. Although international law sources already protect these buildings, recent experience suggests that greater protections are required, particularly in times of armed conflict. This Article seeks to determine the extent to which the International Criminal Court (ICC) can operate to protect human rights, particularly the right to freedom of religion or belief, while dealing with intentional attacks against buildings dedicated to religion. The Al Mahdi case at the ICC provides the analytical foundation for this research. Al Mahdi was convicted in 2016 of the war crime of attacking buildings dedicated to religion. The attack, implemented by a militant group associated with al Qaeda, targeted ten religious buildings in Timbuktu, Mali, severely affecting the city's religious and cultural diversity. A critical analysis of the Al Mahdi case provides normative guidelines for legal issues arising from the protection of buildings dedicated to religion during armed conflicts. This Article argues that the ICC largely focused on violations of the collective right to cultural life at the expense of a proper consideration of serious breaches of freedom of religion or belief. We also discuss potential interactions between the ICC and international human rights law.

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INTRODUCTION

Buildings dedicated to religion, such as holy places, temples, and burial sites, are legally protected during armed conflicts. This protection is based on international humanitarian law, international human rights law, and international criminal law. These legal disciplines are based on treaties, customs, and principles that offer different levels of protection for buildings dedicated to religion. For such protection to be maximized, international courts should consider these legal fields to be cumulative and mutually reinforcing. For example, the 1998 Rome Statute of the International Criminal Court defines intentional “attacks against buildings dedicated to religion” as a war crime.¹ Attacks on religious buildings violate the laws and customs applicable in armed conflicts,² and such attacks also violate international human rights law.³ Consequently, the International Criminal Court (ICC) should apply the Rome Statute, general principles of international law, and its own jurisprudence while remaining “consistent with internationally recognised human rights.”⁴

The first case decided by the ICC regarding attacks against buildings dedicated to religion is *Prosecutor v. Al Mahdi*.⁵ In 2010, Al Mahdi and members of Ansar Dine—a movement associated with al Qaeda in the Islamic Maghreb (AQIM)—attacked ten religious buildings located in Timbuktu, Mali, severely diminishing the religious and cultural diversity of the community of Timbuktu.⁶ Al Mahdi was arrested and later convicted of the war crime of attacking buildings dedicated to religion under Article 8(2)(iv) of the Rome Statute.⁷ Consequently, an in-depth analysis of the *Al Mahdi* case provides specific normative guidelines for cases involving buildings dedicated to religion, as well as general standards of protection of human rights during armed conflicts.

The *Al Mahdi* case was highly anticipated, especially considering that the Court can hold individuals criminally accountable for their crimes and order

¹ Rome Statute of the International Criminal Court, arts. 8(2)(b)(ix), 8(2)(e)(iv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² See, e.g., JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 34 (2010).

³ See U.N. Human Rights Comm., *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc. CCPR/C/21/Rev.1/Add.4, ¶ 4 (July 30, 1993) [hereinafter UN Human Rights Committee General Comment 22].

⁴ Rome Statute, *supra* note 1, art. 21(3).

⁵ *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016) [hereinafter *Al Mahdi* (Judgment and Sentence)].

⁶ *Id.* ¶ 31.

⁷ *Id.* ¶ 1, at 49.

reparations for the victims against the convicted person.⁸ However, this Article argues that the case did not live up to expectations, with the Court largely focusing on collective cultural rights related to the destruction of protected monuments in Timbuktu at the expense of an in-depth consideration of serious breaches of other human rights. Therefore, after *Al Mahdi*, the central question addressed in this paper is whether and to what extent the ICC has protected freedom of religion or belief while dealing with intentional attacks against buildings dedicated to religion.

The novelty of and need for the present research arises from the fact that both the ICC and the subsequent legal literature on the *Al Mahdi* case have largely or exclusively focused on cultural dimensions, while neglecting relevant aspects related to freedom of religion or belief.⁹ The present Article critically examines this elephant in the room once and for all.

This Article first explores the framework of protections for buildings dedicated to religion in international humanitarian law, international human rights law, and international criminal law (Section I.A). Second, it examines the ICC's human rights jurisprudence, with a focus on *Al Mahdi* (Section I.B). Third, it critically analyzes whether the ICC adequately accounted for freedom of religion or belief in *Al Mahdi* (Section II.A). Finally, it assesses the components of the reparations order of the Court in *Al Mahdi* (Section II.B). Considering all of these elements, this Article offers a systematic examination of the *Al Mahdi* case, in an attempt to provide (further) legal certainty in cases related to intentional attacks on buildings dedicated to religion in international law, particularly international criminal law. An underlying thread throughout this Article is whether and to what extent the ICC may contribute to the enforcement of human rights in mass atrocities, particularly with respect to freedom of religion or belief.

I.

PROTECTION OF BUILDINGS DEDICATED TO RELIGION AND HUMAN RIGHTS AT THE ICC

The universal protection of “buildings dedicated to religion” during armed conflict is a relatively recent legal innovation, coming into existence with the

⁸ See, e.g., ICC Appeals / Three appeals judgements in *Bemba et al*, *Katanga and al-Mahdi cases*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT (Mar. 9, 2018), <http://www.coalitionfortheicc.org/news/20180309/icc-appeals-three-appeals-judgements-bemba-et-al-katanga-and-almahdi-cases>.

⁹ See, e.g., Paige Casaly, *Al Mahdi before the ICC Cultural Property and World Heritage in International Criminal Law*, 14 J. INT'L CRIM. JUSTICE 1199–1220 (2016); Sophie Starrenburg, *Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, EJIL: TALK! (Aug. 25, 2017), <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/>; Serge Brammertz, et al., *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, 14 J. INT'L CRIM. JUSTICE 1143–74 (2016).

adoption of the Rome Statute in 1998.¹⁰ However, more limited international protections have existed for hundreds of years. This Section details the history of the evolution of protections for buildings dedicated to religion. A range of terms—varying in scope but often used interchangeably¹¹—appear in other legal sources: “religious sites,”¹² “sacred places,”¹³ “meeting places,”¹⁴ “places of worship,”¹⁵ and “holy sites”¹⁶ are now used to describe religious buildings protected by international law. Although this Article uses the wording of the Rome Statute, the aforementioned terms are also employed where appropriate.

A. Protection of Buildings Dedicated to Religion in International Humanitarian Law, International Human Rights Law, and International Criminal Law

1. International Humanitarian Law

The protection of buildings dedicated to religion has continuously evolved throughout history. In times of war, it was common for one civilization to take over its enemies’ religious sites and destroy or repurpose them.¹⁷ Historical examples include the Christian destruction of pagan temples from the fourth century onward,¹⁸ as well as the Muslim repurposing of holy places such as the Hagia Sophia in Istanbul and the Dome of the Rock in Jerusalem.¹⁹ More recently, the destruction of the Babri Masjid mosque in 1992 presented a difficult case for Indian courts determining ownership of the site.²⁰ Religion has played a

¹⁰ Rome Statute, *supra* note 1, art. 8(b)(ix) (defining a war crime as “intentionally directing attacks against buildings dedicated to religion”).

¹¹ HEINER BIELEFELDT, et al., FREEDOM OF RELIGION OR BELIEF: AN INTERNATIONAL LAW COMMENTARY 118–19 (2016).

¹² *See, e.g.*, G.A. Res. 55/254, Protection of Religious Sites (May 31, 2001).

¹³ *See, e.g.*, SILVIO FERRARI & ANDREA BENZO, BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE: THE LEGAL PROTECTION OF THE SACRED PLACES OF THE MEDITERRANEAN 1–2 (2014).

¹⁴ EUR. PARL. ASS., Tackling intolerance and discrimination in Europe with a special focus on Christians, 2015—First part-session, Doc. No. 13660, ¶ 6.8 (Jan. 29, 2015), <http://semanticpace.net/default.aspx?search=Y2F0ZWdvcnlf3RyX2VuOiJBZG9wdGVkIHRleHOj> (enter search terms “tackling intolerance and discrimination” and select the document dated Jan. 29, 2015).

¹⁵ *See, e.g.*, Prof. W. Cole Durham Jr., *Places of Worship: Enhancing Implementation of a Core Human Right*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (July 13, 2009), <https://www.osce.org/odihr/38068?download=true>.

¹⁶ *See, e.g.*, Search for Common Ground, et al., *Universal Code of Conduct on Holy Sites* (Jan. 2011), <https://www.codeonholysites.org/translations-of-the-code>.

¹⁷ Kevin Chamberlain, WAR AND CULTURAL HERITAGE: AN ANALYSIS OF THE 1954 CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS 7 (Institute of Art and Law, 2nd ed. 2013).

¹⁸ *See* CATHERINE NIXEY, THE DARKENING AGE: THE CHRISTIAN DESTRUCTION OF THE CLASSICAL WORLD 83–88, 91–100 (2017).

¹⁹ DIARMAID MACCULLOCH, A HISTORY OF CHRISTIANITY: THE FIRST THREE THOUSAND YEARS 260 (2010).

²⁰ *See, e.g.*, M. Siddiq (D) Thr. Lrs. v. Mahant Suresh Das, (2019) 4 SCC 641 (India).

significant role in these conflicts, as religion both requires the protection of holy places and may be used to justify attacks on other religious sites.²¹

Unsurprisingly, religion also played a major role in the formation of international law, even though the relationship is more nuanced than one might assume. Martti Koskenniemi has explained that “‘religion’ and ‘international law’ relate to each other, sometimes supporting, sometimes colliding against each other.”²² For example, religious groups used “just war” theories as a framework to either restrain the use of force against enemies or legitimize persecution of dissenters and other religious groups.²³ The Peace of Westphalia (1648) also provides a classic example of the centrality of religion in the early evolution of international law. This treaty provided for the indirect and highly selective protection of buildings dedicated to religion, as it granted members of major Christian groups the right to worship in private and public churches at “appointed Hours.”²⁴ The development of the protection of buildings dedicated to religion remained selective for centuries, with protections limited to members of certain religious groups or circumscribed to specific States.²⁵

Protection of buildings dedicated to religion began to expand during the second half of the nineteenth century as international declarations started to emphasize the notion that religious buildings deserved protection regardless of their affiliation. The Brussels Declaration (1874) established that seizure, destruction, or willful damage to “institutions dedicated to religion” (*établissements consacrés aux cultes*) “should be made the subject of legal proceedings by the competent authorities.”²⁶ Although it provided an exception for times of urgent military necessity, the Oxford Manual (1880) included a similar provision.²⁷ The Oxford Manual expanded protections for religious

²¹ See additional examples of destruction and appropriation of sacred places by other religious groups in Patrick J. Boylan, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: (THE HAGUE CONVENTION OF 1954) ¶¶ 2.4–2.5 (1993).

²² MARTTI KOSKENNIEMI, et al., INTERNATIONAL LAW AND RELIGION: HISTORICAL AND CONTEMPORARY PERSPECTIVES 18 (2017).

²³ See MALCOLM D EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 22–41 (1997); Mark W. Janis, *Religion and Literature of International Law: Some Standard Texts*, in RELIGION AND INTERNATIONAL LAW 121–40 (Mark W. Janis & Carolyn Evans eds., 2004).

²⁴ Treaty of Peace Between France and the Empire, art. XXVIII, Oct. 24, 1648, 1 C.T.S. 271 [hereinafter Treaty of Westphalia]; see also Knox Thames, *Old is New: Europe and Freedom of Religion or Belief*, in THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW 150 (Malcolm D. Evans, et al. eds., 2015).

²⁵ See, e.g., Francis Lieber, Instructions for the Government of Armies of the United States in the Field, art. 34, General Orders No. 100 (Apr. 24, 1863) [hereinafter Lieber Code], <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=A25AA5871A04919BC12563CD002D65C5>.

²⁶ See, e.g., Project of an International Declaration concerning the Laws and Customs of War, art. 8, Aug. 27, 1874, 1 A.J.I.L. (Supp.) 96, 65 B.F.S.P. 1005, reprinted in THE LAWS OF ARMED CONFLICTS 27 (Dietrich Schindler & Jiří Toman eds., 3rd rev. ed. 1988) [hereinafter 1874 Brussels Declaration]; see also ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 22 (2006).

²⁷ The Laws of War on Land, art. 53, Sept. 9, 1880, adopted by the Institute of International Law

buildings by declaring that “[i]n case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion (*les édifices consacrés aux cultes*).”²⁸ Additionally, the Oxford Manual emphasized that religious conviction and practices should be respected during wars.²⁹ Nevertheless, a treaty-based protection of buildings dedicated to religion was not formulated until the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, which is largely based on its predecessors.³⁰ The 1907 Hague Convention (IV) has been in force since January 26, 1910; however, it has only been ratified by thirty-eight States and is therefore far from being universally accepted.³¹

After 1910, there was a notable lack of development in the protection of buildings dedicated to religion, which might seem counterintuitive. While one might expect subsequent treaties to provide more robust protection for such buildings in international humanitarian law, especially after major conflicts, the opposite occurred. For example, the Roerich Pact (1935), which was drafted to protect artistic and scientific institutions and historic monuments, made no reference to buildings dedicated to religion.³² After the Second World War, the United Nations Educational, Scientific and Cultural Organization (UNESCO) assisted States in drafting the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).³³ The 1954 Hague Convention only mentioned religious property once, and included this category under a strict definition of cultural property: “For the purposes of the present Convention, the term ‘cultural property’ shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether *religious* or *secular*.”³⁴

Therefore, the only buildings dedicated to religion that the 1954 Hague Convention covered were those of great importance to the cultural heritage of

[hereinafter Oxford Manual].

²⁸ *Id.* at art. 34.

²⁹ *Id.* at art. 49.

³⁰ *Cf.* The Hague Convention (IV) respecting the Laws and Customs of War on Land annex: Regulations Respecting the Laws and Customs of War on Land, arts. 27 & 56, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter The 1907 Hague Convention (IV)], with Oxford Manual, *supra* note 27, arts. 34 & 53.

³¹ *Treaties, State Parties, and Commentaries to The Hague Convention IV*, ICRC, (last visited Sept. 24, 2019), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195.

³² Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 289 [hereinafter Roerich Pact].

³³ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, S. Treaty Doc. 106-1, 249 U.N.T.S. 216 [hereinafter 1954 Hague Convention].

³⁴ *Id.* art. 1(a) (emphasis added).

every people.³⁵ This protection is substantially narrower than the protection provided by the 1907 Hague Convention (IV),³⁶ as the vast majority of religious buildings fall outside the scope of the 1954 definition. In 1999, UNESCO strengthened the protection of cultural property in its Second Protocol to the Hague Convention for the Protection of Cultural Property (1999 Second Protocol),³⁷ providing stronger protection for buildings considered as having cultural heritage status and adding some elements contained in the Rome Statute.³⁸ Nonetheless, the 1999 Second Protocol did not promote more robust protection for buildings that are dedicated to religion but are not considered as cultural heritage.³⁹ In practice, UNESCO has registered 1,121 properties in the World Heritage List (as of 2019),⁴⁰ yet only about 20 percent of these properties “have some sort of religious or spiritual connection.”⁴¹ Consequently, despite the importance of these buildings, UNESCO treaties afford minimal protections to buildings dedicated to religion.

Likewise, the Geneva Conventions mention only the protection of “places of worship which constitute the cultural or spiritual heritage of peoples” in the Protocols, which were adopted in 1977, twenty-eight years after the original Conventions.⁴² This provision generated much controversy when it was being drafted,⁴³ yet it is clear from the official records that protection was not intended to extend to all places of worship, but only those “which constitute the cultural or spiritual heritage of peoples.”⁴⁴ Once again, the extent to which these international

³⁵ *Id.*

³⁶ The 1907 Hague Convention (IV), *supra* note 30, arts. 27, 56.

³⁷ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172, 38 I.L.M. 769 [hereinafter 1999 Second Protocol].

³⁸ DIETRICH SCHINDLER & JIŘÍ TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 1037 (Martinus Nijhoff 4th rev. and completed ed., 2004).

³⁹ See 1999 Second Protocol, *supra* note 37, art. 10.

⁴⁰ *World Heritage List*, UNESCO, <https://whc.unesco.org/en/list/><https://whc.unesco.org/en/list/> (last visited Sept. 24, 2019).

⁴¹ *Heritage of Religious Interest*, UNESCO <https://whc.unesco.org/en/religious-sacred-heritage/><https://whc.unesco.org/en/religious-sacred-heritage/> (last visited Sept. 24, 2019).

⁴² Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 53, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions Protocol I]; Protocol Additional to the Geneva Conventions Aug. 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 16, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Conventions Protocol II].

⁴³ CLAUDE PILLOUD, ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, ¶ 4828 (Yves Sandoz, et al., eds., 1987).

⁴⁴ *Id.* ¶ 4839. *But see* Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, ¶ 62, ICRC Doc. CDDH/236/Rev.1 (June 11, 1976) (noting disagreement in the working group over whether any place of worship constitutes the cultural heritage of peoples, or only places that were particularly formative of that cultural heritage).

treaties have refrained from mentioning religious buildings in their terminology is puzzling. Recent International Committee of the Red Cross (ICRC) materials provide further evidence of a discomfort with religious terms. The Third Additional Protocol to the Geneva Conventions (Protocol III), for example, emphasized that the ICRC's two iconic emblems—the Red Cross and the Red Crescent—are not intended to have any religious significance and added a third, arguably neutral, Red Crystal emblem.⁴⁵

The ICRC has, however, recently identified some essential rules of customary international humanitarian law related to the protection of all buildings dedicated to religion during armed conflict. It recognized such rules only after the advent of the Rome Statute, suggesting that this protection has only recently become part of customary law.⁴⁶ Rule 9 provides that “[c]ivilian objects are all objects that are not military objectives,” and includes places of worship in the description.⁴⁷ Rule 10 emphasizes that “[c]ivilian objects are protected against attack,” thus relating this rule to the protection that the Rome Statute provides in Articles 8(2)(b)(ix) and 8(2)(e)(iv), which will be further examined below.⁴⁸ Rules 38 and 40 specify the protection of cultural property and define buildings dedicated to religion as a subdivision of this category.⁴⁹ Rule 104 provides that “[t]he convictions and religious practices of civilians and persons *hors de combat* must be respected.”⁵⁰ This rule emphasizes that freedom of religion or belief must be respected even in times of armed conflict, and its interpretation is based on international human rights law.⁵¹ Finally, Rule 147 prohibits reprisals against protected objects, including buildings dedicated to religion, while Rule 156 describes the destruction of such buildings as a war crime.⁵²

By overlooking the essence of buildings dedicated to religion, international humanitarian law has overlooked fundamental human rights related to these buildings. Indeed, as Gerd Oberleitner has argued, certain human rights, such as freedom of religion or belief, are often “side-lined as less important in armed

⁴⁵ See Protocol additional to the Geneva Conventions Aug. 12, 1949, and relating to the adoption of an additional distinctive emblem (Protocol III), Preamble ¶ 5, Dec. 8, 2005, 45 I.L.M. 558 [hereinafter Geneva Conventions Protocol III].

⁴⁶ We suggest that the text of the Rome Statute, *supra* note 1, arts. 8(2)(b)(ix) and 8(2)(e)(iv), expanded the protection to all buildings dedicated to religion instead of restricting it only to those of defined as cultural heritage. This point is further highlighted *infra* Section I.A.iii. See Manlio Frigo, *Cultural property v. cultural heritage: A “battle of concepts” in international law?*, 86 INT’L REV. RED CROSS 367, 377 (2004). But see Michael Bothe, *War Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379, 410 (Antonio Cassese, et al. eds., 2002); and Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L L. 203, 210–12 (2011).

⁴⁷ HENCKAERTS & DOSWALD-BECK, *supra* note 2, at 34.

⁴⁸ *Id.* at 34–35 n. 69.

⁴⁹ *Id.* at 127 and 132.

⁵⁰ *Id.* at 375.

⁵¹ *Id.* at 377–78.

⁵² *Id.* at 523–26 and 596–97.

conflicts.”⁵³ Thus, a human rights-based approach must be taken when analyzing cases related to the protection of buildings dedicated to religion during armed conflicts.

2. *International Human Rights Law*

The protection of buildings dedicated to religion in international human rights law has developed slowly and has been largely connected to the protection of freedom of religion or belief. At the global level, the obligation to protect freedom of religion or belief in international human rights law largely stems from Article 18 of the Universal Declaration of Human Rights,⁵⁴ and Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR), which states that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁵⁵

The ICCPR does not explicitly provide for the protection of religious or cultural buildings, as the 1954 Hague Convention does.⁵⁶ The ICCPR provides for the protection of the individual right to freedom of religion or belief, a right which includes the freedom to worship in community with others. Since people often gather together to worship in buildings dedicated to religion, these buildings are essential for the realization of the right to freedom of religion or belief.⁵⁷ This protection applies even in times of public emergency, as the ICCPR does not permit any derogation of the right to freedom of religion or belief.⁵⁸ Other human rights are also related to the protection of buildings dedicated to religion, as the existence of these buildings may promote freedom of expression, freedom of assembly, the rights of members of minority groups to practice their own religion, as well as the right of everyone to take part in cultural life.⁵⁹

⁵³ GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 113 (2015).

⁵⁴ G.A. Res. 217 A (III), Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948) [hereinafter U.D.H.R.].

⁵⁵ International Covenant on Civil and Political Rights, art. 18(1), Dec. 16, 1966, 999 U.N.T.S. 171, 178 [hereinafter ICCPR].

⁵⁶ Compare *id.* with 1954 Hague Convention, *supra* note 33, art. 1.

⁵⁷ See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 9, Nov. 4, 1950, E.T.S. 5 [hereinafter E.C.H.R.]; American Convention on Human Rights, art. 12, Nov. 22, 1969, O.A.S. T.S. 36 [hereinafter A.C.H.R.]; African Charter on Human and Peoples' Rights, art. 8, June 27, 1981, (1982) 21 I.L.M. 58 [hereinafter Banjul Charter].

⁵⁸ ICCPR, *supra* note 55, art. 4(2).

⁵⁹ *Id.* arts. 18, 19, 21, 27; International Covenant on Economic, Social and Cultural Rights, art. 15(a).

Nonetheless, most human rights claims about the protection of buildings dedicated to religion are related to the right to freedom of religion or belief, which according to Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, “necessarily includes provisions concerning places of worship, i.e. their construction, renovation, ownership, availability, and accessibility.”⁶⁰ This interpretation is largely based on how soft law documents have developed in this area at the United Nations (UN). The UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Arcot Krishnaswami, wrote a study in 1959 that contained several passages explaining the need to protect places of worship as an integral part of the right to freedom of religion or belief, as well as some “Basic Rules” to assist States in protecting this right.⁶¹ This extensive study was later shortened, and references to places of pilgrimage and burial sites were removed from subsequent documents,⁶² such as the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.⁶³ In 1993, the Human Rights Committee, in General Comment No. 22, reiterated that freedom to manifest religion or belief in worship encompasses, inter alia, “ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship.”⁶⁴

This issue received much more attention at the UN in the 2000s, when terrorist groups started targeting religious sites. The destruction of the Buddhas of Bamiyan by the Taliban in March 2001 generated a swift response from the General Assembly. The resulting Resolution 55/254 aimed to reinforce the protection of religious sites by calling on “all States to exert their utmost efforts to ensure that religious sites are fully respected and protected in conformity with international standards and in accordance with their national legislation and to adopt adequate measures aimed at preventing such acts or threats of violence.”⁶⁵

Another significant document in this area was UN Human Rights Council Resolution 6/37, which highlighted the need for complementarity in protecting buildings dedicated to religion and acknowledged the importance of the work of the Special Rapporteur in this area.⁶⁶ Resolution 6/37 urged States

[t]o exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that

opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

⁶⁰ BIELEFELDT, et al., *supra* note 11, at 118.

⁶¹ Arcot Krishnaswami (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc. E/CN.4/Sub.2/200/Rev.1 (1960).

⁶² BIELEFELDT, et al., *supra* note 11, at 120.

⁶³ G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 6(a) (Nov. 25, 1981).

⁶⁴ UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4.

⁶⁵ G.A. Res. 55/254, *supra* note 12, ¶ 2.

⁶⁶ Human Rights Council Res. 6/37, UN Doc. A/HRC/RES/6/37, ¶¶ 16–20 (Dec. 14, 2007).

religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction.⁶⁷

Even though this resolution amplified the content of human rights treaties in this area, its adoption was not unanimous.⁶⁸ It was adopted by twenty-nine votes with eighteen abstentions, which makes it difficult to qualify the resolution as consensual or consider it as giving hard content to treaties.⁶⁹ Nevertheless, it is noteworthy that the General Assembly has, in some instances, considered the impacts of the destruction of buildings dedicated to religion on the enjoyment of the right to freedom of religion or belief.⁷⁰

Notably, UN Special Rapporteurs on Freedom of Religion or Belief have repeatedly reported on issues related to the protection of buildings dedicated to religion and provided clear normative guidelines in this area. These reports range from carefully worded descriptions of human rights violations in connection to places of worship to naming and shaming States that do not protect religious sites.⁷¹ The late Special Rapporteur Asma Jahangir emphasized that “places of worship, religious sites and cemeteries have more than a material significance for the religious community attached to them,” thus suggesting that “the concept of collective heritage of humankind could be used more prominently with regard to the preservation and protection of religious sites.”⁷² This approach aligns with that of the 1954 Hague Convention,⁷³ despite its limitations (as explained above). In a later report, Jahangir flagged two important interrelated issues regarding the protection of places of worship: “the deliberate destruction of and attacks on places [of] worship and other religious sites of a specific community by non-State actors,”⁷⁴ as well as discrimination and violence on the basis of religion or belief as demonstrated in “frequent attacks on places of worship and the desecration of cemeteries.”⁷⁵ Concerning the situation in Mali specifically, Special Rapporteur Heiner Bielefeldt noted the destruction of religious sites in Timbuktu,⁷⁶ and the

⁶⁷ *Id.* ¶ 9 (e).

⁶⁸ ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 218 (2017).

⁶⁹ *Id.* at 226.

⁷⁰ *See, e.g.*, G.A. Res. 72/177, Freedom of religion or belief, ¶ 13 (d) (Jan. 29, 2018); G.A. Res. 73/176, Freedom of religion or belief, ¶ 13 (d) (Jan. 14, 2019).

⁷¹ Abdelfattah Amor (Special Rapporteur of the Commission on Human Rights on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief), *Interim Report*, ¶ 27, UN Doc. A/56/253 (July 31, 2001).

⁷² Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Annual Report*, ¶ 53, UN Doc. A/HRC/10/8 (Jan. 6, 2009).

⁷³ 1954 Hague Convention, *supra* note 33, art. 1.

⁷⁴ Asma Jahangir (Special Rapporteur on Freedom of Religion or Belief), *Annual Report*, ¶ 27, UN Doc. A/HRC/13/40 (Dec. 21, 2009).

⁷⁵ *Id.* ¶ 35.

⁷⁶ Heiner Bielefeldt (Special Rapporteur on Freedom of Religion or Belief), *Report on Freedom of religion or belief of Persons Belonging to Religious Minorities*, ¶ 48 n. 29, UN Doc. A/HRC/22/51

UN also created another special procedure to explicitly address issues related to the ongoing armed conflict in the country: the Independent Expert on the situation of human rights in Mali.⁷⁷

Initially, the Independent Expert acknowledged the destruction of religious buildings in Mali only as a cultural issue.⁷⁸ The ideas posited by the Independent Expert were in line with Security Council Resolution 2100 (2013) on establishment of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), which virtually ignored the religious nature of some cultural buildings.⁷⁹ Only after the ICC convicted Al Mahdi did the Independent Expert fully acknowledge the religious dimension of the sites destroyed by the Ansar Dine/AQIM in Mali, even though he—like the ICC—made no reference to violations of freedom of religion or belief in Timbuktu.⁸⁰

Furthermore, in 2011 the UN Special Rapporteur in the Field of Cultural Rights (originally entitled the Independent Expert in the Field of Cultural Rights), Farida Shaheed, provided a framework for the protection of religious sites that is more in line with the protection of human rights, placing more significance on the religious aspects of these sites.⁸¹ Resolutions adopted by the UN Human Rights Council to provide assistance to Mali also spoke of the importance of religious buildings.⁸² In other reports, the UN Special Rapporteur in the Field of Cultural Rights, Karima Bennouna, further connected the protection of cultural property to public international law,⁸³ quoting the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage,⁸⁴ Security Council Resolution

(Dec. 24, 2012).

⁷⁷ Human Rights Council Res. 22/18, Assistance to the Republic of Mali in the field of human rights, UN Doc. A/HRC/RES/22/18, ¶ 9 (Apr. 10, 2013) [hereinafter Human Rights Council Res. 22/18].

⁷⁸ Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Report on the Visit to Mali*, ¶¶ 88–89, UN Doc. A/HRC/25/72 (Jan. 10, 2014).

⁷⁹ See S.C. Res. 2100, ¶¶ 16 (f), 32 (Apr. 25, 2013). The Security Council acknowledged the religious nature of some religious buildings, although without reference to human rights, after the *Al Mahdi* case was decided by the ICC, in S.C. Res. 2347 (Mar. 24, 2017) [(on destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict)].

⁸⁰ Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Rep. on the Visit to Mali*, ¶ 36, UN Doc. A/HRC/31/76 (Jan. 21, 2016); Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Rep. on the Visit to Mali*, ¶ 37, UN Doc. A/HRC/34/72 (Feb. 10, 2017); see also Suliman Baldo (Independent Expert on the Situation of Human Rights in Mali), *Rep. on the Visit to Mali*, ¶ 22, UN Doc. A/HRC/37/78 (Feb. 2, 2018).

⁸¹ Farida Shaheed (Independent Expert in the Field of Cultural Rights), *Annual Rep.*, ¶ 48, UN Doc. A/HRC/17/38 (Mar. 21, 2011).

⁸² Human Rights Council Res. 22/18, *supra* note 77, ¶ 1; Human Rights Council Res. 25/36, Assistance to the Republic of Mali in the field of human rights, UN Doc. A/HRC/RES/25/36, ¶ 2 (Apr. 15, 2014).

⁸³ See Karima Bennouna (Special Rapporteur in the Field of Cultural Rights), *Rep. on Mapping of Cultural Right and Preliminary Views on Destruction of Cultural Heritage as a Violation of Human Rights*, UN Doc. A/HRC/31/59 (Feb. 3, 2016); Karima Bennouna (Special Rapporteur in the Field of Cultural Rights), *Rep. on Intentional Destruction of Cultural Heritage*, UN Doc. A/71/317 (Aug. 9, 2016).

⁸⁴ UNESCO, Declaration Concerning the Intentional Destruction of Cultural Heritage (Oct. 17, 2003), <http://portal.unesco.org/en/ev.php>

2199 (2015),⁸⁵ the UN Plan of Action to Prevent Violent Extremism,⁸⁶ and Judge Cançado Trindade's opinion related to the interpretation of the International Court of Justice's ruling in the case of the Temple of Preah Vihear.⁸⁷

There are, however, two problems with approaching this topic purely from a cultural rights perspective. Firstly, while most of these documents refer to the protection of religious and cultural sites, UNESCO documents often ignore a religious perspective altogether,⁸⁸ even when explicitly quoting the pertinent international instruments related to such protection.⁸⁹ Secondly, although an expanded view of the protection of cultural rights might be helpful for collective rights in this context, as Special Rapporteur in the Field of Cultural Rights Karima Bennouna suggested in her submission to the Al Mahdi case,⁹⁰ this approach could prevent individuals from bringing claims based on freedom of religion or belief. We argue that these two problems might have contributed to the ICC's focus on collective cultural rights at the expense of individual rights such as freedom of religion or belief. This could be easily avoided, as the Vienna Declaration and Programme of Action explains that "[a]ll human rights are universal, indivisible and interdependent and interrelated."⁹¹ Therefore, all pertinent human rights should be taken into account in situations involving attacks against buildings dedicated to religion.

Another essential feature of human rights law for the advancement of the protection of buildings dedicated to religion is the fact that human rights courts and treaty-based monitoring bodies have already dealt with similar issues. Therefore, such jurisprudence could certainly inform similar cases in situations of armed conflict. The Inter-American Court of Human Rights, for instance, found a violation of the right to freedom of religion or belief in relation to the destruction of sacred sites that compromised the ability of members of an indigenous community to celebrate burial rites.⁹² In addition, both the African Commission

URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage].

⁸⁵ S.C. Res. 2199, ¶ 15 (Feb. 12, 2015).

⁸⁶ UN Secretary-General, *Rep. of the Secretary-General, Plan of Action to Prevent Violent Extremism*, ¶ 49 (f), UN Doc. A/70/674 (July 18, 2011).

⁸⁷ Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Separate Opinion of Judge Cançado Trindade Reports 2013, 606, Order of July 18, 2011 (ICJ).

⁸⁸ This is not uncommon for the UNESCO, as described in Alberto Melloni, *Naming the sacred: A Chronology of UNESCO Dispute on Jerusalem and its Holy Places* (forthcoming 2019).

⁸⁹ UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, *supra* note 84, at preambular paragraph.

⁹⁰ Prosecutor v. Al Mahdi, ICC-01/12-01/15-214-AnxI-Red3, Brief by Ms. Karima Bennouna, UN Special Rapporteur in the Field of Cultural Rights, at 8–18 (Apr. 27, 2017) [hereinafter Al Mahdi (UN Special Rapporteur on Cultural Rights Brief)].

⁹¹ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, UN Doc. A/CONF.157/23 (June 25, 1993) [hereinafter *Vienna Declaration and Programme of Action*].

⁹² Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Inter-

on Human and Peoples' Rights and the African Court on Human and Peoples' Rights have found that, in cases concerning indigenous peoples, restricting access to sites where the practice of religion takes place is a violation of the right to freedom of conscience and religion.⁹³ The European Court of Human Rights also found that Turkey violated the right to freedom of religion or belief of Greek Cypriots living in Northern Cyprus by restricting their access to places of worship in an area that had experienced armed conflict.⁹⁴ In contrast, the UN Human Rights Committee preferred a collective rights approach, finding only violations of the right of members of minority groups to enjoy their culture, instead of the right to freedom of religion.⁹⁵ Therefore, despite not having been directly referenced in human rights treaties, the destruction of religious sites has been condemned time and time again in international human rights fora.⁹⁶

Moreover, soft law documents in this area provide an extensive rationale for the protection of buildings dedicated to religion,⁹⁷ as well as normative guidelines that could benefit the ICC when deciding related cases.⁹⁸ Theodor Meron has argued that “[b]y raising human rights issues before national courts, human rights lawyers can contribute to the acquisition of additional expertise in human rights law by judges, lawyers, and by the public at large, and to the expansion of the role of international human rights in the protection of the individual.”⁹⁹ The same applies to international courts, which could use a “complementary and mutually

Am. Ct. H.R., (ser. C) No. 250, ¶¶ 151–65 (4 Sept. 2012) [hereinafter *Río Negro Massacres*]. See also *Plan de Sánchez Massacre v. Guatemala*, Merits, Separate Opinion of Judge Cançado Trindade, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶ 47 (Apr. 29, 2004) [hereinafter *Plan de Sánchez Massacre (Merits)*]; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 217–20 (June 27, 2012) [hereinafter *Kichwa Indigenous People of Sarayaku*].

⁹³ *Centre for Minority Rights Development and Minority Rights Group on behalf of Endorois Welfare Council v. Kenya*, Communication 276/03, Decision, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 163–73 (Nov. 25, 2009) [hereinafter *Endorois Welfare Council*]; *African Commission on Human and Peoples' Rights v. Kenya*, Communication 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 162–69 (May 26, 2017) [hereinafter *Afr. Comm'n H.P.R. v. Kenya*].

⁹⁴ See, e.g., *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1, ¶¶ 241–46 [hereinafter *Cyprus v. Turkey (Merits)*].

⁹⁵ See, e.g., *Lubicon Lake Band v. Canada*, CCPR/C/38/D/167/1984 (UN Human Rights Committee Mar. 26, 1990) [hereinafter *Lubicon Lake Band*]; and *Äärelä & Näkkäläjärvi v. Finland*, CCPR/C/73/D/779/1997 (UN Human Rights Committee Oct. 24, 2001) [hereinafter *Äärelä & Näkkäläjärvi*].

⁹⁶ See BIELEFELDT, et al., *supra* note 11, at 120.

⁹⁷ See Peter Petkoff, *Finding a Grammar of Consent for "Soft Law" Guidelines on Sacred Places: the Legal Protection of Sacred Places within the Existing Public International Law Instruments and Grass-root Approaches*, in BETWEEN CULTURAL DIVERSITY AND COMMON HERITAGE, 70–71 (Silvio Ferrari & Andrea Benzo eds., 2014).

⁹⁸ See, e.g., UN Alliance of Civilizations, *The United Nations Plan of Action to Safeguard Religious Sites: In Unity and Solidarity for Safe and Peaceful Worship* (Sept. 12, 2019), <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/12-09-2019-UNAOC-PoA-Religious-Sites.pdf>.

⁹⁹ THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 134–35 (1989).

reinforcing” approach between international humanitarian law and international human rights law to provide greater protection for buildings dedicated to religion.¹⁰⁰

3. *International Criminal Law*

International criminal law complements human rights and humanitarian approaches by providing its own protections to buildings dedicated to religion. Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) states that the “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” constitutes a violation of the laws and customs of war.¹⁰¹ The ICTY has affirmed this specifically for buildings dedicated to religion in a variety of cases, including *Karadžić & Mladić*,¹⁰² *Blaškić*,¹⁰³ *Naletilić & Martinović*,¹⁰⁴ *Brđanin*,¹⁰⁵ and *Župljanin*.¹⁰⁶ Moreover, the ICTY has considered the destruction of religious sites such as mosques or Catholic churches as evidence of intent to destroy a religious group (genocide)¹⁰⁷ and persecution on religious grounds (a crime against humanity).¹⁰⁸ Similarly, in *Case 002/01*, the Extraordinary Chambers in the Courts of Cambodia noted that victims who were forcefully transferred lost contact with their places of worship and thus “experienced a diminished sense of ‘physical and spiritual security.’”¹⁰⁹

The Rome Statute defines intentional attacks against buildings dedicated to religion as a war crime both in international and non-international armed conflicts.¹¹⁰ The wording of the Rome Statute is unambiguous: “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or

¹⁰⁰ See Office of the UN High Commissioner for Human Rights, International Legal Protection of Human Rights in Armed Conflict, 1, UN Doc. HR/PUB/11/01 (Nov. 2011).

¹⁰¹ Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) May 25, 1993, 32 I.L.M. 1159 [hereinafter Int’l Crim. Trib. for the Former Yugoslavia Statute].

¹⁰² Prosecutor v. Karadžić & Mladić, IT-95-5-R61, Review of the Indictment, ¶¶ 6, 15, 16 (Int’l Crim. Trib. for the Former Yugoslavia July 11, 1996).

¹⁰³ Prosecutor v. Blaškić, IT-95-14, Judgment, ¶ 185 (Trial Chamber, Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

¹⁰⁴ Prosecutor v. Naletilić & Martinović, IT-98-34, Judgment, ¶¶ 604–05 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

¹⁰⁵ Prosecutor v. Brđanin, IT-99-36, Judgment, ¶¶ 596–599, 678 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

¹⁰⁶ Prosecutor v. Župljanin, IT-99-36-1, Second Amended Indictment, ¶¶ 44–45 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 6, 2004).

¹⁰⁷ See Gregory M. Mose, *The Destruction of Churches and Mosques in Bosnia-Herzegovina: Seeking a Rights-Based Approach to the Protection of Religious Cultural Property*, 3 BUFFALO J. INT’LL. 180, 191–99 (1996).

¹⁰⁸ See, e.g., Karadžić & Mladić (Review of the Indictment), *supra* note 102, ¶ 94.

¹⁰⁹ Case 002/01, Judgment, ¶ 523 (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014) [hereinafter Case 002/01].

¹¹⁰ Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv).

charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives” is a war crime.¹¹¹ This comprehensive definition represented a substantial improvement over the 1954 Hague Convention and the Geneva Conventions’ approach to the topic.¹¹² The choice to extend the protection to all buildings dedicated to religion was not accidental. The *travaux préparatoires* of the Rome Statute indicate that the drafters, when deciding on the war crime of intentionally attacking buildings dedicated to religion,¹¹³ were divided between the broad definition in the 1907 Hague Convention (IV) and the narrow one found in the Geneva Conventions Protocol I.¹¹⁴ The final text reveals that they chose the former: the protection was intended to extend to all buildings dedicated to religion, and not only to those regarded as cultural heritage sites.

In addition to expanding protection to all buildings dedicated to religion, the Rome Statute enhanced the protection for such buildings in two significant ways. First, the Rome Statute defines as a war crime “intentionally directing attacks against buildings dedicated to religion,”¹¹⁵ and therefore the war crime does not depend on the result of the attack; in short, the actual destruction of religious buildings is not necessary for criminal prosecution.¹¹⁶ Second, the Rome Statute does not qualify buildings dedicated to religion as a subset of cultural property. Rather, buildings dedicated to religion have a stand on their own, alongside buildings dedicated to education, art, science, and health, as well as historic monuments.¹¹⁷ While some buildings may fall under multiple categories, it is essential—at least from a human rights perspective—to acknowledge the importance of each item separately.

The Rome Statute also has its limitations, however. Indeed, it appears to protect only “buildings dedicated to religion,” and not necessarily all sacred sites. Although some religious groups might define a mountain as a sacred place,¹¹⁸ and

¹¹¹ *Id.*

¹¹² See discussion *supra* § A (i).

¹¹³ Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 Feb. 1997*, § B(2)(d), UN Doc. A/AC.249/1997/L.5.

¹¹⁴ Compare The 1907 Hague Convention (IV), *supra* note 30, art. 27, with Geneva Conventions Protocol I, *supra* note 33, art. 85(4)(d).

¹¹⁵ Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv). See also Commission of Responsibilities, Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AM. J. INT’L L. 95, 115 (1920); Int’l Crim. Trib. for the Former Yugoslavia Statute, *supra* note 101, art. 3(d).

¹¹⁶ See, e.g., WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 268 (Oxford Univ. Press 2nd ed. 2016); see also CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 111 (2009).

¹¹⁷ Compare Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv), with 1954 Hague Convention, *supra* note 33, art. 1(a).

¹¹⁸ See UNESCO, *Report of the World Heritage Committee, Twelfth Session*, ¶ XIV/II A, UN Doc.

indigenous peoples might claim an area of land as a place of worship,¹¹⁹ the text of Rome Statute alone does not seem to envision the protection of these sacred sites. Nevertheless, if the ICC reads this provision in line with “internationally recognized human rights,”¹²⁰ a broader interpretation of buildings dedicated to religion could incorporate sacred sites.¹²¹

All of the characteristics discussed above provide greater protections for buildings dedicated to religion during armed conflicts. Although it might be easier to recognize some places of worship as merely cultural sites, in the eyes of the believer such buildings will have a much more profound meaning. Thus, if victims claim that their religious buildings were attacked during armed conflicts, the ICC should address these buildings as religious, not only as a cultural.¹²² Additionally, small buildings dedicated to religion, such as worship places for gatherings of minority religious groups, might not be considered as having any cultural appeal,¹²³ but should still be considered buildings dedicated to religion under the Rome Statute.¹²⁴

In summary, the Rome Statute substantially expanded the protections afforded to buildings dedicated to religion when it was adopted in 1998. It also helped the ICRC define the protection of all buildings dedicated to religion as a rule of international customary law.¹²⁵ Still, this expansion is meaningless if the ICC does not apply the broadened concept to its cases. Thus, this Article will now turn to an analysis of the role of international human rights law in *Al Mahdi*, and then focus on the specific question regarding freedom of religion or belief in the present case.

B. Human Rights in *Al Mahdi*

1. Applicable Law

Article 21 of the Rome Statute lists the legal sources applicable at the ICC in a hierarchical manner. Under Article 21(1)(a), the ICC shall apply the Rome Statute, the Elements of Crimes, and the Rules of Procedure and Evidence,¹²⁶

SC-88/CONF.001/13 (Dec. 23, 1988).

¹¹⁹ Lubicon Lake Band, *supra* note 95, ¶ 16.4.

¹²⁰ Rome Statute, *supra* note 1, art. 21(3).

¹²¹ See, e.g., the Decisions of the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, *supra* notes 92, 93.

¹²² See, e.g., *Al Mahdi* (Judgment and Sentence), *supra* note 5.

¹²³ Emerson Giumbelli, *When Religion is Culture: Observations about State Policies Aimed at Afro-Brazilian Religions and Other Afro-Heritage*, 8 REVISTA SOCIOLOGIA & ANTROPOLOGIA 401, 404–07 (2018).

¹²⁴ Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), 8(2)(e)(iv).

¹²⁵ HENCKAERTS & DOSWALD-BECK, *supra* note 2, at 127–28.

¹²⁶ Rules of Procedure and Evidence, Sept. 9, 2002, ICC-ASP/1/3 [hereinafter ICC Rules of Procedure

which constitute the ICC's "internal" applicable law. This internal law contains human rights clauses. For example, there are normative provisions on the rights of defendants and victims.¹²⁷ Moreover, the crime against humanity of persecution for internationally impermissible grounds such as religion falls under the jurisdiction of the ICC.¹²⁸ Additionally, Article 21 hierarchically lists two "external" tiers of applicable law at the ICC. As Article 21(1)(b) lays down, the first tier consists of "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."¹²⁹ In turn, the second tier consists of "general principles of law derived by the Court from national laws of legal systems of the world."¹³⁰ In order to apply external subsidiary law, the ICC in its case law has determined that two conditions must be met: there must (i) be a gap in the "internal" applicable law, i.e., the ICC legal instruments detailed in Article 21(1)(a), that the rules of treaty interpretation under the Vienna Convention of the Law of the Treaties cannot fill; and (ii) such application needs to be consistent with "internationally recognized human rights" as Article 21(3) of the Rome Statute requires.¹³¹ Under Article 21(2), "[t]he Court may apply principles and rules of law as interpreted in its previous decisions."¹³² However, external international human rights law and international humanitarian law jurisprudence are not mentioned. Although the ICC has relied on such case law, this jurisprudence is not per se binding on the Court.¹³³

Unlike in other cases, the ICC did not explicitly invoke Article 21 in its *Al Mahdi* judgment and sentence¹³⁴ and reparations order.¹³⁵ Nevertheless, Trial Chamber VIII did refer to international humanitarian law instruments previously examined, including the 1907 Hague Convention (IV),¹³⁶ Additional Protocols I and II to the Geneva Conventions,¹³⁷ and the 1999 Second Hague Protocol.¹³⁸ This corresponds to the context of armed conflict in which the events at issue in *Al Mahdi* took place. As for reparations, Trial Chamber VIII followed previous ICC

and Evidence].

¹²⁷ Rome Statute, *supra* note 1, arts. 55, 67, 68, 75, 82(4), 75, 85.

¹²⁸ *Id.* art. 7(1)(h).

¹²⁹ *Id.* art. 21(1)(b).

¹³⁰ *Id.* art. 21(1)(c).

¹³¹ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 126 (Mar. 4, 2009).

¹³² Rome Statute, *supra* note 1, art. 21(2).

¹³³ Prosecutor v. Bemba, Case No. ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, ¶ 72 (Mar. 21, 2016).

¹³⁴ See *Al Mahdi* (Judgment and Sentence), *supra* note 5.

¹³⁵ See Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-236, Reparations Order (Aug. 17, 2017). [hereinafter *Al Mahdi* (Reparations Order)].

¹³⁶ The 1907 Hague Convention (IV), *supra* note 30.

¹³⁷ 1954 Hague Convention, *supra* note 33; 1999 Second Protocol, *supra* note 37.

¹³⁸ 1999 Second Protocol, *supra* note 37.

jurisprudence,¹³⁹ invoking the UN General Assembly Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victim Declaration)¹⁴⁰ and, especially, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Reparations Principles).¹⁴¹

Nonetheless, the Chamber did not call on major international or regional human rights instruments. International humanitarian law is *lex specialis* in nature because it consists of norms which are specially tailored to regulate armed conflicts.¹⁴² Nevertheless, international practice¹⁴³ and scholars¹⁴⁴ accept that, subject to certain exceptions, international human rights law obligations are not derogated during armed conflicts; in principle at least, international humanitarian law and international human rights law norms apply concurrently. Although Trial Chamber VIII did not refer to international human rights law treaties, the Chamber invoked a human right to cultural life and its physical embodiments under the aforementioned international humanitarian law instruments and the World Heritage Convention.¹⁴⁵ Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Human Rights and Article 17(2) of the African Charter on Human and Peoples' Rights also recognize this right. However, these instruments were generally ignored in *Al Mahdi*. Due to their (potential) relevance, Trial Chamber VIII should, at minimum, have explicitly acknowledged why it considered other human rights treaties, but not these particular treaties, in order to justify the judicial selection of the invoked legal sources.

More problematically, Trial Chamber VII focused too much on the cultural dimensions of the Timbuktu monuments and on only one human right: the right

¹³⁹ See *Al Mahdi* (Reparations Order), *supra* note 135, ¶¶ 24–25.

¹⁴⁰ G.A. Res. 40/34 Annex, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985) [hereinafter UN Victim Declaration].

¹⁴¹ G.A. Res. 60/147 Annex, 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 (Mar. 21, 2006) [hereinafter UN Reparations Principles].

¹⁴² See Marco Sassòli & Laura Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts*, 90 INT'L REV. RED CROSS 599, 603–05 (2008); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep 226, July 8, 1996, ¶ 25 [hereinafter Nuclear Weapons (Advisory Opinion)].

¹⁴³ Nuclear Weapons (Advisory Opinion) *supra* note 142;142; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep 136, ¶ 106 (July 9, 2004); UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶ 11 (May 26, 2004).

¹⁴⁴ Jean-Marie Henckaerts, *Study on customary international humanitarian law*, 87 INT'L REV. RED CROSS 175, 195–96 (2005); Andrew Clapham, *The Complex Relationship Between the Geneva Conventions and International Human Rights Law*, in THE 1949 GENEVA CONVENTIONS: A COMMENTARY, 734 (Andrew Clapham, et al. eds., 2015); Sassòli & Olson, *supra* note 142, at 603.

¹⁴⁵ *Al Mahdi* (Reparations Order), *supra* note 135, ¶ 20.

to cultural life. This determination was made at the expense of further considerations of the serious breaches of the victims' right to freedom of religion or belief, given the religious nature of the buildings attacked in Timbuktu. Subsequent submissions filed by parties and participants in *Al Mahdi* largely followed this trend.¹⁴⁶ As Article 18 of the ICCPR and articles of regional human rights treaties, such as Article 8 of the African Charter on Human and Peoples' Rights, recognize freedom of religion or belief, the absence of references to these treaties and relevant human rights jurisprudence in the *Al Mahdi* decisions constitutes an important deficit. Despite the lack of explicit reference to these authorities, however, Trial Chamber VIII extensively relied on previous reparation case law of the ICC, which has used (as adapted) international human rights law and international humanitarian law sources, to decide on victim participation and, especially, reparations in *Al Mahdi*.¹⁴⁷ Thus, Trial Chamber VIII "indirectly" relied on international human rights law sources incorporating freedom of religion or belief. Nonetheless, the aforementioned excessive judicial focus on cultural aspects in *Al Mahdi* caused some negative side effects. For example, Trial Chamber VIII invoked the case law of the Inter-American Court of Human Rights on disruption of culture,¹⁴⁸ but it neglected international human rights law and international humanitarian law jurisprudence on freedom of religion or belief, especially case law related to sacred sites or places of worship.¹⁴⁹

2. Consistency with Human Rights

Under Article 21(3) of the Rome Statute, "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction," including on grounds of "religion or belief."¹⁵⁰ Under its jurisprudence, the ICC must interpret and apply "the law applicable under the Statute . . . in accordance with internationally recognized human rights."¹⁵¹ Human rights underpin the Rome Statute,¹⁵² the ICC

¹⁴⁶ See, e.g., Prosecutor v. Al Mahdi, ICC-01/12-01/15-194, UNESCO Amicus Curiae Observations (Dec. 2, 2016) [hereinafter *Al Mahdi* (UNESCO Amicus Curiae)].

¹⁴⁷ See, e.g., Prosecutor v. Lubanga, ICC-01/04-01/06-3129-AnxA, Order for reparations, ¶¶ 13–19, 23–28 (Mar. 3, 2015) [hereinafter *Lubanga* (Order for Reparations)].

¹⁴⁸ *Al Mahdi* (Reparations Order), *supra* note 135, ¶ 85 n. 134.

¹⁴⁹ E.g., Rio Negro Massacres, *supra* note 92, ¶¶ 151–65; Kichwa Indigenous People of Sarayaku, *supra* note 92, ¶¶ 217–20; Endorois Welfare Council, *supra* note 93, ¶¶ 163–73; Afr. Comm'n H.P.R. v. Kenya, *supra* note 93, ¶¶ 162–69; Cyprus v. Turkey (Merits), *supra* note 94, ¶¶ 241–47.

¹⁵⁰ Rome Statute, *supra* note 1, art. 21(3).

¹⁵¹ *Lubanga* (Order for Reparations), *supra* note 147, ¶ 37.

¹⁵² Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-772, 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 Oct. 2006, ¶ 37 (Dec. 13, 2006) [hereinafter *Lubanga* (Jurisdiction of the Court)].

must exercise its jurisdiction in accordance with these rights,¹⁵³ and Article 21(3) underlies the whole Rome Statute regardless of *lex specialis* provisions.¹⁵⁴ Thus, the decisions of the ICC must be consistent with international human rights law. Article 21(3) arguably has a “supra-legal” or “constitutional” character.¹⁵⁵ Nevertheless, the ICC has appropriately pointed out that it is not a human rights court.¹⁵⁶ By definition, the ICC is an international criminal tribunal with a mandate to determine individual criminal liability rather than State responsibility. Indeed, Article 21(3) does not advocate that the ICC should adjudicate human rights. However, when the ICC exercises its mandate, it should consider all relevant international human rights. As discussed in the previous Section, the applicable law at the ICC includes human rights clauses such as provisions on the rights of the victims (internal applicable law) and, where necessary, international human rights law sources such as the law and practice of regional human rights courts (external applicable law). Moreover, human rights laws constitute a practical standard to assess the legitimacy, legality, and effectiveness of international courts, including the ICC.¹⁵⁷ Furthermore, the adapted or prudent use of international human rights law sources, particularly international human rights law jurisprudence,¹⁵⁸ by international criminal tribunals helps to address issues of fragmentation in international law.¹⁵⁹

Unlike other cases at the ICC, the judicial decisions in *Al Mahdi* lack explicit references to Article 21(3) of the Rome Statute, introducing methodological inconsistencies in the ICC’s practice. A closer analysis of the *Al Mahdi* decisions, however, reveals that the court used international human rights law and international humanitarian law sources, mainly for interpretation and application

¹⁵³ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶ 602 (Mar. 14, 2012).

¹⁵⁴ Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11-565, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 Oct. 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi,” ¶ 229 (July 24, 2014) [hereinafter Gaddafi (Judgment on the Appeal on the admissibility of Al-Senussi)].

¹⁵⁵ SCHABAS, *supra* note 116; Alain Pellet, *Applicable Law, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 1051, 1080–81 (Antonio Cassese, et al. eds., 2002).

¹⁵⁶ Gaddafi (Judgment on the Appeal on the admissibility of Al-Senussi), *supra* note 154, ¶ 219.

¹⁵⁷ Nienke Grossman, *The Normative Legitimacy of International of International Courts*, 86 TEMPLE L. REV. 61, 96–102 (2013); Göran Sluiter, et al., *Introduction, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES*, 1, 27 (Göran Sluiter, et al. eds., 2013); Sigall Horowitz, et al., *The International Criminal Court, in ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS*, 232–51 (Yuval Shany ed., 2014).

¹⁵⁸ ASBJØRN EIDE & MORTEN BERGSMO, HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 20–21 (2003).

¹⁵⁹ Sergey Vasiliev, *International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-fertilisation*, 84 NORDIC J. INT’L L. 371, 388–91 (2015); Paolo Lobba & Triestino Mariniello, *The Grammar of the Judicial Dialogue between International Criminal Tribunals and the European Court, in JUDICIAL DIALOGUE ON HUMAN RIGHTS THE PRACTICE OF INTERNATIONAL CRIMINAL TRIBUNALS*, 1, 1–4 (Paolo Lobba & Triestino Mariniello eds., 2017).

purposes. This is consistent with the jurisprudence of the ICC.¹⁶⁰ In certain situations in *Al Mahdi*, international human rights law and international humanitarian law were judicially used to verify, further back up, and contextualize certain interpretations or outcomes already obtained via direct interpretation or application of the ICC legal instruments. For instance, there are references to international humanitarian law instruments in the interpretation and application of the provisions of the Rome Statute and the Elements of Crimes that concern the legal elements of the war crime of intentional attack against protected objects.¹⁶¹ The fact that Trial Chamber VIII consulted international law sources fulfilled to a substantial extent, albeit not totally, the requirement of interpretative and applicative consistency with internationally recognized human rights laid down in Article 21(3) of the Rome Statute.

International human rights law played a more crucial role with regard to victim participation and reparations in *Al Mahdi*. Aside from general references to the UN Victim Declaration and the UN Reparations Principles, the court relied on the ICC's prior jurisprudence on victim participation and reparations.¹⁶² This case law uses international human rights law sources, notably the aforementioned instruments and regional human rights case law, for clarifying or defining functions.¹⁶³ This corresponds to legal notions or categories merely mentioned in ICC legal instruments, such as definitions of elements and subcategories of victims, kinds of inflicted harm, reparations principles, reparations modalities (compensation, rehabilitation, symbolic measures, etc.), reparations types (individual and collective awards), and others. To identify reparations principles applicable in *Al Mahdi*, Trial Chamber VIII largely used international human rights law sources as interpreted and applied in the ICC's previous jurisprudence. Trial Chamber VIII invoked a number of principles, including: fair, equal, human, and dignified treatment of victims; the granting of reparations without adverse discrimination unless prioritization of those most harmed is needed; the right of victims to appropriate, adequate, and prompt reparations; the reflection of local cultural and customary practices on reparations unless these practices are discriminatory and exclusionary; the adoption of gender-sensitive approaches, considering gender-specific risks, challenges, and discrimination in gaining

¹⁶⁰ See, e.g., Prosecutor v. Lubanga, ICC-01/04-01/06-2904, Decision establishing the principles and procedures to be applied to reparations, ¶¶ 182–255 (Aug. 7, 2012); see also Stephen Bailey, *Article 21(3) of the Rome Statute: A Plea for Clarity*, 14 INT'L CRIM. L. REV. 513, 513 (2014); Margaret McAuliffe deGuzman, *Article 21 Applicable law in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE* 932, 947–48 (Kai Ambos & Otto Triffterer eds., Nomos 3rd ed. 2016); SCHABAS, *supra* note 116, at 530–34.

¹⁶¹ *Al Mahdi* (Judgment and Sentence), *supra* note 5, ¶¶ 14–15.

¹⁶² *Al Mahdi* (Reparations Order), *supra* note 135, ¶¶ 24–26.

¹⁶³ Annika Jones, *Insights Into an Emerging Relationship-Use of Human Rights Jurisprudence at the International Criminal Court*, 16(4) HUM. RTS. L. REV. 701, 719–22 (2016).

access to and defending cultural heritage; and consistency with the rights of the convicted person.¹⁶⁴

3. *Human Rights as an Additional Legal Source*

As legal scholars have noted, the ICC has to a certain extent relied on Article 21(3) of the Rome Statute for “generative” and “gap-filling” functions, which suggests that internationally recognized human rights not included in the ICC’s internal law are applicable and therefore become an additional legal source.¹⁶⁵ For instance, the ICC, based on international human rights law, has stayed proceedings when breaches of abuses of process make a fair trial impossible, though the ICC’s legal instruments do not include this remedy.¹⁶⁶ The ICC has also invoked substantive rights, such as the right to privacy and family life;¹⁶⁷ the right to liberty;¹⁶⁸ and the rights to education and health.¹⁶⁹ Such reliance on these substantive rights is consistent with: i) the inclusion of international human rights law as part of subsidiary external sources applicable at the ICC; and ii) the existence of generative effects, which mean the ICC’s application of certain human rights or remedies is not explicitly included in the Rome Statute.¹⁷⁰

Trial Chamber VIII did not invoke Article 21(3) of the Rome Statute in *Al Mahdi*. Nonetheless, based on international humanitarian law instruments and the World Heritage Convention, the Chamber invoked the “human right to cultural life and its physical embodiments.”¹⁷¹ By referring to UNESCO and expert submissions in *Al Mahdi*, the Chamber drew two main conclusions. First, cultural heritage involves cultural identification and development processes of individuals and groups that wish to transmit this heritage to future generations, including tangible heritage (sites, structures, and remains of historical, religious, and

¹⁶⁴ *Al Mahdi* (Reparations Order), *supra* note 135, ¶¶ 29, 31–34, 37, 105, 146, 148.

¹⁶⁵ Jones, *supra* note 163, at 720–22; Bailey, *supra* note 160, at 535–36, 549; Gilbert Bitti, *Article 21 and the Hierarchy of Sources of Law before the ICC*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT*, 437–38 (Carsten Stahn ed., Oxford Univ. Press 2015).

¹⁶⁶ Lubanga (Jurisdiction of the Court), *supra* note 152, ¶¶ 37–39; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1486, Appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” ¶ 77 (Oct. 21, 2008).

¹⁶⁷ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06-785-Red, Public redacted version of Decision on Prosecution requests to impose restrictions on Mr Ntaganda’s contacts, ¶ 33 (Aug. 18, 2015).

¹⁶⁸ Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3405-Anx, Decision on the application for the interim release of detained Witnesses DRCD02-P-0236, DRC-D02-P-0228 and DRC-D02-P-0350, Dissenting opinion of Judge Christine Van den Wyngaert, ¶¶ 12–15 (Oct. 1, 2013).

¹⁶⁹ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, Dissenting Opinion of Judge Elizabeth Odio Benito, ¶ 21 (July 13, 2012).

¹⁷⁰ See, e.g., Bailey, *supra* note 160, at 535–36, 549; Bitti, *supra* note 165, at 437–38.

¹⁷¹ *Al Mahdi* (Reparations Order), *supra* note 135, ¶ 14.

cultural value) and intangible heritage (traditions, customs, practices, etc.).¹⁷² Second, the loss of heritage during armed conflicts deprives a community of its identity, its memory, and physical testimony of its past.¹⁷³

Several elements of cultural heritage considered by Trial Chamber VIII in *Al Mahdi* have religious aspects. As the Chamber additionally remarked, the World Heritage List included Timbuktu mosques and holy places because they played an essential role in the spread of Islam and are of continuing historical and spiritual importance.¹⁷⁴ Yet the Chamber fell short of referring to freedom of religion or belief. This deficit is striking because the Chamber pointed out that cultural heritage is important not only in itself but also in connection with its human dimension, in that most cultural property and heritage is of sentimental value.¹⁷⁵

Trial Chamber VIII correctly pointed out the narrow scope of the charge in *Al Mahdi* compared to the wider range of alleged human rights violations in Timbuktu.¹⁷⁶ Nevertheless, the Chamber should have highlighted the gross violations of other human rights such as freedom of assembly and, in particular, freedom of religion or belief. Regional human rights bodies in cases concerning religious sites have generally found State's responsible for violations of both cultural rights and freedom of religion or belief.¹⁷⁷ Under Article 18 of the ICCPR and various regional instruments, freedom of religion or belief encompasses both private and public dimensions.¹⁷⁸ These public dimensions comprise active manifestations such as worship, access to places of worship, observance, practice, and teaching.¹⁷⁹

Therefore, the obliteration of the Timbuktu religious sites constituted a serious violation of victims' freedom of religion or belief. The attacks were part of the religious measures and edicts that Ansar Dine/AQIM imposed in occupied Timbuktu to eliminate any visible vice, as determined and implemented by Al Mahdi, who headed the Hesbah (morality brigade).¹⁸⁰ References to violations of freedom of religion or belief would have partially compensated for the lack of charges on crimes against humanity for religious persecution. Furthermore, an

¹⁷² *Id.* ¶ 15.

¹⁷³ *Id.* ¶ 14.

¹⁷⁴ *Id.* ¶ 21.

¹⁷⁵ *Id.* ¶¶ 16, 22.

¹⁷⁶ *Id.* ¶ 108.

¹⁷⁷ E.g., Rio Negro Massacre, *supra* note 92, ¶¶ 151–65; Kichwa Indigenous People of Sarayaku, *supra* note 92, ¶¶ 217–20; Endorois Welfare Council, *supra* note 93, ¶¶ 163–73; Afr. Comm'n H.P.R. v. Kenya, *supra* note 93, ¶¶ 162–69.

¹⁷⁸ UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4; MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 410–25 (N P Engel 2nd rev. ed. 2005).

¹⁷⁹ UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4; Cyprus v. Turkey (Merits), *supra* note 94, ¶¶ 245–46; *see also* NOWAK, *supra* note 178, at 419–21.

¹⁸⁰ *Al Mahdi* (Judgment and Sentence), *supra* note 5, ¶ 81.

explicit analysis of freedom of religion or belief as applied to international crimes involving religious elements in *Al Mahdi* would have been relevant for future cases at the ICC, including the second case related to Timbuktu, *Prosecutor v. Al Hassan*. The following Section discusses aspects related to freedom of religion or belief in *Al Mahdi*.

II.

FREEDOM OF RELIGION OR BELIEF IN *AL MAHDI*

A. *Accountability and Sentencing*

1. *Intentional Attacks Against Buildings Dedicated to Religion*

The war crime of intentionally directing attacks against protected buildings requires an association with an armed conflict.¹⁸¹ From the factual background and analysis conducted by Trial Chamber VIII in the judgment and sentence in *Al Mahdi*, the armed conflict in Mali had religious elements.¹⁸² Ansar Dine/AQIM's occupation of Timbuktu from April 2012 to January 2013 was an episode of internal armed conflict between these groups and the government of Mali. The destruction of the protected sites in Timbuktu was part of the religious and political edicts that Ansar Dine/AQIM imposed during the occupation. These measures were implemented through the establishment of a functioning local government, which in turn created institutions such as an Islamic police force, an Islamic tribunal, and the Hesbah. These religious aspects are also present in the case against Al Hassan. Al Hassan was the de facto chief of the Islamic police and was suspected both of crimes against humanity based on the religious persecution of Timbuktu's inhabitants and the war crime of intentionally attacking historic monuments and buildings dedicated to religion.¹⁸³

As Daragh Murray explains, "the law of armed conflict and international human rights law require the Occupying Power to respect religious freedom [and] [i]nternational human rights law provides further specificity in relation to the content of this obligation."¹⁸⁴ This obligation encompasses the protection of buildings dedicated to religion.¹⁸⁵ The international community originally thought that this obligation applied to the occupying State during international armed conflicts, but legal scholars have suggested that non-State actors who exercise

¹⁸¹ *Id.* ¶ 18.

¹⁸² *See id.* ¶ 31. *See also* Juan-Pablo Perez-Leon-Acevedo, *International Criminal Justice Rendered Concerning the Attack Against Timbuktu Mausoleums and Mosque: Focus on Religion-Related Considerations*, 6 OXFORD J. L. & RELIGION 180 (2017).

¹⁸³ *Prosecutor v. Al Hassan*, Case No. ICC-01/12-01/18-2, Mandat d'arrêt à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Mar. 17, 2018) ¶¶ 1, 14.

¹⁸⁴ DARAGH MURRAY, PRACTITIONERS' GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT ¶ 10.44 (2016).

¹⁸⁵ *See* UN Human Rights Committee General Comment 22, *supra* note 3, ¶ 4.

control over a territory and a population are plausibly and *mutatis mutandis* bound by certain international human rights law principles, standards, and obligations.¹⁸⁶ Some international practice also supports this trend.¹⁸⁷ In any event, a case-by-case analysis must be applied.¹⁸⁸ The status of Al Mahdi and other Ansar Dine/AQIM members as non-State actors does not mean that they cannot violate international human rights law. Under the doctrine of “horizontal effects,” certain rights and freedoms “require extensive protective measures by the State to prevent violations by private persons.”¹⁸⁹ In light of this doctrine, Article 18(1) and 18(2) of the ICCPR can arguably be interpreted in a manner that requires States to prevent private coercion of individuals to have or follow certain religious beliefs.¹⁹⁰ Mali was unable to protect Timbuktuans from the serious breaches of their freedom of religion or belief committed by Ansar Dine/AQIM during the occupation of Timbuktu. These abuses largely exceeded permissible limitations on freedom of religion or belief during public emergencies, such as armed conflicts, and stood in clear violation of Articles 4(2) and 18(3) of the ICCPR.¹⁹¹

As noted above, the Rome Statute substantially expanded the protection of buildings dedicated to religion during international and internal armed conflicts.¹⁹² However, other international instruments, especially UNESCO-related ones, have disregarded some human rights elements in favor of others. Roger O’Keefe correctly affirmed that with the 1999 Second Hague Protocol and the Rome Statute, “the international law on the protection of cultural property in armed conflict has assumed a shape that will probably remain unchanged for quite some time.”¹⁹³ Nevertheless, scholars and international courts have said very little about the connection between the protection of buildings dedicated to religion and civil and political rights such as freedom of religion or belief. Unfortunately, the ICC did not shed light on this in *Al Mahdi* either.

Trial Chamber VIII understood in *Al Mahdi* that the criminal “conduct” was “the attack on cultural objects.”¹⁹⁴ This corresponds to the judicial focus on cultural aspects in *Al Mahdi*. Nevertheless, Article 8(2)(e)(iv) of the Rome Statute

¹⁸⁶ See Oberleitner, *supra* note 53, at 211–19; Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations* 88 INT’L RED CROSS 491, 495–508 (2006).

¹⁸⁷ See, e.g., Philip Alston (Special Rapporteur on extrajudicial summary or arbitrary executions), *Annual Report*, ¶ 76, UN Doc. E/CN.4/2005/7 (Dec. 22, 2004); S.C. Res. 1564, Preamble (Sept. 18, 2004).

¹⁸⁸ See Sandesh Sivakumaran, *Re-envisaging the International Law of Armed Conflict*, 22 EUR. J. INT’L L. 219, 255–56 (2001).

¹⁸⁹ NOWAK, *supra* note 178, at xxi. See also ANJA SEIBERT-FOHR, *PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS* 31–32 (Oxford Univ. Press 2009).

¹⁹⁰ SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 569 (Oxford Univ. Press 3rd ed. 2013); NOWAK, *supra* note 178, at xxi, 412–13.

¹⁹¹ See ICCPR, *supra* note 55, arts. 4(2), 18(3).

¹⁹² Rome Statute, *supra* note 1, arts. 8(2)(b)(ix), and 8(2)(e)(iv).

¹⁹³ O’KEEFE, *supra* note 26, at 360.

¹⁹⁴ *Al Mahdi* (Judgment and Sentence), *supra* note 5, ¶ 18.

does not explicitly include “cultural objects;” instead, this normative provision mentions attacks against “buildings dedicated to religion [and] historic monuments . . . provided that they are not military objectives.” Article 8(2)(e)(iv)(2) of the Elements of Crimes uses the same language.¹⁹⁵

Compared to the reparations award in *Al Mahdi* (examined later), it should be noted that Trial Chamber VIII carefully considered the religious nature of the protected sites attacked in Timbuktu in its judgment and sentence. Trial Chamber VIII stated the following points.¹⁹⁶ First, the Timbuktu mausoleums of saints and mosques constitute an integral part of the religious life of Timbuktu, serving as prayer places for residents and pilgrimage sites for external visitors.¹⁹⁷ Second, Al Mahdi monitored the religious practices of Timbuktuans concerning mausoleums to raise awareness about so-called inconsistent religious Muslim practices and to stop or prohibit them.¹⁹⁸ Third, the destruction of the protected sites corresponded to an alleged Islamic ban on any construction over a tomb.¹⁹⁹ Fourth, Al Mahdi wrote a sermon dedicated to the destruction of the mausoleums and read a prayer at the launch of the attack.²⁰⁰ Fifth, the nine mausoleums and the destroyed mosque had clearly served vital religious functions, especially for local Muslims.²⁰¹ Apart from one mausoleum, all of the attacked sites were religious and historic monuments that had the status of protected UNESCO World Heritage sites.²⁰²

The Chamber concluded that religion motivated Al Mahdi’s attacks.²⁰³ First, Al Mahdi referred to the attack against Timbuktu sites as a way of “eradicating superstition, heresy . . . or subterfuge which can lead to idolatry,” and the attackers feared 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.”²⁰⁴ Second, Al Mahdi added that he did not “know the truth about those saints . . . [but] fools . . . come and take sand from those places to get blessed.”²⁰⁵ Third, he claimed to execute the attack “in collaboration with the imams . . . We only paid attention to the buildings constructed above the graves in the cemetery, and the tombs that are annexed to the mosques from the

¹⁹⁵ See also Roberta Arnold & Stefan Wehrenberg, *Article 8(2)(b)(ix)*, in *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, 416–21 (Otto Triffterer & Kai Ambos eds., C.H. Beck 3rd ed. 2016).

¹⁹⁶ *Al Mahdi* (Judgment and Sentence), *supra* note 5, ¶¶ 28, 34–39.

¹⁹⁷ *Id.* ¶ 34.

¹⁹⁸ *Id.* ¶ 35.

¹⁹⁹ *Id.* ¶ 36.

²⁰⁰ *Id.* ¶ 37.

²⁰¹ *Id.* ¶ 38.

²⁰² *Id.* ¶ 39.

²⁰³ *Id.* ¶ 48.

²⁰⁴ *Id.* ¶ 38(viii).

²⁰⁵ *Id.* ¶ 41.

outside.”²⁰⁶ Fourth, Al Mahdi stressed that Ansar Dine/AQIM spent time “explaining to the people what’s right and what’s wrong, and now’s the time for implementation,”²⁰⁷ namely, the attack. Fifth, Al Mahdi stated that “[t]hose UNESCO jackasses think that this is heritage. Does ‘heritage’ include worshipping cows and trees?”²⁰⁸ Thus, in addition to the circumstances of the attack, Trial Chamber VIII examined Al Mahdi’s statements to conclude that the offenders intended to attack and destroy religious buildings.²⁰⁹

2. Sentencing

Article 78 of the Rome Statute and Rule 145 provide sentencing guidelines.²¹⁰ Under the three main categories of sentencing factors considered in *Al Mahdi*, several religion-related elements can be identified.²¹¹

With respect to the assessment of the gravity of the crimes committed, Trial Chamber VIII considered “in particular, the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time, place and manner.”²¹² As the Chamber pointed out, Al Mahdi, unlike other defendants at the ICC, was not charged with a crime against persons but with the less grave crime against property.²¹³ Nevertheless, the Chamber concluded that this was a crime “of significant gravity.”²¹⁴

Among the sentencing factors related to the assessment of gravity of the crimes committed, particularly “extent of the damage caused” and “the nature of the unlawful behaviour,”²¹⁵ the Chamber identified the following religion-related elements in its judgment and sentence. First, Timbuktu is an emblematic city with a mythical dimension that played a crucial role in the regional expansion of Islam, and is at the heart of Malian cultural heritage due mainly to manuscripts and mausoleums of saints that are located there.²¹⁶ Second, the Timbuktu mausoleums were of great importance to the locals, who admired the sites and were attached to them.²¹⁷ These mausoleums reflected a commitment to Islam and were psychologically important because they were perceived as protecting locals.²¹⁸ The mausoleums were among the most cherished Timbuktu buildings, and were

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* ¶ 46.

²⁰⁹ *Id.* ¶ 48.

²¹⁰ See generally SCHABAS, *supra* note 116, at 1163–81.

²¹¹ See also Perez-Leon-Acevedo, *supra* note 182, at 183–86.

²¹² *Al Mahdi* (Judgment and Sentence), *supra* note 5, ¶ 76.

²¹³ *Id.* ¶ 77.

²¹⁴ *Id.* ¶ 82.

²¹⁵ *Id.* ¶ 76.

²¹⁶ *Id.* ¶ 78.

²¹⁷ *Id.*

²¹⁸ *Id.*

looked after by the entire community, visited by Timbuktuans, and used as prayer places and pilgrimage locations.²¹⁹ Third, the crime was perpetrated for religious motives, as part of measures adopted by Ansar Dine/AQIM to impose their religious edicts on the population of Timbuktu during the occupation of the city, and it affected multiple victims.²²⁰ The attack was part of the Hesbah's campaign, led by Al Mahdi, to eradicate any "visible vice"—namely, destroying buildings dedicated to religion in order to stop religious practices that Ansar Dine/AQIM regarded as prohibited.²²¹ Thus, Trial Chamber VIII appropriately concluded that the "discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to [an] assessment of the gravity of the crime."²²²

In addressing Al Mahdi's culpability, Trial Chamber VIII assessed his degree of participation, intent, and means of executing the crime.²²³ The Chamber concluded that Al Mahdi's actions were religiously motivated, finding that he played an essential role in the execution of the attack, including through organization, supervision, and personal participation in the destruction of protected sites.²²⁴ Al Mahdi justified the need for the attack by writing a sermon, which was read prior to the attack, and by delivering public speeches as the destruction occurred.²²⁵ Although Al Mahdi indicated that Timbuktu practices were prohibited by the Islamic legal community, he had previously been reluctant to attack the sites out of a desire to maintain a good relationship with the locals.²²⁶ Other than the attack against the Sidi Yahia mosque, he advised against using bulldozers so as not to damage graves next to the mausoleums, and ensured that the attackers respected structures next to the mausoleums.²²⁷ The Chamber found these to be mitigating circumstances.²²⁸ In any event, Al Mahdi's official capacity as the head of the Hesbah was not aggravating because he did not abuse his position: "the mere fact that Mr Al Mahdi committed the crime in this position does not as such constitute an aggravating circumstance."²²⁹ However, this conclusion is questionable in the light of the facts.

With regard to the personal circumstances of Al Mahdi, the present Article identifies the following elements in the judgment and sentence. First, Trial Chamber VIII expressly did not consider age or economic background to be

²¹⁹ *Id.*

²²⁰ *Id.* ¶¶ 81, 87.

²²¹ *Id.* ¶ 81.

²²² *Id.*

²²³ *Id.* ¶ 83.

²²⁴ *Id.* ¶¶ 84, 90.

²²⁵ *Id.* ¶ 85.

²²⁶ *Id.* ¶ 89.

²²⁷ *Id.* ¶ 91.

²²⁸ *Id.* ¶ 93.

²²⁹ *Id.* ¶ 86.

relevant.²³⁰ However, the Chamber did consider how well-behaved Al Mahdi was in detention.²³¹ Second, although the Chamber noted statements concerning Al Mahdi's education or knowledge,²³² it provided no aggravating or mitigating weight to Al Mahdi's status as a scholar and an expert on religious matters.²³³ Certainly, the Chamber could have found this status aggravating: Al Mahdi belonged to a family recognized in his community for possessing a particularly deep knowledge of Islam, received a Koranic education from childhood, had a thorough knowledge of the Koran, and had lectured as an expert on religious matters.²³⁴ Ansar Dine/AQIM leaders and the Islamic tribunal viewed and consulted him as an expert on religion.²³⁵ Because of his religious knowledge, Al Mahdi was appointed to lead the Hesbah to regulate the "morality" of the Timbuktu inhabitants, and to prevent, suppress, and repress anything considered a vice.²³⁶ Nevertheless, since the Chamber disregarded Al Mahdi's positive role in his community before the takeover of Timbuktu as a mitigating circumstance, the lack of judicial consideration of Al Mahdi's knowledge of religion as an aggravating circumstance was arguably "compensated" for. Third, the Chamber considered Al Mahdi's remorse and empathy towards the victims, including his offer to reimburse the cost of the destroyed door of the Sidi Yahia mosque, as a mitigating circumstance.²³⁷

B. Reparations

1. Reparations, Claimants, and Beneficiaries

In *Al Mahdi*, Trial Chamber VIII presented some flaws in the identification and categorization of victims. In abstracto, the Chamber correctly determined that "reparations may be granted to legal entities that are direct victims of the crime committed."²³⁸ However, the Chamber *ratio decidendi* stated that the destruction of the protected buildings affected "not only the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community," and quoted UNESCO's assessment of local communities as "the principal victims."²³⁹

²³⁰ *Id.* ¶ 96.

²³¹ *Id.* ¶ 97.

²³² *Id.* ¶¶ 95–97.

²³³ *Id.* ¶ 96.

²³⁴ *Id.* ¶ 9.

²³⁵ *Id.* ¶ 32.

²³⁶ *Id.* ¶ 33.

²³⁷ *Id.* ¶ 104–05.

²³⁸ *Al Mahdi* (Reparations Order), *supra* note 135, ¶ 41.

²³⁹ *Al Mahdi* (Judgment and Sentence), *supra* note 5, ¶ 80; *Al Mahdi* (Reparations Order), *supra* note 135, ¶¶ 51–52.

These findings are not entirely consistent with the law and jurisprudence of the ICC. As described above, the targets of the attacks were by definition protected objects rather than individuals. Certain war crimes specifically consist of attacks against protected or civilian objects rather than civilians.²⁴⁰ Intentional direct attacks against buildings dedicated to religion (Article 8(2)(e)(iv)), for which Al Mahdi was tried and convicted, clearly fall in this category. This is also reflected in the scope of victimhood for victim participation and reparations at the ICC. Under Rule 85(a) of the ICC Rules of Procedure and Evidence, victims are “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”²⁴¹ In turn, Rule 85(b) states that victims “may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion . . . and to their historic monuments.”²⁴² By relying on international human rights law sources, particularly the UN Reparations Principles (Principle 8), and regional human rights jurisprudence, the ICC in its jurisprudence on victim participation and reparations has identified direct and indirect victims.²⁴³ Direct victims are those originally targeted.²⁴⁴ Besides the relatives of direct victims, indirect victims include those who attempted to prevent crimes; suffered harm when helping or intervening on behalf of direct victims; or suffered personal harm as a result of these offences.²⁴⁵

In *Al Mahdi*, organizations and institutions directly related to the Timbuktu monuments and duly represented would, therefore, be considered direct victims. The inhabitants of Timbuktu would be indirect victims. In its victim participation decision in *Al Mahdi*, Trial Chamber VIII followed the requirements for participation of individual victims as established in previous ICC case law: personal identification; personal harm; and causal—but not direct—link between the harm and the crime.²⁴⁶ The Chamber also determined criteria applicable to organizations and institutions: the quality of organization or institution must be established; the individual acting on behalf of the organization or institution must demonstrate his or her capacity to represent it; this individual must establish his or her identity; and the organization must have suffered direct harm resulting from

²⁴⁰ See, e.g., Knut Dormann, *War Crimes under the Rome Statute of the International Criminal Court*, in 7 MAX PLANK YEARBOOK OF UNITED NATIONS LAW 341, 363–65 (2003).

²⁴¹ ICC Rules of Procedure and Evidence, *supra* note 126, at Rule 85(a).

²⁴² *Id.* at Rule 85(b).

²⁴³ Lubanga (Order for Reparations), *supra* note 147, ¶ 6.

²⁴⁴ On direct and indirect victims, see Cherif Bassiouni, International Recognition of Victims' Rights, 6 HUM. RTS. L. REV., 243, 256–57 (2006).

²⁴⁵ Lubanga (Order for Reparations), *supra* note 147, ¶ 6b.

²⁴⁶ Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-97-Red, Decision on Victim Participation at Trial and on Common Legal Representation of Victims, ¶¶ 17–22 (June 8, 2016). [hereinafter *Al Mahdi* (Victim Participation Decision)].

an incident within confirmed charges,²⁴⁷ or charges confirmed by the Pre-Trial Chamber and which constituted the subject-matter of the trial.²⁴⁸

However, the Chamber found that the three individuals who applied on behalf of organizations dedicated to religion and their historic monuments were actually victims who had suffered personal and moral harm as a result of the crime perpetrated.²⁴⁹ Indeed, all victim participants and reparations claimants in *Al Mahdi* were determined to be Rule 85(a) victims (natural persons).²⁵⁰ Thus, no Rule 85(b) victim (organization or institution) participated or claimed reparations prior to the reparations order.

Despite acknowledging the suffering endured by Malians and the international community, Trial Chamber VIII appropriately focused its harm assessment on the community of Timbuktu in order to maximize the reparation effects. Through these specific reparations for Timbuktuans, the Trial Chamber sought to address broader harms to the national and international community.²⁵¹ Consequently, no victim applied for reparations only on behalf of national or international community interests.²⁵² Trial Chamber VIII claimed to consider its assessment only as for harm suffered by or within the community of Timbuktu: “organizations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise so closely related to the city that they can be considered to be part of this community at the time of the attack.”²⁵³ Nevertheless, there is no accurate identification or delimitation of the categories of direct and indirect victims. Moreover, the harm suffered by Timbuktuian organizations and institutions was not properly analyzed.

Trial Chamber VIII largely focused on natural persons for victim participation and reparations. This brought about the legal flaws discussed above. Nevertheless, such an approach may have been justified by teleological considerations. Justice for victims understood to be natural persons is an important goal of international criminal justice²⁵⁴ and is embedded in the preamble of the Rome Statute.²⁵⁵ Such implicit consideration of natural persons, rather than Timbuktu-related organizations, as the main or only direct victims merits further consideration of all relevant rights seriously breached by the crime committed. Yet again, the Chamber excessively focused on cultural aspects at the expense of

²⁴⁷ *Id.* ¶¶ 23–26.

²⁴⁸ See Rome Statute, *supra* note 1, art. 61.

²⁴⁹ *Al Mahdi* (Victim Participation Decision), *supra* note 246, ¶ 28.

²⁵⁰ *Id.* ¶¶ 28, 34.

²⁵¹ *Al Mahdi* (Reparations Order), *supra* note 135, ¶¶ 52–55.

²⁵² *Id.* ¶ 52.

²⁵³ *Id.* ¶ 56.

²⁵⁴ Anne-Marie De-Brouwer & Mikaela Heikkilä, *Victim Issues*, in INTERNATIONAL CRIMINAL PROCEDURE/CRIMINAL PROCEDURE: PRINCIPLES AND RULES, 1298, 1344–46, 1368–70 (Göran Sluiter, et al. eds., Oxford Univ. Press 2013); Horowitz, et al., *supra* note 157, at 232–33.

²⁵⁵ See Rome Statute, *supra* note 1, ¶ 2 (“Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”).

any explicit analysis of freedom of religion or belief or other human rights such as freedom of assembly.²⁵⁶ This arguably undermined the teleological approach. Freedom of religion or belief should have been considered on its own merits and under the principle of interdependence and indivisibility of human rights.²⁵⁷

Unlike other ancient monuments that lack or have lost religious significance, the Timbuktu monuments hold special religious importance as places of worship for Timbuktuans and pilgrims today. Moreover, the attack was aimed at impeding certain forms of worship. Trial Chamber VIII indeed referred to “the faithful and inhabitants of Timbuktu” as direct victims.²⁵⁸ Nevertheless, the Chamber fell short of invoking freedom of religion or belief as a powerful ground to justify its judicial categorization and assessment of victimhood. As examined later, this gap was partially filled when the Chamber examined moral harm. However, the Chamber mainly focused on the cultural rather than religious dimensions of the victims’ statements. While UNESCO and experts provided evidence on cultural heritage,²⁵⁹ no expert witnesses on freedom of religion or belief were present.

139 victims—137 individuals and two organizations—filed individual reparations claims.²⁶⁰ The eligibility of these and other reparation claimants for individual awards will be determined during the screening process that the Trust Fund for Victims will conduct. This Trust Fund, based on Article 79 of the Rome Statute, is the designated body that implements the ICC’s reparations awards under the judicial supervision of Trial Chambers.²⁶¹ As determined by Trial Chamber VIII and confirmed by the Appeals Chamber, victims who are eligible for individual awards are: “(i) those whose livelihoods exclusively depended upon the Protected Buildings and (ii) those whose ancestors’ burial sites were damaged in the attack.”²⁶² This second group corresponds to “the descendants of the saints.”²⁶³ Due to their guarding and maintaining the protected buildings, those in the second category are likely the same individuals as those in the first.²⁶⁴ Trial Chamber VIII considered that these individuals have a different kind of emotional connection to the destroyed sites than the rest of Timbuktuans.²⁶⁵ Had the Chamber

²⁵⁶ See, e.g., Al Mahdi (Reparations Order), *supra* note 135, ¶¶ 26, 34, 53.

²⁵⁷ *Vienna Declaration and Programme of Action*, *supra* note 91, ¶ 5.

²⁵⁸ Al Mahdi (Reparations Order), *supra* note 135, ¶ 51.

²⁵⁹ See, e.g., Al Mahdi (UNESCO Amicus Curiae), *supra* note 146; Al Mahdi (UN Special Rapporteur on Cultural Rights Brief), *supra* note 90.

²⁶⁰ Al Mahdi (Reparations Order), *supra* note 135, ¶ 5.

²⁶¹ See Assembly of States Parties, Regulations of the Trust Fund for Victims, Res. ICC-ASP/4/Res.3, Regulations 54–58 (Dec. 3, 2005) [hereinafter Trust Fund for Victims].

²⁶² Al Mahdi (Reparations Order), *supra* note 135, ¶ 145. See also Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-259-Red2, Judgment on the appeal of the victims against the “Reparations Order,” ¶¶ 33–43 (Appeals Court, ICC Mar. 8, 2018) [hereinafter Al Mahdi (Judgment on Appeal Reparations)].

²⁶³ Al Mahdi (Reparations Order), *supra* note 135, ¶ 89.

²⁶⁴ *Id.* ¶ 145.

²⁶⁵ *Id.* Al Mahdi (Reparations Order), *supra* note 135, ¶ 89.

further examined serious breaches of freedom of religion or belief, more victims might have been eligible for individual awards. Under regional human rights jurisprudence on reparations concerning violations of freedom of religion or belief that involved places of worship or sacred sites, victims have also benefited from individual awards despite judicial consideration of their communities as collective beneficiaries of reparations.²⁶⁶

Nevertheless, an exponential increase in individual reparations beneficiaries must be avoided at the ICC because available resources for reparations are scarce as a result of the indigence of the convicted and reliance on State donations. Balanced approaches should be adopted. For example, faithful Timbuktuans, even those not descended from saints, suffered emotional distress as a direct result of the destruction of buildings dedicated to their religion, and should be compensated for the violation of their freedom of religion. Their eligibility, however, must be subject to a high threshold of emotional distress, as properly proven via medical and psychological tests and other methods. During the screening of individual reparations applications, the Trust Fund for Victims and Trial Chamber VIII should also take into account serious violations of freedom of religion or belief when examining the mental pain and anguish of victims whose ancestors' burial sites were damaged.

Importantly, Trial Chamber VIII has also ordered collective and symbolic reparations for the community of Timbuktu "for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole."²⁶⁷ Implementation of this award should also regard the serious violations of freedom of religion or belief that the Timbuktu community endured. As the Legal Representative of Victims claimed, the 139 reparation claimants are only a portion of those who suffered collective harm across Timbuktu, which had around 70,000 inhabitants at the time of the attack.²⁶⁸

2. *Reparable Harm*

Trial Chamber VIII mostly relied on previous ICC jurisprudence, which is partly based on international human rights law sources,²⁶⁹ to identify the following principles of reparable harm. First, victims must have suffered harm as a result of the crime committed in order to receive reparations.²⁷⁰ Second, harm is injury or damage that does not need to be direct, but must be personal to the victim.²⁷¹ Third,

²⁶⁶ Plan de Sánchez Massacre v. Guatemala, Reparations, Inter-Am. Ct. H.R., (ser.Series C) No. 116, ¶¶ 75–76 (Nov. 19, 2004) [hereinafter Plan de Sánchez Massacre (Reparations)]; Cyprus v. Turkey, 2014-II Eur. Ct. H.R. 1, operative ¶¶ 4–5 [hereinafter Cyprus v. Turkey (Just Satisfaction)].

²⁶⁷ Al Mahdi (Reparations Order), *supra* note 135, ¶ 90.

²⁶⁸ *See id.* ¶ 141.

²⁶⁹ *See, e.g.*, UN Reparations Principles, *supra* note 141, at principles 15–23.

²⁷⁰ Al Mahdi (Reparations Order), *supra* note 135, ¶ 42.

²⁷¹ *Id.* ¶ 43.

“harm may be material, physical or psychological.”²⁷² Fourth, organizations must demonstrate “direct harm to their properties.”²⁷³ Fifth, the crime committed is the actual (“but/for”) and “proximate” cause of reparable harm.²⁷⁴ “Proximate cause” is sufficient to result in liability, and exists where it was reasonably foreseen that the commission of crimes would “cause the resulting harm.”²⁷⁵ Sixth, “balance of probabilities” is the evidentiary standard.²⁷⁶ Seventh, the liability of the convicted person “must be proportionate to the harm inflicted,” their criminal participation, and specific circumstances.²⁷⁷

In *Al Mahdi*, the harm that directly resulted from breaches of freedom of religion or belief was reasonably foreseeable, reinforcing the need for consideration of such violations. Among the types of reparable harm, Trial Chamber VIII properly found moral and material or economic harm, but not bodily harm. Crimes were committed against protected buildings; there were neither crimes against persons nor factual findings with respect to crimes against persons, and bodily harm was not sufficiently foreseeable.²⁷⁸ However, the Chamber did not explicitly consider serious violations of freedom of religion or belief.

While Trial Chamber VIII focused on the cultural dimension of the Timbuktu monuments to assess moral harm, it did not further examine the religious dimension of the Timbuktu monuments. Such a narrow approach is present across the Chamber’s assessment of moral harm. For instance, the Chamber invoked the case law of the Inter-American Court of Human Rights to establish that international human rights law recognizes a relationship between forms of moral harm and disruption of culture.²⁷⁹ Nevertheless, there is no reference to international human rights law or the relationship between moral harm and serious violations of freedom of religion or belief. Another example is the finding of emotional distress resulting from the attack on “cultural property which is integral to the community of Timbuktu.”²⁸⁰ Again, there was no explicit reference to the underlying breaches of freedom of religion or belief that inflicted moral or emotional distress onto victims.

International human rights law sources have considered and identified the existence of moral, psychological, or emotional harm in cases involving serious violations of freedom of religion or belief.²⁸¹ Particularly, regional human rights

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* ¶ 44.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* ¶ 50.

²⁷⁸ *Id.* ¶¶ 93, 98–99.

²⁷⁹ *Id.* ¶ 85 n. 134.

²⁸⁰ *Id.* ¶ 87.

²⁸¹ *E.g.*, Rio Negro Massacres, *supra* note 92, ¶¶ 151–65; Kichwa Indigenous People of Sarayaku,

jurisprudence on reparations—in cases concerning attacks against communities and their places of worship or sacred sites—has considered moral harm and other damages for violations of both cultural rights and freedom of religion or belief.²⁸² This jurisprudence should have been considered by Trial Chamber VIII when judicially assessing moral harm. Victim statements, some of which the Chamber quoted, clearly established the need for an assessment of moral harm comprising not only culture-related but also religion-related considerations. For example, victims claimed: “I was completely emotionally devastated by the destruction of the mausoleums”; “[M]y faith [was] shattered and my belief unsettled”; “I lost everything and all my faith”; “[T]he whole city suffered on the day the mausoleums were destroyed . . . [W]e were in great pain . . . The saints are all important to us . . . We used to seek blessings from them and make offerings to them at every milestone in our lives”; “My family, my friends, and all people of Timbuktu suffered . . . The Saints of Timbuktu are the descendants of Allah. When we used to ask for their blessings, they would be given . . . [E]ven if the saints protect us still, it’s not the same as before”; and “[T]he destruction of the sacred shrines of my ancestors caused me suffering . . . [I]t was the only place in which we gathered and prayed for protection.”²⁸³

In terms of moral harm, Trial Chamber VIII only ordered individual reparations for victims whose ancestors’ burial sites were damaged in the attack, given that these people were regarded as “descendants of the saints” who “ha[d] a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population.”²⁸⁴ Although this is appropriate, it could have been better grounded. The Chamber should have explicitly considered serious breaches of these victims’ freedom of religion or belief, as well as serious violations of their right to private life. As previously noted, consideration of freedom of religion or belief might also better guide the Chamber to identify other subcategories of victims, but with due safeguards to prevent an excessive increase in the number of reparations beneficiaries.

Nevertheless, individual reparations for moral harm do not necessarily have to come in the form of compensation. If there are insufficient resources, reparations may instead come in the form of rehabilitative and symbolic measures. In any case, Trial Chamber VIII ordered collective reparations through rehabilitation for the mental pain and anguish in favor of the Timbuktu community as a whole.²⁸⁵ However, Trial Chamber VIII only invoked “disruption

supra note 92, ¶¶ 217–20; Endorois Welfare Council, *supra* note 93, ¶¶ 163–73; Afr. Comm’n H.P.R. v. Kenya, *supra* note 93, ¶¶ 162–69.

²⁸² Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶¶ 80–89; Río Negro Massacres, *supra* note 92, ¶ 324; Cyprus v. Turkey (Just Satisfaction), *supra* note 266, operative ¶¶ 4–5; Endorois Welfare Council, *supra* note 93, ¶¶ 144–73, 239–51, and operative ¶ 1.

²⁸³ Al Mahdi (Reparations Order), *supra* note 135, ¶ 85.

²⁸⁴ *Id.* ¶ 89.

²⁸⁵ *Id.* ¶¶ 90, 104.

of culture.”²⁸⁶ The Chamber did not mention collective violations of freedom of religion or belief of the Timbuktu community. Interestingly enough, the Chamber referred to “information describing the emotional distress and harm suffered across the Timbuktu community,” and stated that the attack “not only destroyed cherished monuments but also shattered the community’s collective faith that they were protected.”²⁸⁷ These elements point to serious underlying violations of freedom of religion or belief. The destruction of religious buildings in Timbuktu directly and negatively impacted the exercise of freedom of religion and belief of Timbuktuans, who were deprived of their public places of worship. Unfortunately, the Chamber did not flesh out these elements to assess moral harm and related individual and collective reparations.

The culture-centered approach that the Trial Chamber VIII adopted (which was not developed further by the Appeals Chamber) is also problematic in its quantification of moral harm. The Chamber adopted the criteria established by an expert, based on the criteria developed in an award decision by the Eritrea-Ethiopia Claims Commission related to the damaged Stela of Matara.²⁸⁸ However, this comparison is partially unsuitable. Unlike the Stela of Matara, the Timbuktu monuments are not only historical and cultural monuments, but are also prominent buildings dedicated to religion. Among Timbuktuans, the religious dimensions of the protected sites are arguably at least as important as the cultural dimensions. Nevertheless, the Chamber, in its quantification of moral assessment, explicitly considered only the cultural status of the Timbuktu protected sites as World Heritage sites, adopting the notion of “disruption of culture suffered,” just as the Eritrea-Ethiopia Claims Commission and the Inter-American Court of Human Rights had.²⁸⁹ In the end, the Chamber set Al Mahdi’s liability for moral harm at €483,000.²⁹⁰ Had the Chamber considered serious violations of the victims’ freedom of religion or belief, that amount would likely be significantly larger.

With regard to material harm, Trial Chamber VIII (subsequently confirmed by the Appeals Chamber) determined that individual reparations for economic loss would be given only to victims “whose livelihoods exclusively depended upon the Protected Buildings,” including persons who maintained and protected the buildings and owners of businesses exclusively focused on selling “holy” sand from the protected sites.²⁹¹ These findings again imply religious dimensions. The Chamber should have established the relationship between freedom of religion or belief and resulting economic or material losses. For instance, when assessing consequential economic harm, the Chamber quoted victims who claimed to rely

²⁸⁶ *Id.* ¶ 90.

²⁸⁷ *Id.* ¶ 86.

²⁸⁸ *Id.* ¶ 131.

²⁸⁹ *Id.* ¶¶ 131–32.

²⁹⁰ *Id.* ¶ 133.

²⁹¹ *Id.* ¶¶ 81–83, 104(ii), 145; Al Mahdi (Judgment on Appeal Reparations), *supra* note 262, ¶¶ 33–43.

exclusively on pilgrims' donations and gifts for their economic wellbeing.²⁹² Regarding damage to buildings, the Chamber noted that UNESCO spent over €2.53 million to rebuild and rehabilitate mausoleums, mosques, and libraries in Timbuktu.²⁹³ The Chamber then focused on Al Mahdi's specific liability for this harm, which it quantified at €97,000 based on expert reports.²⁹⁴ The Chamber in its judgment and reparations order found that the destroyed buildings were among the most cherished and were perceived as providing protection to Timbuktuans.²⁹⁵ But in fact, the Chamber had quoted the victims' requests for restoration of these sites due to their consideration as holy places and the need for re-establishment of strong "emotional and spiritual ties."²⁹⁶ Once again, there was no explicit judicial consideration of the restoration and conservation of these holy sites in order to affirm the victims' freedom of religion or belief.

3. *Reparations Outcomes*

Under Rules 97 and 98, the ICC may order individual or collective awards against the convicted.²⁹⁷ Under Article 75 of the Rome Statute, reparation modalities include compensation, restitution and rehabilitation.²⁹⁸ In defining these categories, Trial Chamber VIII relied on previous ICC jurisprudence that invoked international human rights law sources, particularly the UN Reparations Principles and jurisprudence of the Inter-American Court of Human Rights. Thus, the Chamber ordered individual compensation for victims whose livelihoods depended exclusively upon the protected buildings and for victims whose ancestors' burial sites were damaged in the attack.²⁹⁹ Additionally, the Chamber recognized and ordered collective reparations in favor of the Timbuktu community as a whole, via rehabilitative and symbolic modalities. The rehabilitation of the protected buildings and the establishment of an "aid/counselling programme tailored to the needs of Timbuktuans to address emotional distress suffered [were] ordered."³⁰⁰ In addition to Al Mahdi's apologies,³⁰¹ the Chamber ordered effective measures to guarantee nonrepetition of the attacks against protected buildings,³⁰² as well as memorials,

²⁹² Al Mahdi (Reparations Order), *supra* note 135, ¶ 73.

²⁹³ *Id.* ¶ 116.

²⁹⁴ *Id.* ¶¶ 116–18.

²⁹⁵ Al Mahdi (Judgment and Sentence), *supra* note 5, ¶ 78; Al Mahdi (Reparations Order), *supra* note 135, ¶ 60.

²⁹⁶ Al Mahdi (Reparations Order), *supra* note 135, ¶ 61.

²⁹⁷ Rome Statute, *supra* note 1, art. 75.

²⁹⁸ *Id.*

²⁹⁹ Al Mahdi (Reparations Order), *supra* note 135 ¶¶ 104, 145.

³⁰⁰ *Id.* ¶¶ 67, 90, 92, 104.

³⁰¹ *Id.* ¶¶ 69–71.

³⁰² *Id.* ¶ 67.

commemorations, or forgiveness ceremonies designed to “give public recognition of the moral harm suffered by the Timbuktu community and those within it.”³⁰³

Since judicial considerations of serious breaches of freedom of religion or belief are missing, these reparations outcomes may be criticized. First, individual compensations could also have been ordered for Timbuktuans who could prove the existence of considerable emotional distress as a result of serious breaches of their freedom of religion or belief in the form of the destruction of their places of worship. In turn, compensatory figures could have increased if serious breaches of freedom of religion or belief were also taken into account. Nevertheless, these proposals may not be feasible due to the reparations system of the ICC: reparations at the ICC are rendered against convicted persons rather than responsible States. Most convicted individuals, including Al Mahdi, are indigent, so State donations are required to fund reparations. By paying attention to international human rights law sources, the ICC has determined that it cannot order an increase in compensation without greater funding.³⁰⁴ Nonetheless, an increase in compensation for victims of serious breaches of freedom of religion or belief is exactly what is needed. Indeed, the ICC already examines reparations criteria such as the feasibility of economic quantification of the harm, the gravity of the crime, and the specific circumstances of each case. Compensation must include all forms of damage, loss, and injury.³⁰⁵ Furthermore, there is significant overlap between persons whose ancestors’ burial sites were damaged in the attack and persons whose livelihoods depended exclusively on the protected buildings.³⁰⁶ This leaves room to compensate additional victims. Compensation via individual and collective awards has always been granted in regional human rights jurisprudence concerning reparations for violations of freedom of religion or belief and involving places of worship or sacred sites.³⁰⁷

Second, Trial Chamber VIII found Al Mahdi’s apologies to the Timbuktu community, Mali, and the international community as a whole to be genuine, categorical, and empathetic.³⁰⁸ Nevertheless, the Chamber considered that in any judicial case, some victims will always be unsatisfied with the apology given.³⁰⁹ In his apologies, Al Mahdi invoked Islamic principles of forgiveness and referred to Timbuktu’s heritage.³¹⁰ He did not, however, explicitly address the terrible

³⁰³ *Id.* ¶ 90.

³⁰⁴ Lubanga (Order for Reparations), *supra* note 147, ¶ 37; UN Reparations Principles, *supra* note 141, at Principles 16, 20.

³⁰⁵ Lubanga (Order for Reparations), *supra* note 147, ¶¶ 20, 37, 39.

³⁰⁶ Al Mahdi (Reparations Order), *supra* note 135, ¶ 145.

³⁰⁷ *E.g.*, Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶ 125; Río Negro Massacres, *supra* note 92, ¶ 324; Cyprus v. Turkey (Just Satisfaction), *supra* note 266, at operative ¶¶ 4–5; Endorois Welfare Council, *supra* note 93, operative ¶ 1.

³⁰⁸ Al Mahdi (Reparations Order), *supra* note 135, ¶ 70.

³⁰⁹ *Id.* ¶ 69.

³¹⁰ Prosecutor v. Al Mahdi, ICC-01/12-01/15-T-4-Red-ENG, Trial Hearing, 8–9 (Aug. 22, 2016) <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-T-4-Red-ENG>.

impact of his crime on victims' freedom of religion or belief. Public apologies should include acknowledgement of the facts and acceptance of responsibility.³¹¹

The collective symbolic measures in the reparations order in *Al Mahdi* do not explicitly invoke freedom of religion or belief. Symbolic measures, such as promises not to commit the same crimes or forgiveness ceremonies, should be ordered in a manner that includes an explicit recognition of the serious breaches of freedom of religion or belief. This would help to further satisfy victims. Additional symbolic reparation modalities not mentioned by the Trial Chamber should also be considered. Under Principles 22(h) and 23(e) of the UN Reparations Principles, relevant regional human rights jurisprudence,³¹² and the practice of the Extraordinary Chambers in the Courts of Cambodia,³¹³ these modalities could include: unrestricted access to religious and cultural sites by community members; incorporation of an accurate account of the violations that occurred in international human rights law and international humanitarian law in educational materials; resources to promote collective memory; continued provision of human rights and international humanitarian law education to all sectors of the society; permanent and mobile exhibitions to inform current and future generations of the atrocities committed; and the construction of a peace learning center. Indeed, the Trust Fund for Victims has proposed the performance of sanctification ceremonies for the mausoleums in order to restore their previous sacredness.³¹⁴

Finally, additional rehabilitative measures could be implemented to properly address the harm resulting from serious breaches of freedom of religion or belief. As established in ICC jurisprudence, based on Principle 21 of the UN Reparations Principles, the provision of medical services, healthcare, psychological, psychiatric, or social assistance, and legal and social services constitutes rehabilitation.³¹⁵ Regional human rights jurisprudence dealing with violations of freedom of religion or belief that involved sacred sites has also identified similar categories.³¹⁶ Rehabilitative measures ordered by the Extraordinary Chambers in the Courts of Cambodia, such as testimonial therapy and self-help group therapy, could also be explored.³¹⁷

³¹¹ UN Reparations Principles, *supra* note 141, at Principle 22(e).

³¹² *See, e.g.*, Endorois Welfare Council, *supra* note 93, operative ¶ 1; Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶ 104.

³¹³ Case 002/01, *supra* note 109, ¶¶ 1134–35, 1137.

³¹⁴ Prosecutor v. Al Mahdi, ICC-01/12-01/15-265-Corr-Red, Draft Implementation Plan for Reparations, ¶¶ 266–67 (ICC Trust Fund for Victims May 18, 2018).

³¹⁵ Lubanga (Order for Reparations), *supra* note 147, ¶ 42.

³¹⁶ *See, e.g.*, Río Negro Massacres, *supra* note 92, ¶ 289; Plan de Sánchez Massacre (Reparations), *supra* note 266, ¶¶ 106–08.

³¹⁷ Case 002/01, *supra* note 109, ¶¶ 1132–33.

CONCLUSION

The central question posed by this Article is whether and to what extent the ICC has protected human rights while dealing with intentional attacks against buildings dedicated to religion. As explained throughout the Sections of this article, Trial Chamber VIII only addressed the collective right to cultural life, while virtually ignoring other human rights at stake—most evidently freedom of religion or belief.

This preference for a cultural rights approach is rooted in the development of international law, which has historically disregarded universal protections for buildings dedicated to religion. International humanitarian law tried to solve this issue by fleshing out what the protection of such buildings meant for the full realization of human rights. It also recognized the need for complementarity between international humanitarian law and international human rights law in order to effectively protect buildings dedicated to religion during armed conflicts. The Rome Statute provides such protection, and for this reason, the first case decided by the ICC in relation to attacks on buildings dedicated to religion merits extensive analysis.

Al Mahdi had the potential to—and to a certain extent did—develop this area further. Overall, Trial Chamber VIII's approaches are laudable. However, the *Al Mahdi* decisions present critical deficits, such as the lack of consideration for gross violations of freedom of religion or belief. Such shortcomings could be rectified through the implementation of the reparations ordered in *Al Mahdi*.

The violations of freedom of religion or belief, in this case, are twofold. First, the attack and destruction of the Timbuktu mausoleums and mosque unduly limited the right of many persons to worship with others in their community. Second, the attacks emotionally affected believers in Timbuktu and beyond. The fact that Trial Chamber VIII took into consideration several religious elements present in the case makes its resounding silence regarding freedom of religion or belief even more astounding. These shortcomings could be remedied by developing a rationale that more clearly connected the events in Timbuktu to human rights doctrine.

This conclusion does not ignore the fact that the ICC is primarily a criminal court. It only suggests that the Court could adequately enforce human rights within the constraints of its mandate. In its essence, the Court seems to have missed an excellent opportunity to contribute to the enforcement of freedom of religion or belief. Such a contribution would certainly be useful in future cases, given that systematic and widespread attacks on buildings dedicated to religion continue to take place. Unfortunately, Iraq, Syria, Myanmar, and Yemen are prime examples of States devastated by armed conflicts in which persons have been deprived of many human rights, including the freedom to manifest their beliefs "in community with others."³¹⁸

³¹⁸ ICCPR, *supra* note 55, art. 18(1).

The ICC had the opportunity to address a significant gap in human rights protection and enforcement at a critical moment. Moving forward, the Court should not exclusively on one right when the circumstances of a case beg for the consideration of others. In the future, the Court can address this issue by taking a more holistic and systemic approach, one that is based on the consideration of human rights as “universal, indivisible[,] interdependent, and interrelated.”³¹⁹

³¹⁹ *Vienna Declaration and Programme of Action*, *supra* note 91, ¶ 5.

