

A Comprehensive Approach of Transitional Justice to Address the Deliberate Destruction of Cultural Heritage

Shuvra Dey*

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Abstract

Given the fact that cultural heritage has been the subject of multi-dimensional crimes during or in the aftermath of armed conflicts, this article attempts to analyze why and how such crimes can be brought under transitional justice (hereinafter TJ) mechanisms. It starts with the challenge to ascertain the inbuilt relationship, importantly, how cultural heritage enters into the domain of TJ. To this end, it fragmentises the rights of heritage and laws associated with these rights and examines how multiple discourses (i.e. human rights, humanitarian law, and criminal law) come together to form the notion of heritage rights and how their recognition contributes to cultural heritage's entrance into TJ project. Thereafter, it assesses the resonance of potential TJ mechanisms and elucidates how they can help reveal the truth concerning crimes against heritage, bring the perpetrators to justice, rehabilitate the destructed sites, redress the victims, and prevent future attacks. It reiterates the value of four measures widely accepted in the TJ discourse, namely, truth-seeking, prosecution, reparations, and the measures of guarantees of non-recurrence. Finally, it explains why a comprehensive approach in terms of implementing these measures is essential and how such approach facilitates taking into account all the factors associated with the crimes against heritage.

I. Introduction

From the outset, cultural heritage has been a subject of intentional destructions and attacks during or in the aftermath of armed conflicts.¹ Bypassing the international obligations, crimes against cultural heritage are taking place in multiform forms, ranging from destructing heritage

* Doctoral Student, Faculty of Law, Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU). This article is based on author's master's thesis written as part of the M. A. Human Rights programme at the Friedrich-Alexander-Universität Erlangen-Nürnberg. Author expresses his gratitude to Prof. Dr. Laura Clérico for her excellent supervision of the thesis and for her generous support and encouragement while writing the thesis. Author is equally grateful to Prof. Dr. Markus Krajewski for taking time to review the thesis and for sharing his valuable thoughts and comments. Views and errors, if any, are solely author's responsibility.

¹ Rush D Holt, 'Submission, on behalf of the American Association for the Advancement of Science (AAAS), to the United Nations Special Rapporteur in the field of cultural rights in response to the invitation to contribute to a consultation on the intentional destruction of cultural heritage as a violation of human rights, in particular cultural rights' (10 June 2016) <<https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/AAAS-R.Holt.pdf>> accessed 4 May 2021.

to the looting and organized trafficking of such cultural objects.² Over the past few decades, attacks against heritage have considerably increased, and many protected buildings have been fully or partially destroyed. The war in Afghanistan and Iraq and also the continuing civil war in Syria, Mali and some other parts of the world have caused massive casualties, and the perpetrators in many cases targeted heritage as a means of reprisal ‘on a symbolic and ideological level’.³

In 2012, the *jihadi* armed groups in Mali deliberately destroyed ten mausoleums and mosques of Timbuktu.⁴ All of those destroyed sites (except the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were designated by the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO) as world heritage sites.⁵ Mainly, the attacks were conducted by the leaders of the Ansar Dine and Al-Qaeda in the Islamic Maghreb (hereinafter AQIM) who wanted to impose their ‘religious and political edicts’ on the territory of Timbuktu.⁶ But they considered the practices of the visitors and the residents of Timbuktu with regard to the said mausoleums and mosques as a threat to their political and religious ideology; and consequently, ended up destroying those protected sites. Likewise, the (non-state) armed groups in Iraq and Syria caused massive damage to many archaeological sites, and, some of the protected sites are still in danger. Out of the five Iraqi ‘cultural sites’ currently on the UNESCO World Heritage List (Ashur, Hatra, Samarra, Erbil Citadel, Babylon), the first three are according to the UNESCO facing ‘imminent threat to their integrity as sites of major cultural heritage significance’.⁷ And among the sites placed on the UNESCO World

² Along with the destruction of cultural heritage, the Human Rights Council is also concerned about certain other crimes related to destroyed heritage and calls for international cooperation to combat against and prevent the ‘organized looting, smuggling and theft of and illicit trafficking in cultural objects’; see UNHRC Res 33/20 (6 October 2016) UN Doc A/HRC/RES/33/20, 2. The Security Council also called for preventing the trade in Iraqi and Syrian cultural property; see UNSC Res 2199 (12 February 2015) UN Doc S/RES/2199, 17.

³ To find the data about the incidents in Egypt, Iraq, Lebanon, Libya, Syria, Tunisia, Yemen, see Emma Cunliffe and others, ‘Submission to Study on Intentional Destruction of Cultural Heritage: Heritage Destruction in the MENA region’ <<https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/EndangeredArcheology.pdf>> accessed 4 May 2021; To read about the destruction of cultural property in Syria, see Emma Cunliffe, Nibal Muhsen and Marina Lostal, ‘The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations’ (2016) 23(1) International Journal of Cultural Property 1; With regard to the situation in Iraq, see Rashid International e.V., ‘The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights’ <<https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/RASHID.pdf>> accessed 4 May 2021; See also Dacia Viejo-Rose, ‘Reconstructing Heritage in the Aftermath of Civil War: Re-Visioning the Nation and the Implications of International Involvement’ (2013) 7(2) Journal of Intervention and Statebuilding 144.

⁴ To read about the situation in Mali, see Office of the Prosecutor (OTP), *Situation in Mali: Article 53(1) Report* (ICC OTP 2013) (henceforth ‘OTP Report’) <https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf> accessed 4 May 2021.

⁵ Francesca Capone, ‘An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage’ (2018) 16 Journal of International Criminal Justice 645, 647.

⁶ See *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171, T Ch VIII (27 September 2016) para 31.

⁷ Rashid International e.V. (n 3) 7.

Heritage Tentative List, few of these (i.e. the Assyrian capital cities of Nimrud, Nineveh) have been subjected to serious destruction by ‘Daesh’⁸ during their occupation of the Mosul region.⁹ Daesh, along with other armed groups (i.e. ANF, individuals and groups associated with Al-Qaida), were also active and dominant in Syria. They have caused heavy losses to the protected buildings and put many sites in danger, which include but are not limited to the heritage sites of Palmyra, Aleppo, Bosra, and Damascus.¹⁰

The United Nations (hereinafter UN) is highly concerned about the ‘acts of destruction and looting of the cultural heritage’, stressing the importance of holding such perpetrators accountable.¹¹ The Security Council (hereinafter SC) even adopted a resolution to *condemn* the destruction of cultural heritage in Iraq and Syria.¹² On the other hand, the role of the Human Rights Council (hereinafter HRC) was noteworthy, as the body adopted a resolution followed by a joint statement of 154 states which recognizes the need for a ‘holistic’ approach to address ‘the destruction of tangible and intangible cultural heritage’, aiming to prevent the attacks and hold the perpetrators accountable.¹³ The HRC through its resolution called upon the states ‘to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage’.¹⁴ The HRC also requested the UN High Commissioner for Human Rights to convene a ‘one-day intersessional seminar’ to find best ways to prevent or ‘to mitigate the detrimental impact of the damage’ to the cultural heritage.¹⁵ The seminar was convened in July 2017 and the High Commissioner presented the summary of the seminar in the form of a report, the outcomes of which influenced the HRC to further adopt a resolution in March 2018.¹⁶ Although the 2018 resolution reiterated the role of the states to respect, promote, and protect cultural rights, it also came up with certain recommendations that were absent in the previous resolution.¹⁷ It *calls for* ‘mainstreaming the protection of cultural heritage into...peacebuilding processes, and in post-conflict reconciliation initiatives’.¹⁸ Reaching this point of recognizing the need to incorporate crimes against heritage into post-conflict recovery processes¹⁹ is a very timely beginning that entails

⁸ The Islamic State of Iraq and the Levant (ISIL), also known as the Islamic State of Iraq and Syria (ISIS), officially as the Islamic State (IS), and by its Arabic language acronym ‘Daesh’ is a jihadist militant group.

⁹ Rashid International e.V. (n 3) 7.

¹⁰ See UNESCO list of World Heritage in danger <<https://whc.unesco.org/en/danger/>> accessed 4 May 2021; Holt (n 1) 2.

¹¹ See UNGA Res 69/281 ‘Saving the cultural heritage of Iraq’ (May 2015) UN Doc A/RES/69/281, paras 1, 6.

¹² UNSC Res 2199 (n 2) paras 15, 17.

¹³ UNHRC Res 33/20 (n 2).

¹⁴ *ibid* para 1.

¹⁵ *ibid* para 13.

¹⁶ See Report of the United Nations High Commissioner for Human Rights, *Intersessional seminar on cultural rights and the protection of cultural heritage* UN Doc A/HRC/37/29 (December 2017).

¹⁷ See UNHRC Res 37/L.30 (19 March 2018) UN Doc A/HRC/37/L.30.

¹⁸ *ibid* para 8.

¹⁹ Likewise, the Special Rapporteur in the field of cultural rights in her report also stressed that the acts of heritage destruction require ‘to be addressed in the context of holistic strategies for the promotion of human rights, and peace-building’; see Karima Bennouna, ‘Report of the Special Rapporteur in the Field of Cultural Rights’, UN Doc A/HRC/31/59 (February 2016) para 82. The UNESCO also developed strategy, which provides ‘rehabilitation of cultural heritage as an important cultural dimension, which can strengthen intercultural dialogue, humanitarian action, security strategies and peacebuilding’; see UNESCO, ‘Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralisms in the Event of Armed Conflict’ UNESCO Doc 38 C/49 and 197/EX/10.

more scrutiny, mainly about the relevancy, possible scopes, or limitations. Guided by the concerns raised by the UN organs, recommendations made by the HRC, and alarmed by the growth of deliberate destructions and crimes against cultural heritage, this article therefore stresses the need of bringing such crimes under the mechanisms of TJ. To this end, it analyses the scope of possible TJ mechanisms and their importance of implementing in a comprehensive way to better address such destructions and the consequences.

II. Working Definition and Related Concept

A. What is Cultural Heritage?

The scope of cultural heritage²⁰ is very wide and evolving where a better approach for acknowledging it would be to understand its characteristics instead of confining it within a circle. In a broad sense, the cultural heritage does not belong only to any individual or even a community, but is rather connected ‘to the whole of humankind’.²¹ The cultural heritage, either tangible or intangible, always accompanies certain value which is handed on by the past to the present and which deserves to be transmitted to the future generations.²²

For the purpose of this study, cultural heritage is characterised at least from two contexts: first, tangible heritage which includes, but is not limited to, archaeological sites, cemeteries, cultural centres, historic structures, libraries, monuments, museums, and religious sites;²³ and second, intangible heritage which may encompasses social practices, rituals, religious ceremonies, oral traditions, and expressions.²⁴ On the other hand, the deliberate destruction of cultural heritage normally falls into three categories: destruction during armed conflicts, targeted destructive acts, or looting of cultural objects during or in the aftermath of armed conflicts.²⁵ These destruction or attacks can be done with a motive to destroy any tangible heritage or to erase any intangible heritage.

B. Why cultural heritage calls for consideration in transitional justice?

²⁰ Throughout this article, the expressions cultural heritage, cultural property and protected buildings/sites are interchangeably used.

²¹ Jukka Jokilehto, *A History of Architectural Conservation: The Contribution of English, French, German and Italian Thought towards an International Approach to the Conservation of Cultural Property* (PhD dissertation defended at York University, ICCROM 1986) 1; Johan Brosché and others, ‘Heritage under attack: motives for targeting cultural property during armed conflict’ (2017) 23(3) *International Journal of Heritage Studies* 248, 250.

²² Lyndel V Prott and Patrick J O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1(2) *International Journal of Cultural Property* 307, 311.

²³ Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) [1954 Hague Convention]; article I of the Convention provides a persuasive definition of tangible cultural heritage, but defined it as ‘cultural property’; Also see Holt (n 1) 1.

²⁴ The UNESCO in 2003 adopted the convention for the protection and safeguarding of the intangible cultural heritage; see Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) art 2; See also Karima Bennoune, *Report of the Special Rapporteur in the field of cultural rights* UN Doc A/71/317 (Human Rights Council 2016) para 10.

²⁵ Holt (n 1) 1-2.

At first, it is essential to find a reasonable justification of this question since TJ ‘is not a panacea for all ills’.²⁶ Of course, bringing every concern in the TJ discourse may challenge its innate sanctity; however, the cultural heritage has its own appeal, as on the one hand, it is continuously subjected to attacks during or in the aftermath of armed conflict, while on the other, it heavily influences the post-conflict recovery processes.

Notably, the cultural heritage has an intrinsic connection to the objectives TJ always strives to achieve. For instance, what the culture and cultural heritage can offer, i.e. healing, opening space for dialogue and participation, creating atmosphere of tolerance, and reconciliation,²⁷ are central to the goals of TJ. So the attacks or threats to the heritage naturally have a direct impact to the TJ, meaning that such acts may not only affect the ‘stability, social cohesion, and cultural identity’, but also can create a major obstacle to peace and reconciliation.²⁸ Therefore, the crimes against cultural heritage require to be addressed by holistic mechanisms; along with prosecuting the perpetrators, preference should also be given to the needs of victims, importantly, in assisting the start of the process of rehabilitation and reconciliation.²⁹ Consequently, considering the mutual interconnection between cultural heritage and TJ, and recognizing the need of ‘full range of processes and mechanisms’ to deal with the multitude of heritage crimes, this study emphasizes on a comprehensive TJ approach.³⁰

III. The Relevance and the Entry of Cultural Heritage in Transitional Justice

First and foremost, it is necessary to identify how cultural heritage enters into the domain of TJ. In recent times, a line of research has been developed by certain authors, advocating the idea of incorporating crimes against heritage into TJ processes.³¹ What has mostly been emphasized is the interrelationship between cultural heritage and human rights or right to

²⁶ Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017).

²⁷ Ereshnee Naidu-Silverman, *The Contribution of Art and Culture in Peace and Reconciliation Processes in Asia. A literature review and case studies from Pakistan, Nepal, Myanmar, Indonesia, Afghanistan, Sri Lanka and Bangladesh* (Danish Centre for Culture and Development 2015) 10; Also see Andrea Breslin, ‘Art and Transitional Justice: The ‘infinite incompleteness’ of transition’ in Lawther, Moffett, and Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 268.

²⁸ UNHRC Res 33/20 (n 2) 2.

²⁹ Recognizing the importance of TJ measures, and acknowledging the limitations of national criminal law, Louise Arbour opined that, ‘analogies to national criminal law were necessary but insufficient to deal with the range of grievances and remedial actions required in societies emerging from conflict’; see Louise Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) 40(1) *International Law and Politics* 1, 2.

³⁰ With respect to a holistic approach of transitional justice (TJ), or what it may offer, Alexander L Boraine observed: transitional justice is ‘a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation’; see Alexander L Boraine, ‘Transitional Justice: A Holistic Interpretation’ (2006) 60(1) *Journal of International Affairs* 17, 18; Also see Arbour (n 29) 2.

³¹ Marina Lostal and Emma Cunliffe, ‘The Aftermath of Destruction of Cultural Heritage: Factoring in Cultural Rights in Post-Conflict Recovery Processes’ (2016) Human Rights Office of the High Commissioner Submission to Study on Intentional Destruction of Cultural Heritage <<https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/>> accessed 04 May 2021; Also see Marina Lostal and Emma Cunliffe, ‘Cultural Heritage that Heals: Factoring in Cultural Heritage Discourses in the Syrian Peacebuilding Process’ (2016) 7 *The Historic Environment: Policy & Practice* 248.

memory (or to truth) that gives a strong basis to think about heritage in the TJ context.³² But what still deserves to be expounded is the interconnection and interdependence between human rights, humanitarian law, and criminal law; their role in defining and shaping the notion of heritage rights; and how their recognitions influence cultural heritage's entrance into TJ project. Taking care of the interconnection between all three discourses and their distinct role in narrating heritage rights, this part of the article identifies two main approaches to portray how heritage enters into the realm of TJ and can be addressed by its mechanisms. Firstly, the human rights discourse, which is defined here as 'human rights approach' to cultural heritage, serves as an entrance gate for cultural heritage. Secondly, an intertwined approach of humanitarian law and criminal law that elevates crimes against heritage to the legal status of international crimes and generates criminal responsibility, serves as a strong ground to bring such crimes to justice and guarantee non-recurrence in the future.

A. Human Rights Approach to Cultural Heritage

To initiate TJ measures to address the past oppression, primarily, focus is given on the consideration of whether it was a grave human rights violation or serious humanitarian abuse.³³ Thus, human rights always stand as one of the dominant pathways through which the victims of gross violations can embark on the way of TJ. Therefore, the consideration of cultural heritage from the perspective of TJ would naturally demand to understand its relation with human rights.

From manifold grounds cultural heritage may be seen as an intrinsic part of human rights, especially when it reflects the 'spiritual, religious, cultural' values of certain groups, minorities or communities,³⁴ and also when it comes to respect and protection of such values. It seems that the interconnection between heritage and culture gives it more legitimacy in the human rights discourse since cultural rights are commonly accepted as 'part of the wider human rights system'.³⁵ Nonetheless, what is also relevant and goes beyond an individualistic and culture centric approach is that the heritage is considered as a 'public patrimony', which states have duty to safeguard and transmit to future generations for the sake of all

³² Lucas Lixinski, 'Cultural Heritage Law and Transitional Justice: Lessons from South Africa' (2015) 9(2) *International Journal of Transitional Justice* 278, 281-286.

³³ Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (foundation of the mandate) UN Doc A/HRC/21/46 (9 August 2012) paras 21-22.

³⁴ Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22(1) *European Journal of International Law* 9, 10. Also see Bennoune, UN Doc A/HRC/31/59 (n 19) para 47; A/HRC/17/38 and Corr.1, para 77.

³⁵ Farida Shaheed, 'Report of the independent expert in the field of cultural rights', UN Doc A/HRC/14/36 (22 March 2010) 3-4. See Preamble of the Constitution of the United Nations Educational, Scientific and Cultural Organization (16 November 1945), provides: 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern'. Also see UNESCO, 'UNESCO World Report: Investing in Cultural Diversity and Intercultural Dialogue' (2009) <<https://unesdoc.unesco.org/ark:/48223/pf0000185202225>> accessed 4 May 2021, the *World Report* asserts, 'recognition of cultural diversity grounds the universality of human rights in the realities of our societies'. See Bennoune, UN Doc A/HRC/31/59 (n 19) para 23.

humankind.³⁶ However, in the following paragraphs, the human dimension of cultural heritage and its relation with human rights are assessed elaborately.

i. Human Dimension of Cultural Heritage

From the human rights perspective a cultural heritage is important not for its aesthetic dimension, but rather for its ‘human dimension’, in particular ‘its significance for individuals and groups and their identity and development processes’.³⁷ A heritage is a symbol of historic truth, tradition, and identity which it speaks to present and future generations through its metaphoric mouth. People or communities can identify their existence through the eyes of heritage, and can embark on the way of future enrichments and developments through the strength of its symbolic feet. Importantly, the resonance it has for any particular group or community, much more it has for the humanity at large. The preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict recognized that ‘the preservation of the cultural heritage is of great importance for all peoples of the world’.³⁸ Even the International Court of Justice (ICJ) elsewhere reiterated this notion and observed that: ‘the ultimate titulaires of the right to the safeguard and preservation of [...] cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole’.³⁹ The ICTY also in one of its judgements gave indication of how destruction of heritage could lead to the demonization of humanity. In response to the attack on the Old Town of Dubrovnik, the ICTY Trial Chamber articulated that: ‘[t]he shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind’.⁴⁰

The attack against heritage does not only cause loss to a particular community, but also poses a threat to the cultural heritage of the entire humankind. Thus, the rationale behind the protection of heritage is more profound and universal, and its purpose is the welfare of all human beings. And this relevance and importance of cultural heritage for the human beings or humankind clearly depicts its human dimension, in particular its intrinsic connection to human rights.⁴¹

On a different note, it is evident that certain principles which are part of the human rights discourse and demonstrate respect to human dignity are also being adopted and developed by the heritage laws. The obligation to respect cultural heritage is one of those recognized extensively by the heritage discourse, revealing its connection to humanness as well as human rights. Starting from the 1954 Hague Convention to the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, both oblige the states to respect heritage ‘by refraining from any act of hostility’,⁴² as well as ‘to respect international rules’ that criminalise the intentional destruction of heritage.⁴³ Interestingly, the Committee on Economic, Social and Cultural Rights also recognised the need to respect and protect

³⁶ Francioni (n 34) 10.

³⁷ See Bennoune, UN Doc A/HRC/31/59 (n 19) para 47; Bennoune, UN Doc A/71/317 (n 24) para 6; UN Doc A/HRC/17/38 and Corr.1, para 77.

³⁸ 1954 Hague Convention (n 23) third recital of the preamble

³⁹ *Request for Interpretation of the Judgement of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Separate Opinion of Judge Cançado Trindade) ICJ Rep 2013, para 114. See Bennoune, UN Doc A/HRC/31/59 (n 19) para 48.

⁴⁰ *Prosecutor v Miodrag Jokic* (Judgment) IT-01-42/1-S (18 March 2004) para 51.

⁴¹ Francioni (n 34) 13.

⁴² 1954 Hague Convention (n 23) art 4.

⁴³ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (17 October 2003) art IX.

cultural heritage and stated that the right to participate in cultural life imposes obligations on state parties to '[r]espect and protect cultural heritage in all its forms, in times of war and peace [...]'.⁴⁴ The Committee actually has clarified the relation between the right to heritage and the right to participate in cultural life, which in turn demonstrates the connection between cultural heritage and human rights. This connection or relation is also visible in the Convention for the Safeguarding of Intangible Cultural Heritage adopted in 2003. The crucial aspect of this convention is that its addressees are the human groups and communities, including minorities, and it aims to safeguard their traditions and cultural practices (hereinafter intangible cultural heritage).⁴⁵ However, in 2007, the human dimension of cultural heritage law found a new synthesis upon the adoption of the UN Declaration on the Rights of Indigenous Peoples which expressly recognizes the rights of the indigenous peoples to practise their 'cultural traditions and customs'.⁴⁶ The Declaration carries significance in the context of TJ since in many war-affected states, cultural traditions of indigenous communities are deliberately targeted and they are also being deprived of their communal property. In such circumstances, the Declaration requires states to provide redress through 'effective mechanisms' when their 'cultural, intellectual, religious and spiritual property' is taken in violation of their laws, traditions and customs.⁴⁷ Although the Declaration partially defines the term 'effective mechanism', referring to 'restitution' as one of the key elements,⁴⁸ in a broader context, a state may find TJ mechanisms as a sustainable means to serve the aggrieved indigenous communities.

ii. The Relationship between Human Rights, Cultural Rights and Heritage Rights, and their Role in Transitional Justice

A number of scholars are concerned about the role of human rights in the context of TJ, such as Lucas Lixinski who expressly warned against 'overemphasizing the role of human rights with respect to heritage'.⁴⁹ It was an important proposition Lixinski put forward until it propagated a different line of argumentation where certain authors reiterated his view, arguing that it would be 'unprecedented' if anyone claims that the destruction of heritage site is a violation of his 'human right to take part in cultural life'.⁵⁰ They opined that this kind of approach would 'miss the wider effects' of such massive loss has had on the direct victims as well as the international community.⁵¹

Undoubtedly, the violation of the right to cultural heritage has large-scale impacts than violating the human right to take part in cultural life, because what destruction of heritage can cause by eliminating the memory and identity of a community is not equal to the loss caused, for example, due to the prohibition on performing particular rituals or traditional practices.

⁴⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), 'General comment no. 21, Right of everyone to take part in cultural life (art 15, para 1a of the Covenant on Economic, Social and Cultural Rights)', UN Doc E/C.12/GC/21 (2009) para 50; Shaheed (n 35) para 9.

⁴⁵ Convention for the Safeguarding of the Intangible Cultural Heritage (n 24) arts 1 & 2.

⁴⁶ United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 (2007) art. 11.1. See Francioni (n 34) 15.

⁴⁷ United Nations Declaration on the Rights of Indigenous Peoples (n 46) art 11.2.

⁴⁸ *ibid.*

⁴⁹ Lixinski (n 32) 285.

⁵⁰ Lostal and Cunliffe, 'Cultural Heritage that Heals' (n 31) 4.

⁵¹ *ibid.*

But what we also cannot ignore is that heritage plays a vital role in cultural life, and the so-called traditions and practices form part of the cultural heritage,⁵² meaning that the concept of heritage and cultural rights converge or tend to meet at a particular point. Therefore, it is important to search for convergence and take into consideration the ‘conceptual link’ that exists between heritage, human rights, and cultural rights.⁵³ To that end, this part, firstly, assesses how cultural rights are strongly connected to heritage rights with a view to clarifying the perceived hierarchy that exists between them; secondly, offers an effect based discussion to understand the effects of cultural rights in the post-conflict societies; and thirdly, narrates how the human rights discourse operates and complements the heritage rights and laws.

a. Interconnection between Cultural Rights and Heritage Rights

Cultural rights as a part of human rights should not be generalised when human rights and heritage rights are contested. Rather, it is crucial to understand the synergy that exists between these two rights. Although the traditional conception of cultural heritage encompasses tangible objects of historic importance (i.e. historic monuments, sites, etc.), yet a substantial part of it deals with the intangible components, (i.e. rituals, traditional ceremonies, performing arts, oral history, etc.), which are widely accepted as ‘intangible cultural heritage’.⁵⁴ The intangible cultural heritages are nothing but an expression of cultural practices and values. Although the rights generated from them might be sub-divided into cultural rights and heritage rights but both are closely connected, and often co-exist. The Inter-American Court of Human Rights (IACtHR), in the case of the *Yakye Axa Indigenous Community*, has made a very comprehensive observation.⁵⁵ At first, the Court recognized the cultural practices (i.e. art, rituals, oral expressions and traditions, customs, etc.) and their values as ‘non-material cultural heritage’.⁵⁶ Then, the Court opined that ‘to guarantee the right of indigenous peoples to communal property, it is necessary to take into account that their land is closely linked’ to their ‘traditional practices and culture’.⁵⁷ From the overall findings of the Court, one can identify that the right to communal property of a community has strong connection to their ‘traditional practices and culture’,⁵⁸ and the recognition of such right may contribute to the free development and transmission of culture to the future generations,⁵⁹ which is one of the fundamental aims of protecting cultural heritage. Since the communal property does have heritage value, one must need to acknowledge its inbuilt relation with ‘traditional practices and culture’, meaning that such practices and culture are the intrinsic part of cultural heritage. In 2003, the UNESCO adopted a binding convention for safeguarding the intangible cultural

⁵² Intangible heritage encompasses ‘traditions, customs and practices, knowledge, vernacular or other languages, forms of artistic expression and folklore’; see First Expert Report, ICC-01/12-01/15-214-AnxI-Red3, 5; *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017) para 15.

⁵³ See Francesco Francioni, ‘Culture, Heritage and Human Rights: An Introduction’ in Francesco Francioni and Martin Scheinin (eds), *Cultural human rights* (Martinus Nijhoff Publishers 2008) 7.

⁵⁴ Prott and O’keefe (n 22) 308. To find how tangible cultural heritage is linked to intangible heritage, see *Report of the Special Rapporteur in the field of cultural rights*, UN Doc A/71/317 (n 24) para 7.

⁵⁵ *Case of the Yakye Axa Indigenous Community v. Paraguay* (Merits, reparations and costs) Inter-American Court of Human Rights Series C No 125 (Judgment of 17 June 2005).

⁵⁶ *ibid* para 154. Also see Bennoune (n 24) para 10.

⁵⁷ *Case of the Yakye Axa Indigenous Community v. Paraguay* (n 55) para 154.

⁵⁸ *ibid* para 155.

⁵⁹ Bennoune (n 24) para 6.

heritage.⁶⁰ The convention defines wide spectrum of ‘practices, representations, expressions, knowledge, skills’ as intangible cultural heritage⁶¹ and acknowledges the ‘deep seated interdependence’ between such intangible cultural heritage and the tangible cultural heritage.⁶² Being aware of the interconnection and interdependence between heritage rights and the rights associated with intangible ‘traditional practice and culture’, it appears that a proactive approach would be to understand their role and status conjointly in the process of TJ instead of categorizing them on a hierarchical basis.

b. Cultural Rights and their Effects in Transitional Justice

We need to be careful before incurring a demarcation between cultural rights and heritage rights based on their perceived ‘effects’ in the process of TJ. Since a considerable part of cultural rights carry heritage value and co-exist with heritage rights, subjugation of any of the rights can have an adverse impact in the community.⁶³ We can take the example of the Case of *the Plan de Sánchez Massacre*, where the victims were unable to perform the funeral rites, ceremonies, and other traditional manifestations.⁶⁴ The Court seriously took into consideration of ‘the magnitude of the damage caused to the victims’ due to the non-adherence of those traditional rites and customs.⁶⁵ The Court acknowledged that the loss of the ‘cultural identity and cultural vacuum’ can cause psychological damage and the consequences sometimes ‘go beyond the individual sphere and affect the family and community fabric’.⁶⁶ To better understand the consequences of the denial of the cultural practices and rituals, one can revisit the experiences of the apartheid regime of Africa. One of the worst practices was the disrespect for the traditional rituals around death that incited the anger and pain among many people.⁶⁷ Ms Tony Mazwai whose son died in 1988 explained the cruel atmosphere of the funeral:

I was informed that my son was a well-trained guerrilla and that the people who attend the funeral have to be limited to 200 in number ... They insisted there should be no speeches, no freedom songs, nothing. It was like a war.⁶⁸

The rituals were not only part of traditional practices but also connected to the dignity of the victims. Recognizing the significance of those cultural practices and the gravity of their denial, the then Truth and Reconciliation Commission (hereinafter TRC) recommended for ‘exhumations and reburials’, and provided financial and logistic assistance to the families of the victims so that ‘dignified reburials’ could take place.⁶⁹ These initiatives demonstrated

⁶⁰ Convention for the Safeguarding of the Intangible Cultural Heritage (n 24).

⁶¹ *ibid* arts 1 & 2.

⁶² Convention for the Safeguarding of the Intangible Cultural Heritage (n 24) third recital of the preamble.

⁶³ Bennoune, UN Doc A/71/317 (n 24) paras 7-8.

⁶⁴ *Case of the Plan de Sánchez Massacre v. Guatemala* (Reparations) Inter-American Court of Human Rights Series C No 116 (Judgment of 19 November 2004).

⁶⁵ *ibid* 82.

⁶⁶ *ibid* 78.

⁶⁷ Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Vol 5 1999) 152-154 <<http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>> accessed 04 May 2021.

⁶⁸ *ibid* 153.

⁶⁹ Truth and Reconciliation Commission (n 67) 366.

respect to the dignity of the victims which helped to diminish the anger and mental pain of their families.

On a different note, it would not be unrealistic if anyone implies that cultural and religious values are sometimes used as a means to prolong the transition. This approach lies in the history of Africa where certain religious values (non-Christian faith) in education were repressed and other 'alien values' were imposed to perpetuate the apartheid goals.⁷⁰ Consequently, one cannot ignore the danger a savage culture or its values might have in post-conflict settings. It is therefore crucial to identify those savage cultures and resist them, so that they cannot block the TJ movement. On the other hand, same cultural values can have completely different, in fact remarkable effects in process of TJ. For example, ideology like *ubuntuism*⁷¹ - grounded in the traditional African culture - played a significant role in the process of transformation from apartheid to democracy in Africa. This is not only about the transformation, these days war affected societies adopt multi-cultural practices as strong means to revive by overcoming the past trauma they have endured.⁷² Thus culture and cultural practices have become a strong means to recover psychological loss, contributing considerably in the process of social reconstruction and transformation. Taking care of the inbuilt relation between culture and heritage and their importance for the progress of TJ, this study, therefore, prefers to understand the synergies and how they can complement each other in the process of TJ.

c. Role of Human Rights in the Metaphor of Heritage Law

This section attempts to go into deep and assess the concerns raised by a group of scholars against overemphasizing the role of human rights with respect to heritage and heritage laws. Although the concerns raised provoke one's thought, still it deserves further analysis to have a comprehensive understanding. One might be curious to learn as to when we overemphasize human rights and when we should be cautious not to do it the moment heritage rights are at transition. To explain the caution thesis against the role of human rights, one may refer to the interplay between the right to property and tangible heritage rights. While the property rights seek to protect the rights of the possessor only, fundamental principles behind the heritage rights are more profound, aiming to protect the heritage for the enjoyment of present and future generations.⁷³ Unlike individual property rights, protection of heritage is indispensable for the 'general interest of universal culture'.⁷⁴ Now the question is if both the rights contest each other, what role human rights can play considering the fact that both are connected to it. To elucidate the issue more clearly, we can take the facts of the case of *Beyeler v. Italy*, decided

⁷⁰ *ibid* 91-92.

⁷¹ *ibid* 92; footnote 60 of the report it is explained. that: '*Ubuntu*, generally translated as "humaneness", expresses itself metaphorically in *umuntu ngumuntu ngabantu* – "people are people through other people"'.⁷²

⁷² To find how art and culture contribute to transitional justice process, see Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (guarantees of non-recurrence), UN Doc A/HRC/30/42 (7 September 2015) para 95; John Daniel Giblin, 'Post-conflict heritage: symbolic healing and cultural renewal' (2014) 20(5) *International Journal of Heritage Studies* 500; Daniel Golebiewski, 'The Arts as Healing Power in Transitional Justice' (*E-International Relation Students*, 2014) <<https://www.e-ir.info/2014/02/19/the-arts-as-healing-power-in-transitional-justice/>> accessed 04 May 2021; Breslin (n 27).

⁷³ Prott and O'keefe (n 22) 309.

⁷⁴ *Beyeler V. Italy* (ECtHR, Judgment of 5 January 2000) para 113.

by the European Court of Human Rights (ECtHR).⁷⁵ In that case, the Italian Government allowed the Ministry of Cultural Heritage to acquire a work of art by exercising the right of pre-emption in 1988. According to the Court, that acquisition violated the applicant's fundamental right to 'the peaceful enjoyment of his possessions' under article 1 of the Protocol No. 1.⁷⁶ In such a circumstance when community interest to safeguard the cultural heritage and individual's fundamental rights confront each other, an overly broad application of human rights that favours individual rights may not serve cultural value approach.

Having acknowledged this fact, this part of the article aims to understand the functioning mechanisms of human rights and how they complement the heritage discourse. Human rights entail obligations of states to respect, protect, and fulfil the rights arising from human rights treaties and laws.⁷⁷ Although this tripartite dimension of attributing duties and responsibilities to states was first championed by Henry Shue,⁷⁸ subsequently, it has been developed by General Comments and Concluding Observations of the UN Treaty Bodies.⁷⁹ In this context, the obligation to respect means that the state has a duty to respect heritage laws and not to interfere with the access to the enjoyment of heritage rights of the communities, groups, and individuals.⁸⁰ On the other hand, the obligation to protect entails that the state must protect heritage from the abuse of other non-state actors by preventing, investigating, punishing, and redressing such abuse 'through effective policies, legislation, regulations, and adjudication'.⁸¹ Similarly, the obligation to fulfil means that the state must take measures 'to progressively realise' heritage rights, 'to the maximum of available resources and by all appropriate means'.⁸² The obligation to fulfil has a lot to do in a post-conflict state; for instance, a state requires to initiate educational or awareness-raising programs, or to build memorials, so as to guarantee non-repetition of attacks against cultural heritage. It seems that a state has enormous duties to accomplish, such as respecting heritage laws, legislating, and enforcing laws to protect heritage, and to also perform the obligations under international

⁷⁵ *Beyeler V. Italy* (n 74).

⁷⁶ *ibid* para 122.

⁷⁷ For a comprehensive understanding, see Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (CUP 2015) 49-51.

⁷⁸ Henry Shue, 'Rights in the Light of Duties' in Peter Brown and Douglas Maclean (eds), *Human Rights and US Foreign Policy* (Lexington: Lexington Books 1979) 65-81; Further elaborated in Henry Shue, 'The Interdependence of Duties' in Philip Alston and Katarina Tomasevski (eds), *The Right to Food* (Martinus Nijhoff 1984) 83-95; Schmid (n 77) 50.

⁷⁹ Committee on Economic, Social and Cultural Rights, 'General Comment 12 on the Right to Adequate Food' (1999) UN Doc E/C.12/1999/5, para 15; Committee on Economic, Social and Cultural Rights, 'General Comment 14 on the Right to the Highest Attainable Standard of Health' (2000) UN Doc E/CN.12/2000/4, para 33; CEDAW Committee, 'General Recommendation No. 26 on Women Migrant Workers' (2008) UN Doc. CEDAW/C/2009/WP.1/R, para 2. Also see *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008) UN Doc A/HRC/8/5, endorsed by Resolution A/HRC/RES/8/7 (2008); *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) UN Doc A/HRC/17/31, endorsed by Resolution A/HRC/RES/17/4 (2011).

⁸⁰ Roger Matthews and others, 'Heritage and Cultural Healing: Iraq in a Post-Daesh Era' (2019) *International Journal of Heritage Studies* 1, 4.

⁸¹ *Guiding Principles on Business and Human Rights* (n 79) Principle 1.

⁸² Schmid (n 77) 50-51.

treaties that a state is committed to do.⁸³ And the non-performance of such obligations may give rise to state responsibility under human rights law. The human rights discourse helps to perceive such responsibilities and attribute them to a state.

Interestingly, the norms and principles of human rights have not remained confined within the traditional conception of state responsibilities of respecting and protecting human rights, but rather carries ample significance in the heritage discourse by generating both state and individual responsibility. For instance, the obligation to respect, a recognized principle of the human rights discourse, not only entails the responsibility of states, but also can trigger the responsibilities of individuals. As F. Francioni observed, the obligation to respect has ‘transcended the static scheme of state responsibility and has implicated the international criminal liability of individuals’ for the attack against or destruction of cultural heritage.⁸⁴ If we analyse this context, it can be identified that the so called individual criminal liability, which is the subject of criminal law, has spawned from human rights principles for the violation of heritage law, which is nothing but an expression of humanitarian law. So the heritage laws together constitute a complex branch, accommodating multiple discourses that may not ideally be realised ‘on their own’ in isolation of others.

Moving back to the Lixinski’s caution against overemphasizing the role of human rights with respect to heritage where he tried to make himself align with the views of C. Bell and launched a competing claim for heritage law to govern (at least some) TJ dilemmas.⁸⁵ There is no doubt that the heritage laws as a distinct regime can be used on their own to govern the dilemmas of TJ, but what C. Bell also emphasized was that the justice issued in transition would be pursued ‘within best applicable legal framework’, meaning the framework which is more relevant and suitable.⁸⁶ He identified four competing (but complementary) legal regimes which are relevant to the normative requirements of TJ: domestic criminal law, international human rights law, humanitarian law, and international criminal law.⁸⁷ These are four distinct regimes having different purposes, but in pursuing justice they can co-exist and complement each other.⁸⁸ The co-existence does not always mean the colonisation of one by another, at least when it is grounded on necessity. And this sort of complementary approach is crucial for heritage laws because they are closely connected with (and dependent on) all these regimes and their institutions.

This connection and dependency has been more clear and reflected in the decision of the *Claims Commission* provided in response to the Eritrea’s claims against Ethiopia as result of the alleged violation of international law during the armed conflict occurring on 1998–2000.⁸⁹ One of the claims was against the unlawful damage caused to the *Stela of Matara*, an

⁸³ Matthews and others (n 80); where the authors argued that the ‘International Cultural Heritage Law (ICHL) largely focuses on states as the owners and guardians of cultural property’.

⁸⁴ Francioni (n 34) 13.

⁸⁵ Lixinski (n 32) 285.

⁸⁶ Christine Bell, ‘Transitional Justice, Interdisciplinarity and the State of the “Field” or “Non-Field”’ (2009) 3(1) *International Journal of Transitional Justice* 5, 21.

⁸⁷ *ibid* 19.

⁸⁸ The International Court of Justice (ICJ) emphasized the interdependence between human rights and humanitarian law and opined that the human rights treaties *continue to apply in war time*. See *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 04 May 2021 [106]; *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168 [216].

⁸⁹ *Eritrea-Ethiopia Claims Commission - Partial Award: Central Front - Eritrea's Claims* 2, 4, 6, 7, 8 & 22, (Decision of 28 April 2004) XXIV Report of International Arbitral Awards 115.

object of great historical and cultural significance.⁹⁰ But the traditional heritage laws could not give resort to the claim since neither of the state was a party to the 1954 Hague Convention. As the article 56 of the Hague Regulations prohibits deliberate damage of historic monuments, the Commission held that such prohibition is also a part of customary law.⁹¹ Hence, the damage of *Stela* was a violation of customary international humanitarian law.⁹² It is worth mentioning that the recognition and protection of heritage rights sometimes goes beyond heritage treaty laws, and is complemented by the norms and rules of different legal regimes. In such cases, a holistic approach would be to interpret heritage law as a flexible corpus that does not create differences but accommodates and, if necessary, co-exists with other supportive regimes. Such an approach will not deflate, but rather enable heritage laws to play an effective role in post-conflict settings.

B. Intertwined Approach of International Humanitarian Law and Criminal Law

As with human rights law, the international humanitarian law (hereinafter IHL) primarily obliges states to respect rules of war, and the states, if fail to comply with such obligations, are generally held responsible internationally for their wrongful conducts. But the IHL goes beyond dealing with state responsibility, covering also the conduct of the non-state armed groups to a limited extent.⁹³ This part of the article raises concern about the continuing attacks against cultural heritage by the individuals and members of the armed groups, and importantly, analyses how the IHL, largely complemented by the international criminal law (hereinafter ICL), has been serving to hold such crimes responsible under TJ mechanisms. One may find at least from two directions that ICL and IHL mutually complement each other to bring heritage crimes to justice and guarantee non-recurrence of such crimes: i) by elevating the attacks against cultural heritage to the legal status of international crimes; and ii) by developing legal ground for criminal responsibility in response to the growing attacks against heritage conducted by individuals or their groups.⁹⁴

i. Elevation of Crimes against Heritage to the Legal Status of International Crimes

Whereas the human rights law in the majority of cases generates a duty to respect or a duty to protect heritage rights, the intertwined approach of IHL and ICL on the other hand entails a duty to prosecute, punish, or extradite the perpetrators of the heritage crimes. Mainly, an intertwined approach of IHL and ICL differs from the human rights approach in a sense that

⁹⁰ *ibid* para 107.

⁹¹ *ibid* para 113. However, to read about how the 1954 Hague Convention emerged into customary international law, see David A. Meyer, 'The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law' (1993) 11 Boston University International Law Journal 349.

⁹² Eritrea-Ethiopia Claims Commission - Partial Award (n 89) para 113.

⁹³ Applicability of IHL depends on circumstances whether non-state armed groups fulfill certain requirements or not. In general, Common Article 3 of the Geneva Conventions at least opens up the space for non-state actors to enter into IHL regime. For further analysis, see Annyssa Bellal and others, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93 International Review of the Red Cross 47, 47–79.

⁹⁴ See Francioni (n 34) 10.

it really elevates the heritage crimes to the level of ‘international crimes’.⁹⁵ A crime is said to be accepted as international crime when it carries at least two characteristics. Primarily, to constitute international crime, as has been reflected in the views of Evelyne Schmid, ‘international law must either directly establish criminal liability at the international level or require states to criminalise conduct in domestic criminal law’.⁹⁶ Generally, the treaties of the IHL and ICL discourse criminalise heritage crimes at the international level.⁹⁷ The international court and tribunals also play vital role while dealing with heritage crimes by progressively interpreting the treaties and defining such crimes in line with international crimes. For instance, the Statute of the International Criminal Court (hereinafter ICC) whereas characterises the attacks against cultural properties only as ‘war crime’, the international and quasi international judicial institutions on the other hand were far more progressive, searching even the genocidal intent or special intent (*dolus specialis*) behind the attacks on cultural property. The International Court of Justice (hereinafter ICJ), for example, had made an outstanding observation while deciding the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in 2007. As a result of the attacks against religious and cultural property, the Court held that such acts may be considered ‘as evidence of a genocidal intent aimed at the extinction of a group’.⁹⁸ Even the *ad hoc* and hybrid tribunals elsewhere attempted to qualify heritage crimes not only as war crimes, but also as crimes against humanity and genocide.⁹⁹

On a different note, the courts and tribunals do not always confine themselves to relying on the literal provisions of the international treaties, but often invoke customary norms and general principles of international law generating liability both at the domestic and international level.¹⁰⁰ Importantly, the IHL expressly urges the state parties ‘to comply with general principles of law and international law’ while punishing heritage crimes by imposing ‘appropriate penalties’.¹⁰¹ It is essential to mention here that the state parties can play a significant role by criminalising international crimes at the domestic level for which they are obliged under international treaties, customary norms, or general principles of international law. For example, article 28 of the 1954 Hague Convention, reiterated further by the 1999 Second Protocol,¹⁰² obliges the state parties to take, ‘within the framework of their ordinary

⁹⁵ The international crimes recognized under the Rome Statute are– genocide, crimes against humanity and war crimes, and crimes of aggression, see *Rome Statute of the International Criminal Court*, 17 July 1998 (entered into force on 1 July 2002) (Rome Statute).

⁹⁶ Schmid (n 77) 63.

⁹⁷ Since 2002, the International Criminal Court (ICC) and its statute (hereinafter *Rome Statute*) has been providing the legal basis and institutional mechanism to criminalise and prosecute heritage crimes at the international level; see Rome Statute (n 95) art 8(2)(b)(ix) and art 8(2)(e)(iv).

⁹⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] (Judgment) ICJ Rep 43 [344]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3 [390].

⁹⁹ *Prosecutor v Radislav Krstic* (Judgment) ICTY Case No. IT-98-33-A (19 April 2004) [25]; ECCC, Case 002 (Indictment) Case File No. 002/19-09-2007-ECCCOCIJ (15 September 2010) [1420]-[1421]. See Karolina Wierczynska and Andrzej Jakubowski, ‘Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case’ (2017) 16(4) *Chinese Journal of International Law* 695, 708.

¹⁰⁰ For instance, the ICTY places the offences against cultural property in the category of ‘violations of the laws or customs of war’. See *Prosecutor v. Kordic and Cerkez*, ICTY Case No. IT-95-14/2-T (26 February 2001) [207].

¹⁰¹ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (1999) art 15(2).

¹⁰² *ibid* arts 16-19.

criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons' who commit crimes against cultural property by breaching the obligations of the Convention.¹⁰³ The 2003 UNESCO Declaration also reiterated the obligations of state members to prosecute and punish 'any intentional destruction of cultural heritage'.¹⁰⁴ However, these kinds of manifold roles of international law, either by criminalising heritage crimes directly at the international level or requiring states parties to prosecute at the domestic level, can be one type of approaches to elevate heritage crimes to the status of international crimes. There remains one another ground as to why heritage crimes may achieve the international status. Normally, an international crime, which is considered a grave matter of international concern, may not adequately be dealt by a state only within whose jurisdictional sphere the crime has taken place or by the state of which the victim or perpetrator is a national.¹⁰⁵ Since the international crimes are directed against 'the vital interest of the international community',¹⁰⁶ an integral obligation therefore lies 'to the international community as a whole (*erga omnes*)'¹⁰⁷ rather than to any specific state directly connected to the crimes. Based on this principle of universality or universal jurisdiction, any state may criminalise or prosecute an international crime although the crime was not committed in its territory, or by its nationals, or with any other connection to it.¹⁰⁸ Given the fact that the cultural heritage has value which is universal, the duty to prosecute crimes against heritage therefore transcends the territoriality or nationality principle, and disseminates universally, extending the scope to the international community to take part in a spirit of solidarity. The 1999 Second Protocol to the Hague Convention seems to be proactive in opening up the scope of jurisdiction. This protocol does not aim to preclude 'the exercise of jurisdiction under national and international law',¹⁰⁹ but rather enables each state party to prosecute the perpetrators of heritage crimes if they reside or are present in its territory.¹¹⁰ However, these sorts of developments help us to understand that the crimes against heritage are not only the concern of a single state, but also carry an international status that all other states and international institutions are entitled to address.

ii. Individual Criminal Responsibility for the Crimes against Cultural Heritage

In the time of both international and non-international armed conflicts, individuals or members of the armed groups often target and deliberately attack the cultural properties. But the early rules and regulations protecting the cultural properties were primarily concerned with the duties and interests of the states rendering the belligerent parties to be responsible 'for all

¹⁰³ 1954 Hague Convention (n 23) art 28.

¹⁰⁴ *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage* (2003).

¹⁰⁵ *Hostage Case, United States v List (Wilhelm) and ors* (Trial Judgment) Case No 7 (1948) Nuremberg Military Tribunal [NMT], 1241; Schmid (n 78) 64.

¹⁰⁶ Florian Jessberger, 'The Principle of Universal Jurisdiction in German Criminal Law', 7; <<https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf>> accessed 04 May 2021. This paper was submitted on behalf of the German national group to the Fourth Section of the AIDP's XVIIIth World Congress

¹⁰⁷ See Francioni (n 34) 13.

¹⁰⁸ Zdzislaw Galicki, 'Preliminary Report of the Special Rapporteur on the Obligation to Extradite or Prosecute' (2006) UN Doc A/CN.4/571 [19]; Schmid (n 77) 278.

¹⁰⁹ Second Protocol to the Hague Convention (n 101) art 16.2 (a).

¹¹⁰ *ibid* art 16.1 (c).

acts committed by persons forming part of its armed forces'.¹¹¹ It was not an easy task to come out from this cycle of attributing responsibility only to the states for the violations of international law which was addressed by the judgement of the Nuremberg International Tribunal in 1946 (followed later by the judgement of the Tokyo International Tribunal in 1948), affirming the individual criminal responsibility under international law.¹¹² The principles recognized by the Charter of the Nuremberg Tribunal which was affirmed by the UN General Assembly Resolution,¹¹³ and subsequently, formulated as principles of international law by the International Law Commission (hereinafter ILC),¹¹⁴ had outstanding implications to the development of modern international criminal law. The Charter also opened up the scope for the protection of cultural properties during armed conflict, providing that the acts of plundering 'public and private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity' are crimes that violate the laws or customs of war and give rise to individual responsibility.¹¹⁵ Since then, a strong regulatory framework within the auspice of laws of war has emerged to protect against the deliberate destruction of cultural heritage. Importantly, the adoption of the 1954 Hague Convention, and its protocols (1999) supported by the 1977 Additional Protocols to the 1949 Geneva Conventions, provided legal basis to prevent and prosecute 'act of hostility' directed against cultural properties.¹¹⁶

The actual question of prosecution arose when massive war in former Yugoslavia caused heavy loss to their cultural heritage. As Igor Ordev described, a 'lot of unique, priceless churches, monasteries, mosques, shrines, and other religious objects dating from past centuries, as well as non-religious objects were harmed or destroyed' during the war.¹¹⁷ The drafters of the Statute of the International Criminal Tribunal for the former Yugoslavia

¹¹¹ 1907 Hague Regulations provided protection to the cultural properties, as art 27 clearly states: 'In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'. But the responsibility was attributed only to the belligerent parties; see Convention (IV) respecting the Laws and Customs of War on Land and its annex (adopted 18 October 1907, entered into force 26 January 1910) (Hague Convention IV), art 3.

¹¹² According to the Nuremberg Tribunal: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced', see Official Record of Trial, Vol I, *Official Documents*, 223. Also see Ivan Anthony Shearer, *Starke's International Law* (11th ed. Oxford University Press, 1994) 55.

¹¹³ UNGA Res 95(I) 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal' (11 December 1946) UN Doc A/64/Add.1. Also see Charter of the International Military Tribunal (IMT Charter) (8 August 1945) <<http://avalon.law.yale.edu/imt/imtconst.asp>> accessed 04 May 2021.

¹¹⁴ The International Law Commission (ILC), which formulated the Nuremberg principles, defined war crimes 'as violations of the laws or customs of war which include, but are not limited to [...] plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity', see ILC, 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal' (1950) UN Doc A/CN.4/SER.A/1950/Add.1. Also see Wierczynska and Jakubowski (n 99) 704.

¹¹⁵ IMT Charter (n 113) art 6.

¹¹⁶ The 1954 Hague Convention provides protection to the cultural properties in the event of armed conflicts. It is supplemented by two Protocols – the First Protocol adopted in 1954 and the Second Protocol adopted in 1999. See Hague Convention (n 23).

¹¹⁷ Igor Ordev, 'Erasing the Past: Destruction and Preservation of Cultural Heritage in Former Yugoslavia: Part 1' (2008) 28(4) *Occasional Papers on Religion in Eastern Europe* 16.

(hereinafter ICTY) thus incorporated provisions that secured the Tribunal's jurisdiction to prosecute the persons violating the laws or customs of war, especially, due to 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'.¹¹⁸ The ICTY in its judgments explained the scope of this provision [Art. 3(d) of the ICTY Statute], acknowledged the relevancy of the prosecution of the crimes against heritage under the Statute.¹¹⁹ For instance, in the *Strugar* case, the Trial Chamber of the ICTY held that an act will fulfil the elements of the crime of destruction or wilful damage of cultural property within the meaning of article 3(d) of the Statute, if: "(i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question."¹²⁰

In its judgment in the *Strugar* case, the Trial Chamber demarcated the criterion when attacks or damage can cause crimes against Cultural heritage; however, what is important here is that the ICTY recognized the fact that cultural properties deserve protection 'above and beyond their material dimension',¹²¹ and therefore, defined any deliberate attack against cultural property as international crime within the meaning of its Statute, provided ground for accountability, and prosecuted the perpetrators of such crimes.

At present, it is the ICC which appears to be a dominant international judicial institution possessing jurisdiction to prosecute crimes against cultural properties. The Statute of the ICC (hereinafter Rome Statute) defines acts as war crimes if committed in the course of an international or non-international conflict which consist of 'intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'.¹²² However, it is axiomatic that this definition of the Rome Statute reflects the wording of traditional IHL documents, especially the language of the 1907 Hague Regulations, and contains a 'very general list of protected property' which keeps historic monuments together with hospitals and places where the sick and wounded are collected.¹²³ It is also noticeable that the definition focuses on the tangible properties of art and religion, whereas the intangible cultural heritages are to some extent overlooked. Consequently, the need to focus on the cultural values of the heritage and the clarity in terms of criminalising

¹¹⁸ *Statute of the International Criminal Tribunal for the Former Yugoslavia* (adopted on 25 May 1993) (hereinafter *ICTY Statute*) art 3(d).

¹¹⁹ See *Prosecutor v Kordi & Cerkez* (n 100); *Prosecutor v. Jokic* (n 40).

¹²⁰ *Prosecutor v Pavle Strugar* (Judgment) ICTY Case No. IT-01-42-T (31 January 2005) [312].

¹²¹ Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 *European Journal of International Law* 203, 207. However, the author disagreed with the above-mentioned idea, contending that 'the traditional IHL approach fails to address the concern that historic buildings, monuments, and works of art deserve protection above and beyond their material dimension, precisely because of their cultural value both for the local community and for humanity as a whole'.

¹²² Rome Statute (n 95) art 8(2)(b)(ix) and art 8(2)(e)(iv).

¹²³ See Michael Bothe, 'War Crimes' in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 379, 409–410; Frulli, (n 121) 211.

attacks against such values has been blurred.¹²⁴ But what is remarkable is that the drafters of the Rome Statute at least have opened up the door to bring the perpetrators of the heritage crimes under the profound mechanisms of the ICC. From now onwards, if any attack against heritage takes place, which is a crime within the meaning of the Statute, the ICC can investigate and prosecute,¹²⁵ if necessary, adopt reparative measures to redress the victims or restore and rehabilitate the destructed sites.¹²⁶

C. Preliminary Conclusion

The two approaches discussed here, namely, human rights approach to cultural heritage and the intertwined approach of IHL and ICL, help to understand the relevance of cultural heritage in TJ, and ascertain why or on what basis it can be considered in TJ. The human rights approach provides the ground based on which cultural heritage receives legitimacy to enter into the domain of TJ. Moreover, it is a timely response to the dilemmas posed by the existing literature with respect to the role of human rights in TJ. On the other hand, the intertwined approach of IHL and ICL is complementary to what human rights approach attains. It builds the substantive ground as to why crimes against heritage should be brought into TJ and addressed by its mechanisms.

IV. Comprehensive Approach of Transitional Justice to Address the Deliberate Destruction of Cultural Heritage

To start with the idea of a comprehensive approach of TJ, it is essential to explain what it stands for, or what resonance it has when comes to the concerns of deliberate destruction of cultural heritage. This part analyses the scopes of the potential TJ mechanisms which can be initiated comprehensively with the aims, mainly of preventing future attacks against cultural heritage, revealing the truth about the committed crimes, bringing the perpetrators to justice, rehabilitating the destructed sites, redressing the victims, and promoting 'social cohesion or reconciliation'.¹²⁷

¹²⁴ Frulli (n 121) 211.

¹²⁵ To date, the Trial Chamber of the ICC condemned Mr. Al Mahdi due to his direct affiliation with the heritage crimes in Timbuktu, Mali; see *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) (n 6).

¹²⁶ Article 75(1) of the Rome Statute requires the Court to 'establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. Generally, the Trust Fund for Victims (TFV), created in accordance with article 79 of the Rome Statute, is responsible to implement Court-Ordered reparations. For instance, to provide remedies to the victims and rehabilitate the destructed sites of Timbuktu, the Trial Chamber (VIII) of the ICC issued the reparations order on 17 August 2017 and directed to the TFV to submit a plan for the implementation of the reparations. Later, based on the submission, the Chamber issued its decision and approved the Updated Implementation Plan (UIP) of the TFV; see the 'Decision on the Updated Implementation Plan from the Trust Fund for Victims (UIP)' in the case of *The Prosecutor v. Ahmed Al Faqi Al Mahdi*, ICC-01/12-01/15 (4 March 2019). Also see *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Reparations Order) (n 52).

¹²⁷ Generally, the main goals of implementing TJ measures is 'to provide recognition to victims, foster trust among individuals and particularly in State institutions, strengthen the rule of law and promote social cohesion or reconciliation'. See Pablo De Greiff, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' (prosecutorial prioritization strategies) UN Doc A/HRC/27/56 (27 August 2014) para 19; UNHRC Res 18/7, UN Doc A/HRC/RES/18/7 (13 October 2011); Greiff, UN Doc A/HRC/21/46 (n 33) para 28.

A. Comprehensive Approach of Transitional Justice

TJ is a response to a situation of large-scale human rights violations and serious humanitarian abuses.¹²⁸ Although the traditional conception of TJ refers to the ‘post-conflict’ justice, peace, and reconciliation processes,¹²⁹ in recent days, some scholars have held the opinion that the mechanisms of TJ may even have been tried in ‘pre-transitional states’ where there has not been a clear move from conflict to peace.¹³⁰ TJ is thus not only a project of post-conflict societies, but it also has importance for the cultural heritage which are in threat in a state of ongoing conflict (i.e. Syria, Mali). In the conflict and/or post-conflict societies, TJ normally functions by initiating a series of judicial and non-judicial measures.¹³¹ The common measures that are mostly reflected in the TJ literatures include the truth-seeking initiatives, prosecution, reparations, and the guarantees of non-recurrence (i.e. institutional/security system reforms).¹³²

However, when it comes to the destruction of cultural heritage, the situation is too complex and vast which cannot fully be redressed by any single action. To make it more clear and understandable, the prosecution of certain perpetrators without any truth-telling or granting reparations to victims or efforts to rehabilitate the destructed sites may be viewed as

¹²⁸ Laurel E Fletcher, Harvey M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24(3) *Human Rights Quarterly* 573; Ruti G Teitel, ‘Global Transitional Justice’ (2010) Center for Global Studies, Working Paper 8, George Mason University <https://www.gmu.edu/centers/globalstudies/publications/hjd/hjd_wp_8.pdf> accessed 4 May 2021; ‘Editorial Note’ (2007) 1(1) *International Journal of Transitional Justice*, 1-5; Louis Bickford, ‘Transitional Justice’ in Dinah L. Shelton et al. (eds), *Encyclopedia of Genocide and Crimes Against Humanity*, vol. 3 (New York, 2004) 1045-1047; International Center for Transitional Justice (ICTJ), ‘What is Transitional Justice?’ (2009) <<http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>> accessed 4 May 2021; Anja Seibert-Fohr, *Transitional Justice in Post-Conflict Situations* (Max Planck Encyclopedia of Public International Law 2011).

¹²⁹ The definition inscribed in the Secretary-General’s report clearly mentioned that ‘[t]he notion of ‘transitional justice’ [...] comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses’; see *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN Doc S/2004/616 (23 August 2004) 8.

¹³⁰ See Joanna R Quinn, ‘Whither the “Transition” of Transitional Justice?’ (16 May 2011) 12; this paper was prepared for the presentation at the Annual Meeting of the Canadian Political Science Association, Waterloo, Canada. In the views of Kai Ambos, the ‘concept deals with justice in societies in transition, either post-conflict or during an ongoing conflict’; see Kai Ambos, ‘The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC’ in Kai Ambos, Judith Large, Marieke Wierda (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Springer 2009). Also see ICTJ (n 128).

¹³¹ UN, ‘Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice’ (2010) <https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf> accessed 23 March 2021; *Analytical Study on Human Rights and Transitional Justice*, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, UN Doc A/HRC/12/18 (2009); Ambos (n 130) 19-103; Anika Oettler, ‘The Scope and Selectivity of Comparative Area Studies: Transitional Justice Research’, GIGA Working Papers No. 246 (2014) <https://www.giga-hamburg.de/de/system/files/publications/wp246_oettler.pdf> accessed 23 March 2021.

¹³² See Report of the Secretary General (n 129); Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General (n 131); Greiff, UN Doc A/HRC/21/46 (n 33) paras 20-21; Elizabeth A Cole, ‘Transitional Justice and the Reform of History Education’ (2007) 1(1) *The International Journal of Transitional Justice* 115.

a very superficial attempt, leaving behind a broad context unnoticed or untouched.¹³³ Likewise, reparations without truth-telling or prosecutions can also be perceived as ‘an effort to buy the acquiescence of victims’.¹³⁴ Considering these unexpected shortcomings, the then Special Rapporteur Pablo De Greiff suggested that TJ measures ‘work best when designed and implemented in relation to one another’.¹³⁵ ‘Individually inadequate, but mutually complementing, these measures, therefore, should be conceived of and implemented not as discrete and independent initiatives but rather as parts of an integrated policy’.¹³⁶ This kind of comprehensive approach facilitates to take into account the full range of factors that may have contributed to the destructions, and helps to respond in a sustainable manner.¹³⁷ In the following section of the article, as parts of comprehensive policy, four types of measures, namely, truth seeking, prosecution, reparations, and methods for the guarantees of non-recurrence have been described.

i. Truth-seeking Processes

The victims of heritage crimes have the ‘imprescriptible right to know the truth about the circumstances in which violations took place’.¹³⁸ This right of knowing truth is a recognized right under international law¹³⁹, the fulfilment of which can ‘promote and protect human rights’.¹⁴⁰ Revealing truth makes an indispensable contribution by officially and publicly acknowledging the facts that have taken place.¹⁴¹ This acknowledgement serves as a form of recognition of the value of aggrieved persons ‘as victims and as holders of rights’.¹⁴² In this way, truth-seeking initiatives foster trust and resentment, increase transparency and accountability, and ultimately, lead to reconciliation.¹⁴³

¹³³ Greiff, UN Doc A/HRC/21/46 (n 33) para 23.

¹³⁴ *ibid*; ICTJ (n 128).

¹³⁵ Greiff, UN Doc A/HRC/27/56 (n 127) para 18.

¹³⁶ Pablo De Greiff, ‘Justice and Reparations’ in Pablo De Greiff (ed), *The Handbook of Reparations* (OUP 2006). See Greiff, UN Doc A/HRC/21/46 (n 33) para 27; Greiff, UN Doc A/HRC/27/56 (n 127) para 18.

¹³⁷ ICTJ (n 128).

¹³⁸ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc E/CN.4/2005/102/Add.1 (2005) principle 4; Working Group on Enforced or Involuntary Disappearances, ‘General Comment on the Right to the Truth in Relation to Enforced Disappearances’ UN Doc A/HRC/16/48, 2.

¹³⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I) 1125 UNTS 17512 (adopted on 8 June 1977) art 32; see the Preamble, *International Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010); UNGA ‘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 Doc A/RES/60/147 (21 March 2005) Principle 24.

¹⁴⁰ UNHRC Res 12/L.27, UN Doc A/HRC/12/L.27 (25 September 2009) para 1; E/CN.4/2006/91; A/HRC/5/7; CAT/C/COL/CO/4 (2010) para 27; A/HRC/16/48, para 39; A/HRC/22/52, paras 23-26, 32-34; A/HRC/7/3/Add.3, para 82; A/HRC/14/23, para 34. See Pablo De Greiff, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (truth), UN Doc A/HRC/24/42 (28 August 2013) para 18.

¹⁴¹ Greiff, UN Doc A/HRC/21/46 (n 33) para 30.

¹⁴² *ibid*.

¹⁴³ See Eduardo Gonzalez and Howard Varney (eds), *Truth Seeking: Elements of Creating an Effective Truth Commission* (Amnesty Commission of the Ministry of Justice of Brazil 2013) 4; Breslin (n 27) 274.

However, the right to truth is not confined to individual victims; even the ‘society has the inalienable right to know the truth about past events’.¹⁴⁴ A society has the right to know about its past history of oppression or glorious traditions that are reflected in its heritage. This right entails at least two responsibilities: first, measures should be taken to protect heritage in order to preserve collective memory; and second, in case of violation against heritage, measures should be taken to reveal the truth so that the society can know and understand about the reasons of that violation.¹⁴⁵ If the truth is told at the society level, people can learn and prevent the repetition of such acts in the future. Therefore, it is important in a post-conflict society ‘to establish institutions, mechanisms, and procedures’ which are capable of seeking the truth.¹⁴⁶ These initiatives help to explore the roots of the violence, and ‘influence consideration of how to reform the composition of society’ so that the attacks or destructions will not happen again.¹⁴⁷

The primary obligation to set-up such mechanisms and procedures lies with the state within whose territory the destructions took place.¹⁴⁸ A common phenomenon in the conflict-oriented societies is that the states establish truth commission either independently or with the cooperation of international community. In general, truth commissions are mandated to investigate the gross human rights violations or humanitarian abuses ‘that took place over a period of time’.¹⁴⁹ For instance, the Truth, Justice and Reconciliation Commission (CVJR) of Mali was created in 2014 with a broad temporal mandate to ascertain the truth about the violations that have taken place between 1960 and the present day.¹⁵⁰ But this kind of a broad mandate is not always functional in reaching to the root of the causes since the Commissions are in majority of the cases overburdened with manifold crimes, and high number of victims and perpetrators. To take into account the experiences of Mali, although the mandate of the CVJR came to an end (which extended until 2021), some of its goals still remain

¹⁴⁴ In a judgment, the Inter-American Court of Human Rights framed the right to truth in the form of a positive State obligation, stressing that ‘the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations’; see *Myrna Mack Chang v. Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 101 (25 November 2013) [274]; Greiff, UN Doc A/HRC/24/42 (n 140) para 19. The Working Group on Enforced or Involuntary Disappearances in its General Comment opined that: [t]he right to the truth is both a collective and an individual right; see Working Group on Enforced or Involuntary Disappearances (n 138) 2.

¹⁴⁵ Golebiewski (n 72) footnote 93; Breslin (n 27) 274-5.

¹⁴⁶ Greiff, UN Doc A/HRC/24/42 (n 140) para 20.

¹⁴⁷ Breslin (n 27) 274-275.

¹⁴⁸ To find the state’s obligation to reveal truth, see the *Declaration on the Protection of All Persons from Enforced Disappearance* (1992) art 13; *International Convention for the Protection of All Persons from Enforced Disappearance* (2006) art 24. Also see Joanna R Quinn, ‘The Development of Transitional Justice’ in Lawther, Moffett, and Jacobs (eds) (n 26) 21; Melanie Klinkner and Ellie Smith, ‘The Right to Truth, Appropriate Forum and the International Criminal Court’ in Natalia Szablewska and Sascha-Dominik Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer 2015) 13.

¹⁴⁹ Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011) at 11; Cheryl Lawther, ‘Transitional Justice and Truth Commissions’ in Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Edward Elgar Publishing 2017) 343.

¹⁵⁰ Truth, Justice and Reconciliation Commission (CVJR) of Mali was created upon adoption of the Ordinance No. 2014-003/P-RM of January 15, 2014.

unaccomplished.¹⁵¹ Down the line, there are multiple reasons why national truth commissions face challenges to fulfil their mandates. On-going conflicts, lack of resources, experts, and technical capacity, are all stumbling blocks a commission has to go through to deal with the multitude of past abuses. In such cases, state's executive or judicial mechanisms can play a complementing role by undertaking 'effective investigation'.¹⁵² An effective investigation has always been in the centre of the process of truth-seeking.¹⁵³ When the truth commission and state organs work simultaneously to investigate the reasons behind the perpetrations, there remains a better chance in those states of ensuring the right to truth.

The international actors, especially the special procedures of the Human Rights Council (hereinafter HRC) and the Office of the Prosecutor (hereinafter OTP) of the ICC, have also been contributing in revealing the truth. The special procedures of the HRC are made up of special rapporteurs, independent experts, or working groups who monitor or report on a wide range of human rights violations from a thematic or country specific perspective.¹⁵⁴ Special procedures undertake country visit to assess the situation of the human rights at the domestic level, and the findings and recommendations of the visit are published as a report and submitted to the HRC.¹⁵⁵ Generally, upon request of the mandate holder, the state sends an invitation for a fact-finding mission.¹⁵⁶ But the fate of the mission depends on the consent of the state, meaning that the mandate holder can visit only when the state accepts the request and sends the invitation. On the other hand, the OTP of the ICC can also initiate investigation if there is reasonable basis to believe that international crimes under the Rome Statute have taken place in the territory of a state Party.¹⁵⁷ The Prosecutor may initiate investigation either *proprio motu* or on the basis of referral of a situation by the state party, and commence the investigation only if the Pre-Trial Chamber authorises.¹⁵⁸ Unlike the special procedures of the HRC, the OTP does not stop with the consent of the state party. If a state is party to the Statute, and there is reasonable basis to believe that crimes against heritage have been taken place in its territory, the Prosecutor upon authorisation of the Pre-Trial Chamber may proceed to investigate.¹⁵⁹ Even if a state is not a party to the Statute, the Prosecutor may

¹⁵¹ Ephrem Rugiririza, 'Mali and the Difficulty of Seeking Truth under Fire' (*JusticeInfo.net*, 15 January 2019) <<https://www.justiceinfo.net/en/truth-commissions/39996-mali-and-the-difficulty-of-seeking-truth-under-fire.html>> accessed 23 March 2021.

¹⁵² To find the obligation of the State to investigate, see Declaration on the Protection of All Persons from Enforced Disappearance (n 148) art 13. Also see Klinkner and Smith (n 148) 13.

¹⁵³ To find the nexus between the obligation to investigate and the realization of right to truth, see General Comment on the Right to the Truth in Relation to Enforced Disappearances (n 138) 4-5.

¹⁵⁴ See the Special Procedures' Homepage <<https://ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>> accessed 23 March 2021.

¹⁵⁵ See OHCHR, 'Human Rights Council and Special Procedures Division' (2011) <https://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/allegati/30_Human_Rights_Council_and_Special_Procedures.pdf> accessed 23 March 2021.

¹⁵⁶ See the official webpage of the Office of the High Commissioner for Human Rights (OHCHR) <<https://www.ohchr.org/EN/HRBodies/SP/Pages/CountryandothervisitsSP.aspx>> accessed 23 March 2021.

¹⁵⁷ The International Criminal Court (ICC) is established with the adoption of the treaty called the Rome Statute, strives to investigate and, where warranted, tries individuals charged with the most serious international crimes: genocide, war crimes, crimes against humanity and the crimes of aggression; see the Rome Statute (n 95). However, the Office of the Prosecutor (OTP) is an independent organ of the ICC, responsible to examine situations under the jurisdiction of the Court, carry out investigations and take part in the prosecutions.

¹⁵⁸ See Rome Statute (n 95) arts 14 & 15.

¹⁵⁹ *ibid* art 15 (4).

proceed if the Security Council acting under Chapter VII of the UN Charter refers the situation to the ICC.¹⁶⁰ However, such investigations conducted by the international actors and the subsequent publications of the findings contribute towards ascertaining and revealing the truth.

ii. Prosecution of Crimes against Cultural Heritage

In the context of TJ, a key question is whether a retributive or a restorative justice mechanism is best suited to achieve its ultimate goals.¹⁶¹ The restorative justice model primarily focuses on redressing victims, or restoring peace and social cohesion in the post-conflict societies mainly by initiating truth seeking and reparative measures, and prefers to the use of truth and reconciliation commissions or informal customary mechanisms.¹⁶² On the other hand, the prosecutorial or retributive model of formal legal justice emphasizes on prosecutions, mainly through the domestic courts or hybrid domestic/international courts, *ad hoc* international criminal tribunals, and the ICC.¹⁶³ But few scholars raise concerns about the possible conflict between both the models, arguing that 'a policy of consequent criminal prosecution' could endanger peaceful transition.¹⁶⁴ According to this school of thought, sometimes, 'refraining from criminal prosecution and/or punishment' is necessary to facilitate peace and reconciliation.¹⁶⁵ On the contrary, in the views of the opponents, it is by no means certain that the absence of prosecution could lead to peace and reconciliation; 'rather, in many cases, prosecution may be more promising to facilitate reconciliation and nation building'.¹⁶⁶ The prosecution provides the perpetrators with a scope to recompense for their past acts and reintegrate into the society. It is also a process that acknowledges the harm caused to the victims, giving them a sense that they are the holders of rights, which ultimately leads towards a sustainable peace.¹⁶⁷

Of course, it goes without saying that the prosecution and the condemnation of the perpetrators are of high value to put an end to impunity and deter the future recurrence of serious crimes. The ICC Trial Chamber in its judgement held that the condemnation of the

¹⁶⁰ *ibid* art 13 (b).

¹⁶¹ Noëlle Quénivet, 'Transitional and Generational Justice: Children Involved in Armed Conflicts' in Natalia Szablewska and Sascha-Dominik Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (Springer 2015) 59.

¹⁶² Hayner (n 149); Deborah H Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (United States Institute of Peace Press 2011). Also see Wendy Lambourne, 'Transformative justice, reconciliation and peacebuilding' in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds), *Transitional Justice Theories* (Routledge 2014) 20.

¹⁶³ Antonio Cassese, *International Criminal Law* (OUP 2003); Cesare P R Romano, André Nollkaemper and Jann K Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (OUP 2004); B N Schiff, *Building the International Criminal Court* (CUP 2008). Also see Lambourne (n 162) 20.

¹⁶⁴ For instance, Noëlle Quénivet elsewhere stressed that the 'prosecution is unlikely to be a deterrent to future crimes'; see Quénivet (n 161) 59. Also see Ambos (n 130) 23.

¹⁶⁵ To read about the arguments against criminal prosecution, see Mark J. Osiel, 'Why prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 *Human Rights Quarterly* 118; Ambos (n 130) 23.

¹⁶⁶ Ambos (n 130) 25. Also see Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481, 489; Hector Olásolo, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?' (2003) 3 *International Criminal Law Review* 87, 139.

¹⁶⁷ *Prosecutor v. Ahmad Al Faqi Al Mahdi* (n 6) para 67; Greiff, UN Doc A/HRC/27/56 (n 127) para 22.

perpetrator by way of imposition of a proportionate sentence has both specific and general deterrent effect.¹⁶⁸ An adequate sentence would ‘discourage a convicted person from recidivism (specific deterrence)’, as well as prevent others from committing the similar crimes (general deterrence).¹⁶⁹ Thus, it is crucial for the transitional governments to initiate measures to prosecute and condemn the perpetrators in order to guarantee the non-repetition of attacks against cultural heritage.

iii. Reparations

The right to an effective remedy and reparations are widely recognized by the international and regional human rights and humanitarian law instruments, and ‘elaborated upon in subsequent jurisprudence’ of the human rights organs.¹⁷⁰ Victims of gross violations of international human rights law or serious violations of international humanitarian law by right deserve ‘adequate, effective and prompt reparation’.¹⁷¹ Adequate reparations, if ensured in good time, redress harm caused to the victims, and importantly, promote justice.¹⁷² However, the reparatory justice model is distinctive from what retributive justice strives to achieve. Reparatory justice refers to victim-oriented measures,¹⁷³ and mainly focuses not on the perpetrator who has committed the crime, but on the victim who has suffered or on the object which has been affected by that crime. Thus reparation is the special form of TJ mechanism which aims at addressing the effects and consequences of gross violations of human rights and humanitarian law, and also offers measures to prevent the recurrence of such violations in the future.

There are multiple forms of reparation, but in a broad sense they can be divided at least into five categories: restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-recurrence.¹⁷⁴ When it comes to the large scale violations against cultural heritage, the restitution measures attempt to repair, or whenever possible, restore the destructed sites and buildings to the original situation; compensations ensure both pecuniary and non-pecuniary awards to cover the economic loss and moral harm suffered by the victims

¹⁶⁸ *Prosecutor v. Ahmad Al Faqi Al Mahdi* (n 6) para 67.

¹⁶⁹ *ibid.*

¹⁷⁰ The Human Rights Committee, in its General comment No. 31, states: ‘Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. [...] reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.’ For a case of State-to-State reparation for violations of international human rights law and international humanitarian law; see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 116. Also see UN, ‘Guidance Note of the Secretary General: Reparations for Conflict Related Sexual Violence’ (June 2014) 3 <<https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf>> accessed 23 March 2021.

¹⁷¹ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order (n 52) para 33; the Trial Chamber held that: ‘[i]t is of paramount importance that victims receive appropriate, adequate and prompt reparations’. Also see *Lubanga* Reparations AO, ICC-01/04-01/06-3129-AnxA, para 44.

¹⁷² Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principle 15. Also see Moffett (n 26) 377.

¹⁷³ Lavinia Stan and Nadya Nedelsky (eds), *Encyclopedia of Transitional Justice* (vol.1, Cambridge University Press, 2013) 288; Moffett (n 172) 377.

¹⁷⁴ Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principles 19-23; Moffett (n 172) 379-80. Also see *Velásquez Rodríguez v Honduras* (Reparations and Costs) Inter-American Court of Human Rights Series C. No. 7 (21 July 1989).

due to the destructions of heritage; rehabilitation entails ‘physical and mental care’ to heal the victims and the community at large; measures of satisfaction include the symbolic measures, *inter alia*, public acknowledgement of victims’ harm or letter of apology to the victims; and measures of guarantees of non-recurrence are long-term and sustainable initiatives intended to prevent future attacks against cultural heritage.¹⁷⁵

In a nutshell, the reparation contributes to the process of TJ by focusing on the concerns of victims, giving them the sense that they are not just the victims, but rather the holders of rights.¹⁷⁶ Thus reparations enable victims to recover their dignity, reduce mental pain and anguish, and ultimately, help to promote peace and reconciliation.¹⁷⁷

iv. Guarantees of Non-recurrence

In post-conflict societies, guarantees of non-recurrence can be ‘satisfied by a broad variety of measures’ which may include, *inter alia*, institutional reforms, societal interventions, or interventions in the cultural and individual spheres.¹⁷⁸ In terms of the prevention of crimes against cultural heritage, intervention at the societal level is important at least to raise awareness or to build a positive outlook towards heritage, and for creating an atmosphere where society itself will be the saviour. To this end, initiation of the educational and awareness-building programmes, and constructing museums or memorials to preserve the historic memory can be some of the commendable attempts to break the existing stereotype.¹⁷⁹ On the other hand, institutional reforms at the state level are also beneficial, such as offering support to state mechanisms to protect the heritage which helps in pursuing the post-conflict reconstruction measures efficiently.¹⁸⁰ When it comes to the prevention of deliberate destructions, it is essential to educate and empower the security forces responsible to protect

¹⁷⁵ To find the modalities of different forms of reparation, see Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principles 19-23. Also see Moffett (n 172) 80.

¹⁷⁶ Greiff, UN Doc A/HRC/21/46 (n 34) para 30; Pablo De Greiff, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (reparation) UN Doc A/69/518 (2014) para 9.

¹⁷⁷ *ibid*; *Lubanga* Reparations (n 171) para 71; *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order (n 52) para 28.

¹⁷⁸ Pablo De Greiff, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’ (‘guarantees of non-recurrence’) UN Doc A/HRC/30/42 (7 September 2015) para 23. The UN Basic Principles and Guidelines also suggested number of measures to guarantee non-repetition; see Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principle 23.

¹⁷⁹ See *Prosecutor v. Ahmad Al Faqi Al Mahdi*. Reparations Order (n 52) para 83. Also see Greiff, UN Doc A/69/518 (n 176), para 33; Serge Brammertz and others, ‘Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY’ (2016) 14(5) *Journal of International Criminal Justice* 1143, 1174; where the authors emphasized on the need of ‘positive education about the value of cultural property’.

¹⁸⁰ Lostal and Cunliffe (n 31) 6. Also see Carla Ferstman, ‘Reparation as Prevention: Considering the law and practice of orders for cessation and guarantees of non-repetition in torture cases’ (2010) 23-24 <<http://projects.essex.ac.uk/ehrr/V6N2/Ferstman.pdf>> accessed 23 March 2021. However, with regard to the institutional reforms, the UN Basic Principles and Guidelines underscore the importance of, *inter alia*, ‘(a) ensuring effective civilian control of military and security forces; (b) ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders’; see Basic Principles and Guidelines on the Right to a Remedy and Reparation (n 139) principle 23.

the cultural properties. States can organize training and workshops to improve the capacity of those protecting and maintaining the heritage.¹⁸¹ Although it is not an easy project to implement all the measures at the post-conflict stage, the states at least can take them seriously and start implementing them one after another.

V. Concluding Remarks

The proposition nurtured by this article to incorporate crimes against cultural heritage into comprehensive TJ processes does not only aim to claim the retribution or the punitive consequences of deterring future recurrence, but more to facilitate rehabilitation of the destructed sites, redress the victims, and promote peace and reconciliation. With these aims in view, this article analyses the scopes and stresses the importance of four categories of TJ measures: truth-seeking, prosecution, reparations, and the measures of guarantees of non-recurrence. What is central to this study is the idea of comprehensive approach of TJ, meaning that such measures should be implemented not as independent initiatives but rather as parts of an integrated policy. This kind of holistic approach serves to take into consideration all the factors (including consequences) associated with the crimes against cultural heritage, and guarantee the non-recurrence of such crimes in the future.

However, the question which still awaits an answer is: How the transitional states would implement the measures given the fact that they always wrestle with a bundle of difficulties ranging from lack of enforcement mechanisms to the shortage of resources and logistics? It would therefore be essential to conduct empirical studies (along with doctrinal research) to identify the nuances of success and challenges when it comes to the implementation of a number of TJ measures in a comprehensive manner.

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¹⁸¹ The TFV as a part of its implementation plan proposed measures which also included workshops 'designed to improve the capacity-building for those protecting and maintaining the buildings' of Mali; see Decision on the Updated Implementation Plan from the Trust Fund for Victims (UIP) (n 126) para 113.