

RESEARCH ARTICLE

Historic Monuments and Religious Buildings as Victims in *Prosecutor v Al Mahdi* at the International Criminal Court

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Abstract

In this article, we combine anthropological and legal approaches to interrogate the position and status of “victims” during *Prosecutor v Al Mahdi* at the International Criminal Court (ICC). Anthropological work on ontology and distributed agency provides a potential model for a broader reading of the category of victim. We then consider the war crime committed and propose an adapted application of international law sources on victimhood in order to develop a new legal-doctrinal approach that considers material objects and heritage as “direct victims” of violence and expands the range of possible “secondary victims” in ICC proceedings.

Keywords: Al Mahdi; International Criminal Court; victims; historic monuments and buildings dedicated to religion

Introduction

On 27 September 2016, the Trial Chamber VIII (TC-VIII) of the International Criminal Court (ICC) delivered its judgment in *Prosecutor v Al Mahdi (Al Mahdi)*. Al Mahdi pleaded guilty to the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in June–July 2012. The Chamber sentenced him to nine years’ imprisonment, later reduced to seven years.

The damage inflicted on Timbuktu in 2012 was widespread and included 14 of the 16 mausoleums which had been classified as part of Timbuktu’s 1988 UNESCO World Heritage status. Attacks also targeted the Al Farouk monument, where the winged horseman seen as the protector of the city was vandalized. An estimated 4,203 manuscripts from the Institute of Higher Islamic Studies and Research Ahmed Baba were burnt or stolen by armed groups. The attacks against cultural heritage took place against a backdrop of very serious alleged wider harm to the local population in an effort by Ansar Dine to impose a strict reading of Sharia law.

Upon hearing the admission of guilt, journalists attending the trial rushed from the room to file their stories. Their headlines stated that this was the first time that architectural destruction had been

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so clearly articulated as a war crime. It should, however, be noted that the International Criminal Tribunal for the Former Yugoslavia (ICTY) had previously entered convictions on cultural heritage destruction.¹ Other headlines questioned whether the destruction of cultural heritage as the sole focus of an ICC trial was appropriate, when crimes against people seemed to have more resonance and urgency.² Most of the media coverage positioned the Timbuktu destructions within a broader trend of global performative destructions and a few questioned the appropriateness of trying Al Mahdi at the ICC when he could have perhaps been tried in Mali.³ The crimes that Al Mahdi was tried for were, for many, considered too narrow given the wider alleged crimes he was suspected to have been involved in due to his role in the *Hesba* (morality police) at the time of the occupation by Ansar Dine of Timbuktu. Despite these shortcomings, the trial marked a number of new developments commented on by the international legal community:

“While the destruction of cultural sites has been prosecuted before, the Al Mahdi trial marks a number of ‘firsts’ for international justice and the International Criminal Court (ICC) in particular. It’s the first time that anyone has been prosecuted for destroying cultural sites as a war crime at the ICC. Al Mahdi, who has accepted responsibility for demolishing shrines and mausoleums in Timbuktu, is also the first-ever Islamic radical and the first citizen of Mali to be put on trial at an international criminal tribunal. For the ICC, it is the first time that anyone charged by the Court has pleaded guilty.”⁴

What was less clear, however, is whether and how the destroyed cultural heritage in Timbuktu was the direct victim of the crime, as victimhood throughout the trial was always refracted: onto the local populations, the Sufi tradition, the Malian State, the international community, UNESCO and so on. This paper considers this “displaced victimhood” and opens up a space to think about how a direct link between perpetrator (Al Mahdi) and victims, who arguably ought to also include the destroyed tombs of saints or mausoleums, could and perhaps should be addressed by the ICC. It will examine the status of “victim” in relation to symbolic violence, material damage, agency, human remains and reparations. Thus, one of the central arguments herein is that the historic and religious buildings which were destroyed in Timbuktu could and should be considered victims of atrocities in the light of anthropological and socio-legal grounds.

Al Mahdi provides good opportunities to revisit the scope of victimhood in contexts of atrocities. While there is universal consensus about considering humans as victims of international crimes, there is still an important amount of reluctance to or scepticism about also regarding non-human entities themselves as victims of atrocities. Due to the complexity of such matter, the present article does not aim to elucidate it conclusively. Nevertheless, it is herein sustained that historic and religious monuments as a very specific category of non-human entities can also be considered to be victims of atrocities, in particular when they have been intentionally attacked and destroyed. While the victim definition contained in the ICC Rules in principle excludes non-human entities from the legal victim categories *sensu stricto* at the ICC, those non-human entities should also *lege ferenda* [as the law should be] be considered as victims. Our discussion and findings should not necessarily

1 See, eg, *Prosecutor v Jokic* IT-01-42; *Prosecutor v Strugar* IT-01-42; *Prosecutor v Kordić & Čerkez* IT-95-14/2.

2 J Jones “Destroying priceless art is vile and offensive – but it is not a war crime” (22 August 2016) *The Guardian*, available at: <<https://www.theguardian.com/artanddesign/jonathanjonesblog/2016/aug/22/ahmad-al-mahdi-war-crimes-the-hague-destroying-mausoleums-timbuktu>> (last accessed 1 August 2025).

3 “Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded” (FIDH press release, 30 September 2015), available at: <<https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but>> (last accessed 1 August 2025); C Magnoux “Affaire Al Mahdi (destruction des biens religieux et culturels au Mali): Retour sur quelques enjeux” (3 November 2015) *Clinique de droit international pénal et humanitaire Blogue Laval University*, available at: <<https://www.cdiph.ulaval.ca/en/blogue/Mahdi-CPI>> (last accessed 1 August 2025).

4 M Kersten “Some thoughts on the Al Mahdi trial and the guilty plea” (24 August 2016) *Just Security*, available at: <<https://justiceinconflict.org/2016/08/24/some-thoughts-on-the-al-mahdi-trial-and-guilty-plea/>> (last accessed 1 August 2025).

be extrapolated to other types of infrastructure such as dams, schools or farms, and even buildings of a “humanitarian” type such as hospitals. We focus on the potential victimhood of religious and historic monuments not only because of the events of *Al Mahdi* but also due to ontological and normative / legal reasons. Furthermore, attention should be drawn to the presence of intent when the said buildings are destroyed. That attacks are intentional rather than merely reckless or negligent actions (eg, excessive collateral damage) can further support our claims for expanding victimhood to include religious and historic buildings attacked and destroyed on purpose. This is plausibly related to the fact that victimhood can be understood as including perceptions of perpetrators as well as interactions between perpetrators and victims.

To answer the main research question and unpack the argument, the paper is organized into seven sections. Section 2 examines the anthropological grounds of our argument. Section 3, entitled “The naming of the saints”, looks at the human remains that lie underneath the destroyed mausoleums and further elaborates on how these architectural structures come to exercise agency. Section 4 turns to the question of victimhood. Next, section 5 analyses the legal elements of the crime committed. Section 6 discusses the legal definition and categories of victims, providing normative-legal arguments for extending the notion of victimhood to also include mausoleums and historic monuments. Section 7 adds some socio-legal considerations, before moving on to the conclusions.

Anthropological grounds

Since 1945, both UNESCO and anthropologists dealing with material culture have moved towards an increasingly embodied understanding of the relationship between people and things. UNESCO’s post war intellectual project started with education (“since wars begin in the minds of men”... then updated to the “minds of men and women”), but soon gathered momentum around World Heritage sites, then cultural landscapes and intangible cultural heritage all the way to the recognition of “Living World Treasures”, namely people recognized as having exceptional cultural knowledge that needs to be passed down to future generations.

These phenomenological and ontological readings of human experience have long intellectual pedigrees across time and traditions but, in UNESCO’s projects, were narrated and given a specificity that coalesced around an idea of “outstanding universal value” (OUV). With OUV and a unified idea of the human “mind” emerges a universalism that comes into constant tension with the relativism that is of particular interest to anthropologists. Instead of this universal reading of the human mind sucking the agency away from sites and objects towards the human actors that make and live within them, it has paradoxically highlighted the need to further understand the capacity of cultural heritage to act on people now and in the future, for example, the fact that art has distributed agency⁵ or that our understanding of nature and culture need perhaps to be reversed and that the natural or material world has a contingent ontological status⁶ or that cultural heritage is only ever considered valuable as a means of providing meaning for future human populations⁷ in an impulse to live beyond ourselves.

This global concern with the protection of heritage is enshrined through a series of conventions, ratified by diverse member states and invoked in the case of conflict or concern. UNESCO’s work (for example through its 1972 World Heritage Convention) can equally be made up of decisions to delist sites because of a perceived loss of OUV (eg, Liverpool: Maritime Mercantile City in 2021) as to put sites on a list of sites in danger.⁸ Timbuktu was inscribed to the list of sites in danger in 1990, then received international assistance and was removed from the list in danger in 2005 only to be

5 A Gell *Art and Agency: An Anthropological Theory* (1998, Oxford University Press).

6 P Descola *Beyond Nature and Culture* (2005, University of Chicago Press).

7 S Scheffler *Death and the Afterlife* (2013, Oxford University Press).

8 UNESCO “List of world heritage in danger”, available at: <<https://whc.unesco.org/en/danger/>> (last accessed 1 August 2025).

re-inscribed in 2012.⁹ Sites are therefore at risk for many different reasons. Regarding Timbuktu, desertification and poverty were the early risks to the site, with the 2012 violence emerging as a new and particular threat.

UNESCO's World Heritage framework provides a ready supply of heritage / value evaluations through its vast archive of documents relating to protected sites (candidature files, mission reports, management plans and so on) and these were the documents turned to during the *Al Mahdi* trial to illustrate the importance of the destroyed sites.¹⁰ UNESCO's project also relies on a reading across scale and relevance, as echoed in the ICC trial. Allais points out:

“If AQIM relies on Al Mahdi as a local connector for implanting itself in Timbuktu, the ICC equally requires him to use his own personhood to depict an expanded field of applicability for international law. The same qualities that Al Mahdi offered to the terrorist network are fully exploited by the ICC: he is a person who can ‘expand’ his identity and belonging concentrically. This is particularly evident in the way Al Mahdi structures his guilty plea, in a statement that repeats atonement in a scalar progression from local brotherhood, to national citizenship, to global humanity.”¹¹

The destroyed sites in Timbuktu are therefore understood in a situational, relational way (in connection to the guardian families, the Sufi tradition and UNESCO's previous efforts) just as Al Mahdi's actions and the point of connection through destruction only make sense in a much broader reading of his biography: from local teacher to radicalized preacher (from false consciousness to convert). The whole logic of *Al Mahdi* is premised on the effects of the mediatization of the event (for both perpetrator and victims) which is not the situation in many other cases reaching the ICC. These other cases concern acts of violence that perpetrators would much rather conceal. In part, this is because their effect on victims is all immediately legible (on bodies, such as rape and torture) and therefore universally condemned.

Al Mahdi therefore provided a unique moment of reckoning with the meaning of materiality and victimhood, of non-human victims and the effects of the destruction of heritage. In this case, the destruction was of tombs of saints (mausoleums), the veneration of which are part of the long local tradition of Sufi Islam and considered the authentic way to worship by many in the local population. The accused, Al Mahdi, was part of this Sufi tradition by upbringing but chose a different path during the 2012 events, aligning with Ansar Dine and declaring the veneration as forbidden under higher Islamic teaching.¹² Al Mahdi pleaded guilty to the crime of intentionally directing attacks against protected historic and religious buildings and in a much-publicized apology described his actions as a mistake, a bracketing off from his normal social self and his love for the population of Timbuktu, of which he is part.¹³ His apology also recognized the logic of the court and the victims in the wider sense including Mali and the international community. At no point was his spiritual relationship with the mausoleums (and his reading of Islamic law) put forward as a defence that could invalidate the court's claims. Al Mahdi did not plead an ontological misunderstanding and the destroyed mausoleums were

9 UNESCO World Heritage Convention “Decision 37 COM 8C.2: Update of the list of world heritage in danger (retained properties)”, available at: <<https://whc.unesco.org/en/decisions/5177>> (last accessed 1 August 2025).

10 UNESCO World Heritage Convention “Timbuktu”, available at: <<https://whc.unesco.org/en/list/119/>> (last accessed 1 August 2025).

11 L Allais “Amplified humanity and the architectural criminal” (2017) 14/1 *Future Anterior: Journal of Historic Preservation, History, Theory and Criticism* 51 at 56.

12 At the opening of the trial, the defendant described himself as follows: “I am called – my name is Ahmad Al Faqi Al Mahdi, I am from the Tuareg – the tribe of Ansar. I was born about 40 years ago in Agoune. I'm a graduate of the Teachers Institute, in Timbuktu. And I was a civil servant in education in the Malian government beginning 2011”. Al Mahdi, initial appearance ICC-01/12-01/15-T-1-ENG ET WT 30-09-2015 4/13 NB PT at 4–5.

13 UNESCO News “Ahmad Al Mahdi: ‘This was the first and last wrongful act I will ever commit’” (19 October 2017), available at: <<https://www.unesco.org/en/articles/ahmad-al-mahdi-was-first-and-last-wrongful-act-i-will-ever-commit>> (last accessed 1 August 2025).

necessarily seen as victims in and of themselves due to their OUV. In his apology, Al Mahdi stated: “All the charges brought against me are accurate and correct”.¹⁴

A first anthropological critique of international bodies such as UNESCO and the ICC is that they are inevitably the intellectual legacy of a euro-centric, enlightenment project. The critique argues that the world is experienced in incommensurably different ways by different people at different times. If there is only one version of this world that is legitimized through global institutions, whoever the author of that version is, they will (whether intentionally or not) cause ontological harm to those who do not share in this version.

In this logic of radical incommensurability, the human experience, even the human body, cannot be universalized and “read” across cultures, religions and time.¹⁵ Cultural heritage therefore, despite UNESCO’s insistence on concepts such as OUV, should always be understood as particularized and in relationship with human actors but also ancestors, other material culture, cultural landscapes, belief systems and so on.

In *Al Mahdi*, two different forms of radical alterity / incommensurability could have been drawn upon by the defendant to explain his actions. The first is that the version of Islam practised by Ansar Dine does not tolerate the worshipping of saints or any form of syncretism that puts material culture (amulets and so on) or elevates individuals, as it gets in the way of a true relationship between people and God.

This is a familiar concept and has been rehearsed throughout history and religions and is the subject of Latour’s *Iconoclash*, in which he explores why and how images and icons provoke such passions in those wanting to destroy them.¹⁶ A second reading of the destruction in Timbuktu could be that the court misunderstood who the victims actually were by not considering the tombs of saints on their own terms, as victims in and of themselves, as the true targets of the destruction.

In *Art and Agency*, Gell puts forward a way of understanding art by placing it within the complex kinship system it was born into, and by examining it as the locus of distributed agency – the agency indexed in the object through the intention of its makers, consumers, referents and so on.¹⁷ This approach suggests that objects (and by association cultural heritage) can and should be understood as having agency in their / its own right – as part of aesthetic or religious economies, as the distributed agency of artists or religious leaders, as evidence of the past or fragments of ancestors.

In the ICC’s practice, victims have been (almost) exclusively human agents. Therefore, *Al Mahdi* had as a focus the destruction of protected buildings, but as victims, the communities most closely linked to those buildings. Some communities, such as the Barey-Ton, the association of masons whose architectural expertise made and maintains the destroyed mausoleums and mosque, were not the primary focus for victimhood or reparations (including compensation). Instead, the Trust Fund for Victims gravitated towards the worshipers and custodian families, thus prioritizing the spiritual value over the creation of the buildings. Yet as Marchand notes in his ethnography of the Masons’ Association in Djenné (Timbuktu’s sister city), the masons possess a great deal of spiritual knowledge and techniques to ensure that the architecture they create fulfils its social and spiritual function.¹⁸

14 *Prosecutor v Al Mahdi* ICC-01/12-01/15-T-4-Red-ENG transcripts, Trial Chamber-VIII (22 August 2016) at 8.

15 Within anthropology, the concept of radical incommensurability was inspired by Viveiros de Castro’s Amerindian perspectivism which was enthusiastically picked up by British social anthropologists after his time at Cambridge University in 1998. Perhaps surprisingly, anthropologists at the time were not concerned with the moral / ethical consequences of a mode of thinking where people exist within hermetically sealed “worldscapes” and instead they enthusiastically rejected the notion of any sort of universal human experience: Eduardo Viveiros de Castro “Cosmological perspectivism in Amazonia and elsewhere” (Hau Masterclass Series, February-March 1988), available at: <https://monoskop.org/images/e/e5/Viveiros_de_Castro_Eduardo_Cosmological_Perspectivism_in_Amazonia_and_Elsewhere.pdf> (last accessed 1 August 2025).

16 B Latour “What is Iconoclash? Or Is there a world beyond the image wars?” in B Latour and P Weibel (eds) *Iconoclash, Beyond the Image-Wars in Science, Religion and Art* (2002, ZKM & MIT Press) 14.

17 Gell *Art and Agency*, above at note 5.

18 T Marchand *The Masons of Djenne* (2009, Indiana University Press).

Masons are linked for life to the buildings they create and it is their responsibility (or that of their descendent apprentices) to keep the buildings in good repair throughout the lifetime of the buildings. In later projects underwritten by UNESCO, the masons, their knowledge and training, became once again the focus of attention and the challenge of maintaining mud-brick buildings and monuments in difficult economic, climatic and political conditions was widely acknowledged.

The naming of the saints

An important dimension of the destroyed tombs in Timbuktu covered by *Al Mahdi* is that although the architecture of the buildings housing them was destroyed, the bodies lying below were not the target. As noted above, Al Mahdi declared from the beginning of the trial that there was no intention to destroy or disturb human remains, something that would have put the crime in a different register, one of outrage upon personal dignity under the text of the ICC Elements of Crimes which is applicable law by the ICC and fleshes out the definitions of the crimes contained in the ICC Statute (articles 9 and 21(1)(a)): “Article 8 (2) (b) (xxi) War crime of outrages upon personal dignity – footnote 49 – For this crime, ‘persons’ can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim”.

Nevertheless, article 8(2)(b)(xxi) is inapplicable to the present case because such provision applies only to international armed conflicts: *Al Mahdi* concerns a non-international armed conflict. In any event, the destroyed tombs of saints were not nameless targets, their identities were referred to throughout the ICC case with conceptual distance achieved by prefacing the names with the words “the mausoleum of” which has the effect of reducing the identification to the likes of street names or labels, away from the fact that human remains lay below:

- (1) The mausoleum of Sidi Mahmoud Ben Omar Mohamed Aquit;
- (2) The mausoleum of Sheikh Mohamed Mahmoud Al Arawani;
- (3) The mausoleum of Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabar;
- (4) The mausoleum of Alpha Moya;
- (5) The mausoleum of Sheikh Sidi Ahmed Ben Amar Arragadi;
- (6) The mausoleum of Sheikh Muhammad El Micky;
- (7) The mausoleum of Sheikh Abdoul Kassim Attouaty;
- (8) The mausoleum of Ahamed Fulane;
- (9) The mausoleum of Bahaber Babadié; and
- (10) The Sidi Yahia mosques.¹⁹

In the case of the destroyed tombs of saints in Timbuktu we can therefore trace multiple biographies and distributed agencies: that of the saint (and the imam at the time who recognized him as such), the custodian family and their descendants, the masons who made and maintain the tomb, the worshippers and the wider participants in the prayer economy of Timbuktu. Timbuktu is known as the “city of 333 saints” and is a focus of pilgrimage and a potent location for the creation of amulets and other protective material culture.²⁰ The destroyed tombs were however not presented to the ICC as materialization of individual saints’ biographies, they were depersonalized and presented as global heritage.

UNESCO’s recognition of Timbuktu’s OUV is therefore secondary, coming as it did in 1988 and drawing its conclusion from the long history of the city and its creation and recreation over

¹⁹ *Prosecutor v Al Mahdi* ICC-01/12-01/15-T-1-ENG transcripts, Pre-Trial Chamber I (30 September 2015) at 5–6.

²⁰ See KM Clarke *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009, Cambridge University Press).

time. Timbuktu's protected buildings are saturated with the meaning they both index but also provoke in those who worship, build, re-mud or simply walk past them. They are also meaningful for those beyond the city, for example the businessmen in the capital Bamako, who pay marabouts in Timbuktu to pray on their behalf. They are meaningful for the heritage communities across Mali, West Africa, at UNESCO in Paris and beyond for which the shrines and Mosque are punctuation of value, a material example of the epitome of skill and thinking and negotiating your place in the world.

Another way of thinking about the events in Timbuktu is suggested by Ba who examines the destructions as part of a wider regime of "governing":

"beyond the criminal acts, this article argues that attacks on such sites may be viewed as actions embedded in a political project of *gouvernement* – what Foucault (2001, 326) defined as 'to control the possible field of action of others', which involves 'the government ... of souls, of communities'. This highlights a gap in the literature: the analysis of destruction of cultural heritage as a political enterprise, one aimed at administering the locale under control of the governors-cum-perpetrators."²¹

This consideration of governmentality, echoed in Clarke's work *Fictions of Justice*,²² moves away from the individual (body) or shrine as a universally understood subject towards the relativity of certain ideological landscapes in which humans, non-humans, shrines and symbols are brought into question in the name of a radically different ontology. Here, the ICC's authority is undone by the call to a higher, non-human (religious) scale of governmentality and the time is collapsed beyond human timespans.

Two things are of note in response to these critiques. First, UNESCO's World Heritage project is also a call to the future beyond any one individual's lifespan, and in this way, it shares some of the same ontological claims as other belief systems through its concept of "OUV" and the claim of knowing what future generations will need to flourish. The second response concerns the claim that the attacks in *Al Mahdi* were less against individual monuments and more an attempt to impose a landscape of governmentality that the monuments undermined.

Who was the victim?

In *Al Mahdi*, the TC-VIII determined that "cultural heritage is important not only in itself, but also in relation to its human dimension".²³ In the judgment, it found that the destruction of the Timbuktu sites "does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community".²⁴ Moreover, the TC-VIII in the *Al Mahdi* reparation order determined that the reparation beneficiaries are the community of Timbuktu (individually and collectively), people throughout Mali and the international community.²⁵ These jurisprudential developments have been examined by scholars who have acknowledged related challenges and have expressed diverse degrees of (dis-)agreement with the case law.²⁶ The ICC was established primarily to protect people against international crimes (genocide,

21 O Ba "Governing the souls and community: Why do Islamists destroy World Heritage sites?" (2022) 35/1 *Cambridge Review of International Affairs* 73 at 74.

22 Clarke *Fictions of Justice*, above at note 20.

23 *Prosecutor v Al Mahdi* ICC-01/12-01/15-236 reparations order, Trial Chamber-VIII (17 August 2017), para 16.

24 *Prosecutor v Al Mahdi* judgment and sentence, Trial Chamber-VIII (27 September 2016), para 80.

25 *Al Mahdi* reparations order, above at note 23.

26 See, eg, M Lostal "The misplaced emphasis on the intangible dimension of cultural heritage in the Al Mahdi case at the ICC" (2017) 1/2 *Inter Genes* 45; H Dijkstal "Destruction of cultural heritage before the ICC: The influence of human rights on reparations proceedings for victims and the accused" (2019) 17/2 *Journal of International Criminal Justice* 391; L Moffett, D Viejo Rose and R Hickey "Shifting the paradigm on cultural property and heritage in international law and armed conflict: Time to talk about reparations?" (2019) 26/7 *International Journal of Heritage Studies* 619; M Lostal

crimes against humanity and war crimes). Often, people are the living, embodied victims of crimes, able to give an account of their experiences and act as witnesses to their own suffering. In the case of destroyed cultural heritage in Timbuktu, the destruction was documented and accounted for by witnesses and experts, using oral testimonies or photographic or satellite images to demonstrate the extent of destruction to the court. Witnesses here may speak of their own moral distress and may eventually be identified as the victims of the attacks by the Trust Fund for Victims, but at the early stage in proceedings, these interlocutors were first called upon to be witnesses, and also sometimes belonged to a category of expert witnesses: religious practitioners, journalists, archaeologists and so on. A person could therefore have a tripartite relationship with the court and embody different forms of relationship towards the crime: (1) victim, (2) witness, (3) expert, and sometimes all three at once.

In the *Al Mahdi* trial, there was an attempt at a clear distinction between “victims” (persons) and “protected buildings”.²⁷ This Cartesian reading of the world was reflected in mainstream media such as the journalist who criticized the case by stating that “we should remember what The Hague is for: preventing the mass murder of humans” and that “culture can be renewed, remade, reinvented. Human life cannot”.²⁸

If culture can always be renewed, remade and reinvented, the destroyed mausoleums of Timbuktu are fundamentally reduced to their constituent parts – the mud and wood and metal from which they were fashioned, with the human remains below left intact, a point that was forcibly made by Al Mahdi’s legal representative during the trial:

“Here in the Trial Chamber ... we are convinced that ... this differentiation must be fully understood because we’re not talking about attacks against mosques. Never was there, is there any question of attacking mosques or minarets, never. Nor was it even a question of attacking tombs. Things must be factually clear. We were talking about attacking the coverings of tombs, implementing the means to allow for the liberation of the tombs, freeing them from elements that were constructed on those sites. And this difference strikes us as being important because it is not the tombs themselves that are being attacked. Materially, the tombs, and Mr Al Faqi Al Mahdi is very clear on this, are to be protected. It is out of the question that anyone touches the tombs or the contents thereof.”²⁹

The argument here was that far from an act of vandalism, the destruction was an act of liberation from false consciousness. Through the intentional destruction of the Timbuktu religious and historic monuments, Al Mahdi and the other Ansar Dine members arguably meant to send a strong message to both the locals and the international community.

Materially, the tombs were rebuilt by the masons of Timbuktu and in this way remain a central part of the traditional religious life of the city. However, the destruction of the mausoleums was intended to send a message to the religious communities of Timbuktu, that their form of worship was *haram* (forbidden) – and it was through the reducing of the tombs to its constituent material parts (mud, wood, metal) that harm was done, the religious sanctity of the sites violated to prove a theological point.

“Implementing reparations in the Al Mahdi case: A story of monumental challenges in Timbuktu” (2021) 19/4 *Journal of International Criminal Justice* 831; JP Perez-Leon-Acevedo and T Alves “Enforcing freedom of religion or belief in cases involving attacks against buildings dedicated to religion: The *Al Mahdi* case at the International Criminal Court” (2019) 37/3 *Berkeley Journal of International Law* 437.

27 *Prosecutor v Al Mahdi* ICC-01/12-01/15-250 response of the defence for Mr Al Mahdi to the observations of the Trust Fund for Victims, defence (11 December 2017), para 17.

28 Jones “Destroying priceless art is vile and offensive”, above at note 2.

29 *Prosecutor v Al Mahdi* ICC-01/12-01/15-T-2-Red2-ENG transcripts, Pre-Trial Chamber I (1 March 2016) at 97.

Alongside other authors,³⁰ Allais suggests that during the trial both Al Mahdi and the international community (represented by the ICC and UNESCO's interests) had to deploy a number of "amplifying" techniques to move beyond the particularity of the tombs (surface) to place Timbuktu in a new category (global): "an analysis of the practices that authenticate Timbuktu as an international treasure – both in court and in ongoing preservation – reveal the techniques of amplification that are embedded into the built environment to hold together an agreement, on both sides of the law, that the target of this new criminality is humanity itself".³¹

In other work, Allais suggests that it is through ongoing acts of bureaucratic management that value is ascribed and remains with certain sites, weaving bureaucracy and diplomacy to create consensus.³² This common ground is identified by Allais as the reason for pickaxes being chosen as the weapons of destruction in some cases in Timbuktu in 2012 (as opposed to bulldozers in others). The act of attack and its mediatization was as important as the destruction itself and pickaxes, she seems to imply, are appropriate and "to-scale" (maybe in particular given the hand-made nature of the monuments) in a moment of global reckoning.³³

Against such a background, this paper questions whether the historic monuments and religious buildings attacked and destroyed in Timbuktu should also be per se considered victims in cases such as *Al Mahdi*. If the court is to accept the logic of the potential to restore the monuments to their former materiality, the harm of their destruction is hard to prove. If, on the other hand, the monuments per se are considered the victims, their destruction becomes the focus of the trial and the only bar to clear in arguing for a guilty verdict.

In the following sections, attention turns to the relevant legal elements of the specific crime committed in *Al Mahdi*, the legal definitions and categories of victims under mainly the ICC's law and jurisprudence and some socio-legal considerations. Then, general conclusions are provided.

The crime committed

To revisit the scope of victimhood and better delimit the categories of victims in *Al Mahdi*, attention should be first drawn to the crime committed: the war crime of "Intentionally directing attacks against buildings dedicated to religion ... historic monuments ... provided they are not military objectives" (ICC Statute, article 8(2)(e)(iv)). Furthermore, article 8(2)(e)(iv)(2) and (3) of the text of the Elements of Crimes respectively lay down that "The object of the attack was one or more buildings dedicated to religion ... historic monuments ... which were not military objectives" and "The perpetrator intended such building or buildings dedicated to religion ... historic monuments, ... which were not military objectives, to be the object of the attack".

What these normative provisions hence seek to protect are historic monuments or religious buildings rather than persons. The ICC in *Al Mahdi* did not (explicitly) list the mausoleums and the mosque destroyed in Timbuktu as such as victims of the war crime in question. In applying those normative provisions, however, the TC-VIII in *Al Mahdi* actually determined, inter alia, that "The Statute protects persons and cultural objects ... are protected as such"³⁴ as well as that:

"direct[ing] an attack' encompasses any acts of violence against protected objects and [the Chamber] will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group ... This reflects the special status of religious, cultural, historical and similar objects."³⁵

30 S D'hondt, B Dupret and J Bens "Weaving the threads of international criminal justice: The double dialogicity of law and politics in the ICC al-Mahdi case" (2021) 44 *Discourse, Context & Media* at 5.

31 Allais "Amplified humanity", above at note 11 at 52.

32 L Allais *Designs of Destruction: The Making of Monuments in the Twentieth Century* (2018, University of Chicago Press).

33 Allais "Amplified humanity", above at note 11.

34 *Al Mahdi* judgment and sentence, above at note 24, para 16.

35 *Id.*, para 15.

Legal scholars commenting on the typology of war crimes in the ICC Statute, and international criminal law in general, have also referred to the existence of attacks against protected objects such as religious buildings and historic monuments as an autonomous category of war crimes.³⁶ Thus, the ICC should have (better) connected its normative analysis of the legal elements of the war crime of an attack against religious buildings and historic monuments committed in *Al Mahdi* with the scope and types of victimhood.

The ICC Statute's normative provision on intentional attacks against religious buildings and historic monuments criminalizes the respective normative prohibitions that have been long contained in international humanitarian law (IHL). IHL seeks to restrict the conduct of hostilities (means and methods of warfare) as well as protect individuals and certain objects (victims) in connection with armed conflicts.³⁷ As the TC-VIII in *Al Mahdi* explicitly and in detail established,³⁸ treaty IHL has long provided special protection of historic and religious buildings, including: i) the 1907 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (articles 27 and 56); ii) the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (article 4); iii) the 1977 Protocol Additional to the 1949 Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (article 53); iv) the 1977 Protocol Additional to the 1949 Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (article 16) and v) the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (article 15). Under customary IHL, historic monuments and religious buildings are also protected during war times.³⁹

While the TC-VIII in *Al Mahdi* correctly acknowledged that IHL “protects cultural objects as such from crimes committed both in battle and out of it”, the Chamber also remarked that “not all crimes forming the grounds for a criminal conviction are necessarily of equivalent gravity and the Chamber has the duty to weigh each by distinguishing, for example, between those against persons and those targeting property”.⁴⁰ Indeed, it noted that, unlike other accused convicted by the ICC, *Al Mahdi* was “not charged with crimes against persons but with a crime against property. In the view of the Chamber, even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons”.⁴¹ Even if this sort of “hierarchy” of international crimes is accepted, historic monuments and religious buildings as such are and should be protected regardless of any effects on humans. It should indeed be taken into account the special place that historic and religious buildings hold within the wide array of non-human entities, in particular other types of buildings, in the context of atrocity crimes. For instance, while the destruction of historic and religious buildings does not per se constitute genocide, international case law⁴² and scholarship⁴³ have continuously asserted that the intentional destruction of buildings such as (ancient) mosques and churches can substantially contribute towards proving the existence of genocidal intent. Among other considerations, this arguably merits the recognition of the sui generis status or nature of historic and religious buildings as (potential) victims within non-human entities / edifications.

36 See, for example, A Cassese and P Gaeta *Cassese's International Criminal Law* (3rd ed, 2013, Oxford University Press); K Ambos *Treatise on International Criminal Law* (2021, Oxford University Press).

37 See, for example, M Sassòli *International Humanitarian Law* (2019, Edward Elgar); E Crawford and A Pert *International Humanitarian Law* (2nd ed, 2020, Cambridge University Press).

38 *Al Mahdi* judgment and sentence, above at note 24, para 14.

39 See J Henckaerts and L Doswald-Beck *Customary International Law: Volume I: Rules* (2005, Oxford University Press) 127–30.

40 *Al Mahdi* judgment and sentence, above at note 24, paras 15 and 72.

41 *Id.*, para 77.

42 For example, *Prosecutor v Krstić* ICTY judgment, Trial Chamber (2 August 2001), para 580.

43 See, for example, Seán Fobbe et al “Cultural heritage destruction during the Islamic State’s genocide against the Yazidis” (2021) 5 *The Asian Yearbook of Human Rights and Humanitarian Law* 111.

The above-detailed considerations should have been better reflected in the categories of victims identified by the ICC in *Al Mahdi*. Similar to national criminal law, the law applicable at the ICC is not limited to the criminalization of the prohibition of unlawful attacks against persons. As an additional example, article 8(2)(b)(iv) of the ICC Statute criminalizes the war crime of an intentional attack that causes “widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”. This provision protects the environment as such during armed conflicts, without requiring a negative impact on humans. A logical extension of this debate is whether “ecocide” should be incorporated into the ICC Statute, the environment as such will be protected also during “peace” times.⁴⁴ The consideration of the environment as a victim under article 8(2)(b)(iv) as a corollary to non-human entities as victims may actually be illustrated by the ICC Office of the Prosecutor (OTP)’s references to “non-human victims” in its Draft Policy on Environmental Crimes under the Rome Statute.⁴⁵

It should be noticed that the language of article 8(2)(b)(iv) indeed draws directly from that of article 51(5)(b) of the Additional Protocol I to the Geneva Convention: the main difference being the addition of specific wording on environmental damage. The fact that article 51(5)(b) is entitled “Protection of the Civilian Population” would seemingly imply that there is some anthropocentric connection to the harms discussed. In any event, article 8(2)(b)(iv) also reflects article 35(3) of the Additional Protocol I which establishes that “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.⁴⁶ That is why article 8(2)(b)(iv) has been regarded as introducing an ecocentric war crime.⁴⁷

An underlying element that explains the ICC’s (partial) mismatch between the crime committed and the scope of victimhood in *Al Mahdi* is arguably that the ICC’s nature and mandate as a *criminal* court rather than a *human rights* court was not fully understood or implemented by the actors involved in the proceedings, including the ICC Trial and Appeal Chambers. By analysing the crime committed in *Al Mahdi*, it can be argued that the ICC, like *mutatis mutandis* national criminal courts, handles cases that involve attacks against and destruction of non-human entities because (international) criminal law is not confined to protecting humans. While it can be questioned that the destruction of non-human entities automatically results in assigning victim-status to the respective entity before courts, the very specific nature and characteristics of religious and historic buildings that set them apart from other categories buildings as indicated earlier should be taken into account. In turn, this must inform the categories of victimhood of the respective criminal cases in which historic and religious buildings have been intentionally targeted and destroyed.

Legal definition and categories of victims

The TC-VIII in neither the judgment / sentence nor the reparation decision in *Al Mahdi* explicitly recognized the destroyed Timbuktu mausoleums and mosque as such to be direct victims of the war crime of attacks against historic monuments and religious buildings. The Chamber’s approach was overall consistent with the normative provisions contained in the ICC Rules of Procedure and Evidence (Rules), which are part of the applicable ICC law. Rule 85 (“Definition of victims”) considers two categories of victims at the ICC:

44 On ecocide, see D Robinson “Ecocide – puzzles and possibilities” (2022) 20/2 *Journal of International Criminal Justice* 313.

45 ICC OTP “Draft policy on environmental crimes under the Rome Statute” (18 December 2024), paras 29, 54, 86 and 102. See also J Perez-Leon-Acevedo and R Manzo “The environment as a victim at international courts: Ecocentrism vs. anthropocentrism” in H Bertot (eds), *El orden jurídico internacional ante las vicisitudes del siglo XXI* (2024, Tirant lo Blanch) 315.

46 S Wehrenberg “Article 8(2)(b)(iv)” in K Ambos *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (4th ed, 2021, Beck / Hart / Nomos) 426.

47 *Ibid.*

- “(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
 (b) Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion ... and to their historic monuments ...”

Thus, rule 85 defines victims as either natural persons (rule 85(a)) or institutions or organizations that have sustained damage to their property (rule 85(b)). This means that, *lege lata* [as the law exists], it is very complicated to expand the quoted definition to include historic and religious monuments as victims per se under the ICC Rules and, by extension, the law of the ICC. That is why, as indicated in the introduction, the legal argumentation for the consideration of historic and religious monuments as victims themselves primarily concerns *lege ferenda* legal grounds: what the law and practice of the ICC should be. This *lege ferenda* argumentation could provide some considerations for a potential amendment of rule 85.

During the *Al Mahdi* trial, the Chamber originally rejected three applications from organizations because it found that there was no proof that the buildings invoked were organizations or institutions within the meaning of rule 85(b) and that the individuals who submitted the applications had the capacity to represent the organizations / institutions.⁴⁸ Conversely, the Chamber considered that the applications suggested that the applicants endeavoured to apply as individuals rather than as acting on behalf of organizations / institutions and, thus, it assessed the applications under rule 85(a) (human victims) rather than rule 85(b) (organizations / institutions); however, it added that this was without prejudice of new applications by individuals acting on behalf of the organizations / institutions.⁴⁹ Later in the proceedings, applicants were finally admitted as acting on behalf of five organizations / institutions based on the fact that the quality of the organization, the individual’s capacity acting on its behalf and his / her identity were clearly established; however, information on these organizations and their representatives is non-public and they are referred to by code numbers.⁵⁰ It was only indicated that “the organisation suffered a direct harm as a result of the destruction of the mausoleum ... to the extent that the buildings [REDACTED] were destroyed”.⁵¹ Nevertheless, the judgment / sentence and reparation order, which are the most important decisions in general and for victimhood in *Al Mahdi*, did not explicitly list the Timbuktu mausoleums and mosque themselves as victims. In any event, it is acknowledged herein that, since the decisions concerning organizations that seemingly had applied as victims are not public, it is difficult to exactly precise how and to what extent the level of success of those applications impacted the Chamber’s decision of not naming the buildings as victims.

Furthermore, the TC-VIII in the *Al Mahdi* judgment / sentence and the reparation order referred to the “faithful and inhabitants of Timbuktu” as “direct victims” of the destruction of the Timbuktu sites and it added that such destruction also affected “people throughout Mali and the international community”.⁵² Thus, the Chamber explicitly considered that Timbuktu’s faithful and inhabitants are the direct victims of the war crime of the attack against the Timbuktu sites, and it implied that other Malians would be indirect victims.

Lege ferenda, we argue that the ICC rule 85 and the TC-VIII’s categorization of victimhood in *Al Mahdi* are open to criticism. Based on the anthropological arguments presented in the previous sections, it can be argued that (i) the direct victims of intentional attacks on historic monuments and religious buildings are primarily the sites themselves and / or (ii) these monuments should be considered direct victims in addition to a number of directly affected individuals. On this basis, the

48 *Prosecutor v Al Mahdi* decision on victim participation at trial and on common legal representation of victims, Trial Chamber VIII (8 June 2016), para 28.

49 *Ibid.*

50 *Id.*, paras 7 and 9.

51 *Id.*, para 10.

52 *Al Mahdi* judgment and sentence, above at note 24, para 80; *Al Mahdi* reparations order, above at note 23, para 51.

TC-VIII in *Al Mahdi* should have obiter dicta considered the attacked sites of Timbuktu either as the ultimate direct victims or (alternatively) as direct victims along with “the faithful and inhabitants of Timbuktu”. Below, we show that there are also strong *lege ferenda* legal arguments for extending the notion of victimhood to include historic monuments and religious buildings.

First, the TC-VIII’s categorization of victimhood in *Al Mahdi* is partially inconsistent with the underlying logic of the ICC’s well-established jurisprudence concerning humans only and its potential analogical application to cases also involving non-human entities. In *Lubanga*, the ICC had clearly defined direct victims as “those whose harm is the ‘result of the commission of a crime within the jurisdiction of the Court’” and indirect victims as “those who suffer harm as a result of the harm suffered by direct victims”.⁵³ These definitions had been previously applied to crimes against individual persons: namely, for example, in *Lubanga*, the direct / indirect victim categories have been applied but only concerning human victims. Thus, concerning the war crimes of conscription, enlistment or the use of children in direct hostilities, child soldiers were “direct” victims, and their parents were “indirect victims”.⁵⁴

However, the potential analogical application of the direct / indirect victim categories in crimes involving non-human entities may *lege ferenda* be, inter alia, justified by the fact that the ICC is not only an international judiciary body but also a criminal court, about which the argumentation developed in the previous section (“The crime committed”) may be particularly useful. Thus, as explained, *Al Mahdi* involved the war crime of “Intentionally directing attacks against buildings dedicated to religion ... historic monuments ...” (ICC Statute, article 8(2)(e)(iv)), which article 8(2)(e)(iv)(2) and (3) of the text of the Elements of Crimes further detail: “The object of the attack was one or more buildings dedicated to religion ... historic monuments ...” and “The perpetrator intended such building or buildings dedicated to religion ... historic monuments, ..., to be the object of the attack”. Indeed, as also indicated, the TC-VIII in *Al Mahdi* found that “The Statute protects persons and cultural objects ... are protected as such”⁵⁵ and “This reflects the special status of religious, cultural, historical and similar objects”.⁵⁶ Moreover, international (criminal) law scholarship has referred to attacks against protected objects like religious buildings and historic monuments as an autonomous category of war crimes.⁵⁷ Furthermore, the ICC OTP has referred to “non-human victims” in the context of environmental crimes.⁵⁸ This is mutatis mutandis similar to war crimes against historic and religious buildings in the sense that non-human entities are the object of the attack. Unlike most war crimes, these environmental war crimes and war crimes of attacks against historic and religious buildings originally or primarily target non-human entities rather than humans themselves. This may certainly impact the scope and categorization of victimhood.

While the ICC did not recognize victimhood to the protected buildings as such, it ordered reparations for their direct benefit in the form of rehabilitation and maintenance. Thus, it may be questioned what would have been an added value of categorizing them as proper victims given that they benefited from reparations nonetheless. A potential answer is that such an explicit recognition, at least through some said in passing analysis, would have arguably led to better jurisprudentially connections between, on the one hand, the legal elements of the war crime of an attack against religious buildings and historic monuments, and, on the other one, the complex victimhood dimensions in *Al Mahdi*.

53 *Prosecutor v Lubanga* ICC-01/04-01/06-1813 redacted version of “Decision on ‘indirect victims’”, Trial Chamber I (8 April 2009), para 44.

54 *Id.*, paras 42–54.

55 *Al Mahdi* judgment and sentence, above at note 24, para 16.

56 *Id.*, para 15.

57 See, for example, Cassese and Gaeta *Cassese’s International Criminal Law*, above at note 36; Ambos *Treatise on International Criminal Law*, above at note 36.

58 ICC OTP “Draft policy on environmental crimes under the Rome Statute”, above at note 45, paras 29, 54, 86 and 102.

As to why the definitions of direct and indirect victims from *Lubanga* should have been applied in *Al Mahdi* and the lack of binding precedent at the ICC, while the fact that an ICC trial chamber has reached a particular conclusion does not mean others are bound to do so as well, article 21(2) (“Applicable Law”) of the ICC Statute establishes that: “The Court may apply principles and rules of law as interpreted in its previous decisions”. This provision actually contrasts with article 59 of the Statute of the International Court of Justice, which lays down that “the decision of the Court has no binding force except between the parties and in respect of that particular case”. Moreover, as Schabas importantly notes: i) it is arguably not a wise approach for an ICC Chamber to neglect previous ICC case law and ii) the ICC’s practice shows that “There are many examples of the Court following earlier decisions”.⁵⁹

Thus, the above-mentioned categories and definitions *lege ferenda* should have been mutatis mutandis applied in *Al Mahdi*, at least through obiter dicta explicit findings. In other cases at the ICC and other supranational courts that involved direct and indirect victims, direct victims were humans. However, it is still arguably possible to proceed analogically with the application of the categories of direct and indirect victims in cases such as *Al Mahdi*. This is because the said typology of victimhood has been thought to be of general application rather than only restricted to human victims: of course, this is subject to adaptations rather than plain rejection when primary or direct victims are or include historic and religious buildings. Thus, *lege ferenda*, while the attacked and destroyed Timbuktu mausoleums and mosque should also be considered “direct” victims, the “faithful and inhabitants of Timbuktu” could be regarded as “indirect” victims. Some Timbuktu inhabitants who were particularly affected, namely the descendants of the “saints” whose mausoleums were destroyed and those locals whose livelihood (almost) entirely depended on Timbuktu-related activities (mainly tourism) could also be considered as “direct” victims.

The previous *lege ferenda* consideration of the attacked Timbuktu sites as, additionally, “direct” victims and the others as “indirect” victims is also arguably consistent with the ICC’s previous jurisprudence where the Appeals Chamber illustratively indicated these examples of “indirect” victims: direct victims’ family members, those who attempted to prevent the commission of the crime(s) under consideration, those who suffered harm when helping or intervening on behalf of direct victims and individuals who endured personal harm as a result of the crime(s) in question.⁶⁰ Hence, those persons throughout Mali (outside Timbuktu) personally affected by the attacks are arguably “indirect” victims. In turn, the consideration of the “international community” as a victim in *Al Mahdi* is redundant or already implicit. By their very nature and definition, all international crimes – not only the war crime of attacks against cultural sites that are part of the UNESCO’s world heritage list – are and should be considered as seriously affecting both the international community as a whole and the basic values that it stands for.⁶¹

Second, the above-examined categorization of “direct” and “indirect” victims is also consistent with the jurisprudence of other supranational courts dealing with atrocities. In construing its jurisprudence on victimhood, the ICC relied on, inter alia, jurisprudence of the European Court of Human Rights (ECtHR) and, especially, that of the Inter-American Court of Human Rights (IACtHR). In cases involving extrajudicial executions and / or forced disappearance of persons, the IACtHR⁶² and the ECtHR⁶³ have found that while the abducted or executed person is the “direct” victim, his / her next of kin are “indirect” victims. In cases related to natural sites (mountains, forests

59 W Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed, 2016, Oxford University Press) at 527.

60 *Prosecutor v Lubanga* ICC-01/04-01/06-3129-AnxA order for reparations (amended), Appeals Chamber (3 March 2015), para 6.

61 See, for example, Cassese and Gaeta *Cassese’s International Criminal Law*, above at note 36.

62 For example, *La Cantuta v Peru* judgment (merits, reparations and costs) (29 November 2006), para 218.

63 For example, *Bazorkina v Russia* appln 69481/01, judgment (27 July 2006).

or rivers) as places of worship, the IACtHR did not consider them as such to be victims.⁶⁴ However, this corresponded to the different nature and mandate of the IACtHR, which is a *human* rights court, as opposed to the ICC, which is a *criminal* court. Such an important difference means that, inter alia, while the IACtHR identifies victims of human rights violations, the ICC recognizes victims of international crimes. Moreover, the IACtHR as a human rights court can only find state responsibility for violations of *human rights*. This means that the IACtHR lacks jurisdiction to find, *sensu stricto*, state responsibility for violations of international law protecting historic and religious buildings. This is a key difference with the ICC, which has jurisdiction to determine individual criminal liability for the said violations in contexts of armed conflicts.

Although gross violations of human rights and humanitarian law are generally constitutive of international crimes, these two categories are legally speaking autonomous. This is noted because the TC-VIII in *Al Mahdi* invoked jurisprudence from the IACtHR to refer to moral harm related to the disruption of culture.⁶⁵ Nevertheless, the non-explicit reference to the Timbuktu sites as direct victims in *Al Mahdi* seems to indicate that the Chamber, which was restricted by the relatively constrained victim definition contained in ICC rule 85, adopted an anthropocentric approach to victimhood, extrapolating mechanically rather than properly adapting such human rights jurisprudence to the specificity of both *Al Mahdi* and the ICC's mandate. It should be also added that the most recent jurisprudence of the IACtHR has innovatively combined anthropocentric and eco-centric approaches to protect rights in environmental cases, which has led to the recognition of nature itself as a potential victim despite the *human* rights mandate of this regional court.⁶⁶ Such pivotal jurisprudential development has been welcomed by several commentators.⁶⁷

In turn, these categories of direct / indirect victims and references to the jurisprudence of the IACtHR and ECtHR have been invoked by hybrid criminal tribunals where victims can participate and / or claim reparations. These tribunals are the Extraordinary Chambers in the Courts of Cambodia (ECCC),⁶⁸ the Special Tribunal for Lebanon⁶⁹ and the Extraordinary African Chambers in the Senegalese courts.⁷⁰ Under the ECCC Internal Rules, "victims" are "a natural person or legal entity that has suffered harm as a result of the commission of any crime within the jurisdiction of the ECCC".⁷¹ It is true that the ICC does not need to rely on the jurisprudence of other international courts because such case law lacks force on the ICC. Nonetheless, as Schabas notes based on the ICC's practice, the ICC cannot be "depriv[ed] ... of the authority to consider principles and rules of law derived from the case law of other judicial bodies. There are too many examples of references to the case law of the ad hoc tribunals and human rights courts".⁷² Therefore, *lege ferenda* and (mainly)

64 See, for example, *Plan de Sánchez Massacre v Guatemala* judgment (reparations) (19 November 2004), paras 77 and 85–88; *Yakye Axa Indigenous Community v Paraguay* judgment (merits, reparations and costs) (17 June 2005), paras 154 and 203.

65 *Al Mahdi* reparations order, Trial Chamber-VIII (17 August 2017), para 85.

66 See *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of articles 4(1) and 5(1) of the American Convention on Human Rights)* advisory opinion OC-23/17 (15 November 2017) Series A No 23; *Lhaka Honhat Association v Argentina* judgment (merits, reparations and costs) (24 November 2020) Series C No 400.

67 See, for example, M Tigre and N Urzola "The 2017 Inter-American Court's Advisory Opinion: Changing the paradigm for international environmental law in the Anthropocene" (2021) 12/1 *Journal of Human Rights and the Environment* 24; M Feria-Tinta "Inter-American Court of Human Rights" in E Sobenes et al (eds) *The Environment Through the Lens of International Courts and Tribunals* (2022, Asser / Springer) 249; JP Perez-Leon-Acevedo "Reparations in environmental cases: Should the International Criminal Court consider the Inter-American Court of Human Rights' jurisprudence?" (2024) 15/3 *Journal of International Dispute Settlement* 377.

68 For example, *Case 001* appeals judgment, Supreme Court Chamber (3 February 2012).

69 For example, *Prosecutor v Ayyash et al* STL1101/PT / PTJ decision on the VPU's access to materials and the modalities of victims' participation in proceedings before the pretrial judge (18 May 2012).

70 For example, *Prosecutor v Habré* judgment, Trial Chamber (30 May 2016).

71 ECCC Internal Rules "Glossary" (2015) at 85.

72 Schabas *The International Criminal Court*, above at note 59 at 528.

through obiter dicta findings, the category of “direct” victims in *Al Mahdi* should have explicitly and clearly included or corresponded to the attacked Timbuktu mausoleums and mosque, for victim participation in the proceedings and as reparation beneficiaries. Although the TC-VIII formally authorized certain organizations (their names are confidential information) related to the Timbuktu sites to participate through their representatives as victim participants in the *Al Mahdi* trial, victim participation during this trial in practice was (virtually) only focused on natural persons (Timbuktu inhabitants). Moreover, in the post-conviction reparation stage, the Timbuktu sites as such were not explicitly listed as reparation beneficiaries.

The guild or association of masons that have for generations taken care of the maintenance of the Timbuktu sites and participated in their re-construction⁷³ and / or the Mission Culturelle de Tombouctou (attached to the Direction Nationale du Patrimoine Culturel) that exercises “guardianship” over or legal representation of, inter alia, the attacked Timbuktu sites should have been explicitly listed as reparation beneficiaries.⁷⁴ While these groups had the right, under rule 85(b), to be confirmed as victims and then seek reparations, it seems that the *Al Mahdi* reparation orders (both at the trial and appeals levels) did not explicitly and / or in detail indicate or flesh out exactly what reparation measures were specifically granted to the above-mentioned associations and organizations.

Hence, in applying ICC rule 85, *Al Mahdi* may show that there is some reluctance to or scepticism about considering historic and religious buildings and monuments also as (potentially) victims themselves when they have been intentionally attacked and destroyed. As discussed earlier, this stand arguably corresponds to (almost) exclusively anthropocentric approaches to international criminal justice as well as the non-recognition of the sui generis or exceptional nature of the said buildings and monuments that set them apart from other types of edifications.

Socio-legal considerations

The ICC’s anthropocentric focus in *Al Mahdi* has narrowed the scope of the protection granted to tangible cultural heritage.⁷⁵ Such an approach may set a precedent in the sense of neglecting situations of destruction of tangible cultural heritage that do not affect the cultural or social practices of a specific population such as the destruction of the Buddhas of Bamiyan in Afghanistan in 2001.⁷⁶ As for the war crime against cultural heritage, making the effects on or consequences for the locals a requirement of the gravity threshold that is assessed to trigger the ICC’s jurisdiction may likely mean the exclusion of certain cultural sites from the ICC’s docket, including those protected under international law.⁷⁷ The destruction of cultural heritage normally seeks to erase the cultural heritage of a population; however, such destruction may also take place due to reasons not related to the identity of a population and / or to the desire to rewrite history such as the case in Syria, when armed forces bombarded the World Heritage site of the medieval fortress of Crac des Chevaliers (July 2013) in its attempts to reconquer the city of Homs.⁷⁸ Due to the fact that *Al Mahdi* altogether excluded charges

73 P Apollonj Ghetti *Étude sur les mausolées de Tombouctou* (2014, UNESCO / Centre du patrimoine mondial) at 13; AO Sidi “Communication de M Ali Ould SIDI, Chef de la Mission Culturelle de Tombouctou, Colloque Villes et Universités au service du développement local, Association Internationales des Maires Francophones” (Lausanne, 20 October 2010) at 3–4.

74 See Décret No 93-203 portant creation des missions culturelles à Tombouctou, Djenne et Bandiagara (12 April 1993), available at: <<https://whc.unesco.org/en/statesparties/ml/Laws>> (last accessed 1 August 2025); Décret No 01 462 fixant l’organisation et les modalités de fonctionnement des missions culturelles de Bandiagara, Djenne et Tombouctou (24 September 2001), available at: <<https://www.unesco.org/fr/cultnatlaws/decret-n01462-du-24-septembre-2001-fixant-lorganisation-et-les-modalites-de-fonctionnement-des>> (last accessed 1 August 2025).

75 Lostal “The misplaced emphasis”, above at note 26 at 51.

76 Id at 55.

77 Id at 57.

78 Id at 58.

involving attacks against humans as such, some scholars have noted that it has been referred to as a “victimless” case.⁷⁹ Such labelling may plausibly reflect an anthropocentric approach to the attacks against cultural heritage and requires further consideration since *Al Mahdi* is so far the only precedent for cases concerning only crimes against cultural heritage (rather than persons) and even for cases involving other kinds of property or the environment.

Situating *Al Mahdi* in the transitional justice (TJ) context is also important. While TJ involves diverse justice mechanisms in post-armed conflicts⁸⁰ and it has focused on truth commissions, reparations and trials,⁸¹ the role of monuments and reconstruction thereof in TJ scenarios have received limited attention. Yet, the reconstruction of tangible cultural heritage is a manner of telling history and healing, enabling actors to reconcile, and can work alongside other TJ mechanisms.⁸² Tangible cultural heritage can play an important role in transition,⁸³ and is linked to the rights to the truth and heritage.⁸⁴ There is a relationship between the reconstruction of cultural heritage and the reconstruction of the society affected by conflicts.⁸⁵ The prevention of future conflicts, long-term peace, human rights protection and accountability can overlap and mutually reinforce each other concerning the role of cultural heritage through the right to the truth, memorialization and reconstruction of cultural heritage (including reparations).⁸⁶ Post-conflict reconstruction of cultural heritage may have a pivotal role in transition since it is useful to narrate identity and history.⁸⁷

The Timbuktu sites are an essential element of Timbuktu’s collective memory and their destruction catastrophically impacted the local population’s identity regardless of the recognition of the destroyed tangible cultural heritage as part of the world’s cultural heritage.⁸⁸ In *Al Mahdi*, the ICC neglected the destroyed Timbuktu mausoleums and mosque as victims, particularly as reparation beneficiaries. It focused on the Timbuktu inhabitants as victims probably because of a feared backlash for a trial that only considered the destruction of heritage.⁸⁹

There is, however, a need to engage with memorialization of the conflict via construction of memorials in the (re)-construction of national historical narratives.⁹⁰ This includes recognizing the importance of the re-construction of the Timbuktu monuments in Mali’s TJ process, namely, the recognition of these monuments (represented by local associations and / or domestic authorities) as victims themselves. While assigning victim status to religious and historic monuments usually requires mediation through human agents such as the local associations related to the maintenance of Timbuktu, such an element arguably does not deny the possibility of recognizing at least some level of victimhood to these very specific kind of buildings when destroyed intentionally in light

79 See, for example, M Forestier “ICC war criminals: Destroying shrines is worse than rape” (2016) 22 *Foreign Policy* 15; Jones “Destroying priceless art is vile and offensive”, above at note 2.

80 See R Teitel “Transitional justice genealogy” (2003) 16 *Harvard Human Rights Journal* 69; C Murphy *The Conceptual Foundations of Transitional Justice* (2017, Cambridge University Press).

81 See C Lawther, L Moffett and D Jacobs Dov *Research Handbook on Transitional Justice* (2017, Edward Elgar).

82 L Lixinski *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice* (2021, Cambridge University Press) at 33.

83 See T O’Donnell “The restitution of holocaust looted art and transitional justice: The perfect storm or the raft of the Medusa?” (2011) 22/1 *European Journal of International Law* 49 at 49.

84 L Lixinski “Cultural heritage law and transitional justice: Lessons from South Africa” (2015) 9/2 *International Journal of Transitional Justice* 278 at 279.

85 Lixinski *Legalized Identities*, above at note 82 at 40.

86 AF Vrdoljak “Cultural heritage, transitional justice, and rule of law” in F Francioni and AF Vrdoljak (eds) *The Oxford Handbook of International Cultural Heritage Law* (2020, Oxford University Press) at 188.

87 Lixinski “Cultural heritage law”, above at note 84 at 296.

88 P Casaly “Al Mahdi before the ICC: Cultural property and world heritage in international criminal law” (2016) 14/5 *Journal of International Criminal Justice* 1199 at 1218.

89 S Starrenburg “Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v Ahmad Al Faqi Al Mahdi” (25 August 2017) *EJIL: Talk!*, available at: <<https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/>> (last accessed 1 August 2025).

90 Ibid.

of non-anthropocentric perspectives and the unique features of these monuments vis-à-vis other types of buildings. Although the cultural property in *Al Mahdi* is protected to benefit persons, such protection preserves invaluable heritage and identity related to protected sites.⁹¹

Finally, certain interdisciplinary legal studies consider the role of emotion and affect in legal proceedings.⁹² Anthropologists acknowledge that attributing personhood to non-human entities has key effects,⁹³ including the anthropology of ontologies⁹⁴ and actor-network theory.⁹⁵

Sentimentalizing non-human bodies such as the destroyed Timbuktu monuments involves emotion attribution, emotionalizing metaphor and positioning of such bodies, namely that the attacked Timbuktu sites can be seen as bodies close and similar to humans.⁹⁶ The sentimentalization of non-human bodies as a process of legal meaning-making leads to the consideration of their destruction as so grave that it constitutes international crimes.⁹⁷

Conclusion

In conversation with *UNESCO Courier* after the trial, Al Mahdi explained the careful thinking that went into the destruction of the tombs:

“In the discussion session that led to the decision to destroy the monuments, I openly said that I thought such an action was not appropriate, since it could cause more harm than good. I reminded them of the Sharia ruling that says that no vice may be suppressed if its suppression leads to another equal or greater vice. I warned them that the destruction could lead to greater misfortune for the people. I was thinking, in particular, that it might incite hatred among the local people. I imagined armed groups firing on them. I feared the worst. I was convinced that the destruction of the mausoleums had no legal basis in Sharia law. It’s true that, according to a fatwa recognized by all traditions of Islam, tombs must not be erected more than one *chibr* (about ten centimetres) above ground. But this fatwa only applies to new tombs and not to those that already exist. I wanted to leave the mausoleums intact.”⁹⁸

Al Mahdi’s testimony to the journalist of the *UNESCO Courier* may be a post-rationalization of events but does point to the intimacy of the events in Timbuktu in 2012. As Devji suggests in his work on radical Islam and globalization, scales of understanding and incommensurability are constantly pulling apart and collapsing on each other.⁹⁹ Courts such as the ICC rely on these areas of overlapping understanding about the world to make a tentative claim to universalism, one that is always contingent and evolving and subject to challenge.

91 See, for example, Dijkstra “Destruction of cultural heritage before the ICC”, above at note 26 at 399.

92 TA Maroney “Law and emotion: a proposed taxonomy of an emerging field” (2006) 30/1 *Law and Human Behavior* 119; K Abram and H Keren “Who is afraid of law and the emotions?” (2009) 94/6 *Minnesota Law Review* 1997; SA Bandes and JA Blumenthal “Emotion and the law” (2012) 8 *Annual Review of Law and Social Science* 161; J Bens “Sentimentalizing and legal language: Affect and emotion in courtroom talk” (2017, Affective Societies working paper 04/17 Free University of Berlin).

93 E Hirsch “Property and persons: New forms and contests in the era of neoliberalism” (2010) 39 *Annual Review of Anthropology* 347; S Jansen “People and things in the ethnography of borders: Materialising the division of Sarajevo” (2013) 21/1 *Social Anthropology* 23.

94 Descola *Beyond Nature and Culture*, above at note 6; E Kohn “Anthropology of ontologies” (2015) 44 *Annual Review of Anthropology* 311.

95 B Latour *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005, Oxford University Press).

96 Bens “Sentimentalizing and legal language”, above at note 92 at 11 and 13.

97 Id at 19.

98 A Barrak “Ahmad Al Faqi Al Mahdi: ‘I plead guilty’” (17 October 2017) *The UNESCO Courier*, available at: <<https://courier.unesco.org/en/articles/ahmad-al-faqi-al-mahdi-i-plead-guilty>> (last accessed 11 November 2025); Bens “Sentimentalizing and legal language”, above at note 92.

99 F Devji *The Terrorist in Search of Humanity: Militant Islam and Global Politics* (2019, Hurst).

The concept of “victim” at the ICC will inevitably be subject to these same shifting considerations, especially in relation to a very specific and unique category of non-human entities: historic and religious buildings. As this article has aimed to demonstrate, while the ICC is subject to the relatively limited victimhood definition contained in ICC rule 85, *Al Mahdi* arguably meant a potentially missed opportunity to consider the destroyed Timbuktu monuments as victims themselves under *lege ferenda* considerations which could have materialized in, at least, some obiter dicta discussion. A wider understanding of “victim” on the international legal stage could help strengthen international treaties like the 1954 Hague Convention and its two Protocols and signal that the destruction of peoples’ heritage is in and of itself unacceptable and not a refracted crime in times of conflict.

Finally, it should be noted that, unlike in *Al Mahdi*, the ICC Trial Chamber in *Al Hassan* recently acquitted the accused of, among other charges, the destruction of the Timbuktu monuments – although he was convicted of other charges.¹⁰⁰ Should the ICC Appeals Chamber reverse the said acquittal, it would remain to be seen whether, and to what extent, the ICC will keep the *Al Mahdi* victimhood jurisprudence in such hypothetical future reparation jurisprudence in *Al Hassan*. In any event, an amendment to ICC rule 85 would be highly advisable or even necessary to properly reflect the complex victimhood dimensions in cases concerning non-human entities such as historic and religious monuments or buildings.

Competing interests. None

100 See *Prosecutor v Al Hassan* ICC-01/12-01/18-2594-Red trial judgment, Trial Chamber-X (26 June 2024).