Constructing Victims of Heritage Destruction: Lessons from the Al Mahdi Reparations Order

Rangga Dachlan
Peterhouse

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This dissertation is submitted for the Degree of Master of Philosophy
Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration, except where specifically indicated in the text. It does not exceed the word limit stipulated by the Degree Committee for the Faculty of Human, Social and Political Sciences.
Abstract

This dissertation looks at the enforcement of legal instruments governing the protection of heritage and the extent to which such enforcement mechanism may be useful for the protection of heritage. It delves into the Reparations Order in the Al Mahdi case to see how the International Criminal Court constructs the notion of victims in the aftermath of the destruction of heritage sites in Timbuktu. This construction entails (i) the identification of victim groups; (ii) the assessment of their harm; and (iii) the determination of reparation type and modalities. Scrutinising the Trial Chamber’s use of the World Heritage Convention, this dissertation reveals gaps in all three areas, privileging local victims at the expense of national and international victims. Wide discretionary powers were found to have chiefly motivated the Court’s uneven analyses and could adversely affect its decision-making in future cases. In spite of its limitations, the Court demonstrated usefulness by achieving some expansion in its remit in the protection of heritage and through its role as a figurative “loudspeaker” in publicising the punitive consequence of heritage destruction to the global public.
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To my mother, father, and brother, who are not sure why I’m doing this, but have kept supporting me nonetheless: I love you, too.
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I

Introduction

What does it mean to be a ‘victim’? In the aftermath of a crime, this status may take on a variety of oft-contested meanings. Self-identification by the survivors of the crime and their claim to redress, for example, may be at odds with the way judicial institutions construct the notion of victims and the kind of redress to which they are entitled (Rock 2002: 16; Wolhunter, Olly, Denham 2009: 33). Moreover, criminal tribunals continually grapple with the construction of victims, as it is largely influenced by the specificities of the respective crimes that the people have endured (de Waardt 2016: 432–4). The more complicated and devastating the crime, the more intense is the tribunal’s struggle in adequately providing reparations for the victims’ harm. Looking at a case of crimes against culture, the external construction of victims by a judicial institution will be the focus of this dissertation.

While the deliberate destruction of cultural heritage is by no means a novel crime, the case of Al Mahdi before the International Criminal Court (‘ICC’ or ‘Court’) marked the first time the notion of victim had to be substantively considered on the international level in exclusive connection with heritage destruction. Committed to contributing to the realisation of restorative justice, the ICC’s punitive focus on perpetrators is supplemented by a mechanism through which the victims of international crimes may attain reparations for their harm. What does it mean, then, to be the victims of the international crime of the deliberate destruction of cultural heritage?
This dissertation attempts to analyse the construction of victims in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (‘Al Mahdi’). It proposes to do so by analysing the provisions of the Reparations Order (or ‘Order’ or ‘RO’) vis-à-vis the 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage* (‘World Heritage Convention’ or ‘WHC’ or ‘Convention’) as the relevant legal instrument governing the protection of the destroyed sites. By investigating the use of the Convention in the resultant construction of victims in the Order, this dissertation aims to arrive at a nuanced appraisal of the role of the ICC in the protection of heritage.

1 In order to distinguish the reference made to the name of the convicted individual with that made to the shorthand of the ICC case designation, reference to the latter will be done in *italics*. 
II

Background

II.1. Al Mahdi: A History

In March 2012, rebel groups seized control of Northern Mali and drove government militia to the southern part of the country. The town of Timbuktu fell under two jihadist groups: Ansar Dine and Al-Qaeda in the Islamic Maghreb. To ensure strict religious observance, their joint ‘government’ established the Hisbah—morality police force tasked with the annihilation of any visible violation of Sharia. Appointed leader of the Hisbah was Al Mahdi, a Timbuktu native and esteemed Quranic scholar (OTP 2013: para. 3; Pre-Trial Chamber I [‘PTC’] 2016: paras. 6, 31, 45).

A majority in Timbuktu observes Sufism, which is widely considered blasphemous by Muslims for its mysticism. Around the Old Town, there were centuries-old mausoleums housing the remains of Sufi saints—sacred sites to which the faithful conduct pilgrimage and in which they offer prayers (ICOMOS 1987). While this continual practice may have explained Timbuktu’s reputation as the “City of 333 Saints” (PTC 2016: para. 23), for the new town rulers, it was nothing but sacrilege.

Based on Ansar Dine’s observation of perceived violations of Sharia, in June the Hisbah was ordered to destroy ten sites—comprising nine mausoleums and an ancient door—considered to have inspired superstitious practices. Al Mahdi led the operation in situ and participated directly in destroying four sites (PTC 2016: paras. 18-22; Judgment, para. 38). For five centuries, these sites had been integral to the heritage of Timbuktu, not to mention that nine of them had been listed by the United
Nations Educational, Scientific and Cultural Organization (‘UNESCO’) as “world heritage”. In less than a fortnight, they were destroyed.

Having grown increasingly concerned by the atrocities with which the rebels had ravaged the country, the Malian government referred the situation to the ICC’s attention. The ICC is a tribunal empowered to try the individuals who have allegedly perpetrated the so-called “international crimes”, which are crimes deemed so heinous that they should be universally outlawed (Rome Statute of the ICC 1998 [‘Rome Statute’ or ‘Statute’ or ‘RS’], Preamble para. 6; Cassese et al. 2012: 18–21).

Under the constituent Statute, the Court has jurisdiction over four such crimes: genocide, crimes against humanity, war crimes, and the crime of aggression (RS, arts. 5–8). The ICC operates on a complementary basis: it only hears cases which the State is unwilling or—in the case of war-torn Mali—unable to handle itself (RS, arts. 1, 17). Since the ICC is a treaty-based body, in principle it is authorised to hear cases involving the crimes committed (1) in the territory of a State which has ratified the Rome Statute; or (2) by a national of such a State. Having ratified the Statute since 1998, Mali’s referral of its situation is an express consent to the Court’s intervention.

In 2013, the ICC’s Office of the Prosecutor (‘OTP’ or ‘Prosecutor’) began investigation into which crimes within the jurisdiction of the Court had been allegedly committed in Mali and identifying the individual(s) alleged for the commission of such crime(s) (OTP 2013, paras. 173–5). The OTP reported a slew of war crimes as allegedly having been committed in the country since January 2012: from murder, unlawful execution, rape, pillaging, to deliberate attacks against protected objects (OTP 2013, para. 7). Yet, when it came the time for the Prosecutor to start the official trial proceedings, it only identified one person and one charge of

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1 In exceptional circumstances, the ICC may be empowered to hear cases of crimes committed in the territory of a State which has not ratified the Rome Statute or committed by a national of such a State. This may be done through referral of the situation by the United Nations Security Council (article 13[b]).
crime: Al Mahdi for the war crime of the deliberate attacks against protected objects. The Prosecutor thus made the historic decision to focus the attention of the Court on the destruction of heritage sites as an international crime.

The *Al Mahdi* case marked the first time the subject matter became the sole charge before an international criminal tribunal (‘ICT’). Admittedly, the destruction of protected objects considered cultural heritage had been heard by an ICT before, namely that for the Former Yugoslavia (‘ICTY’ or ‘Tribunal’). Nevertheless, *Al Mahdi* is different—and historic—for three reasons. The first concerns the different scopes of the crime between the two tribunals. The 1993 Statute of the ICTY (‘ICTY Statute’) required factual damage or destruction of the protected objects in order for it to qualify as a war crime, whereas the Rome Statute requires only the intentional direction of attack against them (ICTY Statute, art. 3[d]; RS, art 8[2][e][iv]). Second, no individual had ever been charged by the ICTY exclusively with the destruction of such protected objects. All of the accused persons who were convicted of this crime had seen such conviction in tandem with other crimes, which ultimately received greater attention during the proceedings (see e.g. ICTY — Jokić, Strugar, and Blaskić). In other words, the ICTY dealt with cultural heritage only tangentially. The third difference relates to the ICC’s nature as a criminal tribunal which focuses not only on punitive justice—bringing the perpetrator of a crime to justice—but also on restorative justice, which allows *inter alia* for the provision of redress for the victims of a crime, in the hope of accelerating the process of reconciliation in the aftermath of atrocities (Hoyle 2002: 101; Palassis 2014: 27). The ICC is the first ICT authorised to order the convicted individual to make reparations for the harm inflicted by their crime on the victims. In a Reparations Order, the Court identifies the relevant victims of the crime and determine the reparations to which they are consequently entitled. The solitary conviction against Al Mahdi presents the opportunity to
scrutinise the ICC’s construction of victims pertaining exclusively to the destruction of heritage.

The *Al Mahdi* proceedings were concluded fairly quickly by ICC standards. The accused was surrendered to The Hague in 2015. A panel of three judges—Trial Chamber VIII (‘Trial Chamber’ or ‘Chamber’) —was established to hear his case in May 2016. Trial hearings were held in only two days in late August, during which time *Al Mahdi* made the first admission of guilt the ICC had ever heard. In September, the Chamber passed its Judgment, which sentenced him to nine years of imprisonment.

On 17 August 2017, a Reparations Order was issued. It identifies three groups of victims: (1) “the faithful and inhabitants of Timbuktu”; (2) “the Malian State”; and (3) “the international community” (Judgment, para. 80 in RO, para. 51). Each of these groups had been established as having suffered harm from the commission of the crime, but the extent to which each group’s harm is assessed by the Chamber varies, with almost exclusive attention paid to the first group. The “faithful and inhabitants of Timbuktu” were found to be entitled to individual and collective reparations for three kinds of harm sustained: damage to the destroyed buildings, economic loss, and moral harm. Meanwhile, the State of Mali and the international community were deserving only of symbolic reparations.

The investigations undertaken in this dissertation look at the *Al Mahdi* RO to analyse the extent to which international criminal law is useful in the enforcement of the protection of heritage. This dissertation takes a narrowed-down look into the most important aspect in this fairly recent Order: the construction of victims. This topic is itself at the centre of Dr Dacia Viejo-Rose’s on-going research project, which not only attempts to theorise victimhood in relation to heritage, but also contextualise the role of victims in the greater landscape of rebuilding society.
following armed conflict. Substantiated by her lectures and supervision sessions, this dissertation aims to contribute to this topic in a narrow sense. It attempts to do so by scrutinising the construction of victims only from a single case study, limited strictly to an as-yet implemented court dossier.

II.2. The Reparations Order and the World Heritage Convention

A Reparations Order is prepared by the same Trial Chamber which has found the guilt of an individual convicted of an international crime. The Rome Statute leaves to the Court the determination of all the necessary principles for the production of these Orders (RS, art. 75). At the time of writing, there had been only three ROs issued by the ICC—including the one against Al Mahdi.

Similar to the trial proceedings, the OTP and the defence counsel may submit their adversarial views regarding how the reparation should be set up. In addition, the people who believe they have been harmed by a convicted crime, represented by a Legal Representative for Victims (‘LRV’), may submit applications and views claiming reparations. In the Al Mahdi case, 139 such applications were received by the Chamber—137 from individuals and two business organisations. Considering the distinct nature of each crime, the Chamber might seek opinions from academics and professional organisations with expertise in the subject.

ROs are issued against the convicted individual, who may be demanded to provide reparative measures by himself using personal assets, or, in case of indigence, through a Trust Fund for Victims (‘TFV’). The Chamber will set out the general terms of the reparation required from the convict, and it is the job of the TFV to spell out in a Draft Implementation Plan (‘DIP’) the specific practical measures to be implemented in fulfilment of such terms. This DIP will then be submitted to the Chamber, which will grant its approval thereof subject to its satisfaction that the
measures adequately address the reparation terms. In essence, a Reparations Order is only one of the many steps for the actual granting of reparations for the victims. Nevertheless, without the terms set out in the Order, no actual redress could be actionably provided for the victims of the international crimes (RS, art. 75; RoP, Rule 85[1]).

The determination of redress following the successful conviction of a crime undeniably constitutes the raison d’être of an RO, and such a determination vitally depends on a Trial Chamber’s analysis of victimhood pertaining to that particular crime. Analysing the construction of victims therefore paves the way to understanding how useful a criminal tribunal can be in providing a sense of protection from the crimes covered by its penal code (Hall 2017: 9–12; Druliolle & Brett 2018). Prevailing practice reveals that the construction of victims within an RO entails the identification of victim groups, assessment of harm, and measurement of the types and modalities of reparation (RO, para. 38).

While references to heritage—particularly “cultural heritage”—are made sporadically throughout the Order (inter alia paras. 14–19, 22, 67), when referring to the object of Al Mahdi’s crimes the term most frequently used by the Chamber is “Protected Buildings” (RO, paras. 1, 9, 10, 19, 86). This should not be understood as non-recognition by the Trial Chamber that the destroyed buildings were part of the heritage of Timbuktu. Instead, this is because the Statute itself never explicitly references cultural heritage. Article 8(2)(e)(iv), with whose provision Al Mahdi was charged, spells out the penalisation as war crimes of

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1 The Rome Statute is equally silent on how Trial Chambers should construct victims, so each Chamber is free to self-determine or follow precedent (Cassese et al. 2012: 386). This latter path was taken in Al Mahdi, where the Chamber adopted the principles of reparation from the Lubanga case, comprising “five essential elements”: (i) the Order must be directed against the convicted individual; (ii) it has to establish his liability; (iii) it must explain the reasons for the type of reparations ordered; (iv) it has to define the harm caused to the victims as a result of the convicted crime as well as identify the appropriate modalities of reparations; and (v) it must identify the eligible victims (ICC — Lubanga RO Appeals, para. 32). By eliminating the elements that pertain to the convicted—i.e. (i) and (ii)—the three components necessary for the construction of victims may thus be identified.
[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.

As a consequence, in the determination of reparations, the Chamber accordingly identified the groups of victims who had sustained harm strictly as the result of the destruction of Protected Buildings.

Interestingly, however, two of these groups—the Malian State and the international community—were identified as relevant victims explicitly because the destruction of these Buildings have impoverished the heritage of not only the people of Timbuktu, but also of the entire country and “humanity” as a whole (Judgment para. 80; RO, para. 51). This narrative was adopted from the World Heritage Convention, which sets out inter alia the roles and obligations of each State Party (WHC, arts 6 paras. 1 & 2) and the co-operation among all States Parties (WHC, arts 6[1],[7]) in the protection of “world” heritage. This explicit reference by a criminal tribunal, making use of an instrument whose subject matter is heritage protection, chiefly motivated the lines of inquiry in this dissertation. Did the Trial Chamber take into account all the applicable law on the protection of heritage in its construction of victims? What does the resultant reparations regime here mean for the identification of victims of heritage destruction?

Due to the scope of the destroyed buildings and the judicial avenue on which the case was heard, the only applicable instrument on heritage protection in this case—apart from the Statute itself—is the WHC, to which Mali has been Party since 1977. The other related treaties, namely the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“The Hague Convention”) and its Protocols, are not applicable. These latter treaties govern protection through the prosecution and imposition of penal sanctions by each State Party, not the adjudication of heritage destruction by an ICT (Hague Convention, arts. 3–4; 1999
Second Protocol, art. 7). Additionally, the Malian government’s explicit referral of its situation to the ICC signifies the inability of its national judiciary to adequately respond to the on-going problem. For these reasons, only the use of the WHC will be analysed in this dissertation.

Paying close attention into the use of the WHC in this enforcement setting is furthermore warranted on account of its centrality in the international cultural heritage law. Lostal (2017) identifies the Convention as the “common legal denominator” in heritage protection in times of armed conflict. Due to its near-universal ratification rate, its provisions on the obligation of States Parties to prevent damage on world heritage (WHC, art. 6[2]) will apply to most likely all States in any armed conflict. The WHC provides the minimum preventive obligation to protect cultural and natural heritage even when the warring States are not Parties to the treaties that provide other specific protections for heritage in armed conflict. Due to this reason, Lostal also refers to the WHC as the “lowest common legal denominator” (2017: 69–74, emphasis added), which, in the absence of any other applicable treaty for the protection of heritage, will still apply among the parties.

The Al Mahdi case presents the opportunity to see the applicability of the WHC for the protection of heritage through its interaction with the Rome Statute at the ICC. The result from this investigation will assess the usefulness of the current international criminal legal system in enforcing the protection of heritage under international law. This dissertation attempts to identify:

1. **The extent to which the Trial Chamber utilised the provisions of the WHC in its construction of victims, which entails the assessment of harm for each victim group as well as the types and modalities of reparation;**

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*Per 31 January 2017, the Convention has been ratified by 193 States.*
2. The meaning of the Chamber’s reparations regime for the identification of victims of the deliberate destruction of heritage; and

3. The rationale behind the Chamber’s arrival at the findings as they are laid out in the Reparations Order, in the hope of understanding the factors which may influence future Chamber’s decision-making process if—or when—faced with another case of heritage destruction.
III

Methodology

III.1. The Case Study Approach

The decision to employ the case study approach was taken because this dissertation focuses all of the inquiry on an individual unit of analysis (Flyvberg 2011: 301; Yin 2015: 71; Schwandt & Gates 2018: 600): the Reparations Order in the *Al Mahdi* case. This methodological approach is chosen due to its central tendency to demonstrate beyond what a decision is, but also why they are taken, how they are taken, and possibly how they are implemented (Schramm 1971 in Yin 2015: 51). Since the focus here is on the meanings represented by the text of the RO, the dissertation does not delve into the practical implementation of the reparative measures.¹

The emphasis on the opportunity given by the *Al Mahdi* case to see the interaction between the WHC and the Rome Statute cannot be overstated. The choice of focusing on the RO—making this a *single-case study*—is deliberately made on account of its likelihood to illuminate this particular aspect of interest (Yin 2015: 55, 68). The WHC exemplifies the general problem found in international law: it is ill-equipped in terms of enforcement. The Convention does not contain any provision admonishing violations of obligation and the World Heritage Committee (‘WH Committee’)—established to oversee its implementation—is not empowered to hear violation complaints. Since Mali has been Party to both the WHC and the RS, the ICC thus becomes an important vessel on which to measure how much the enforcement by a criminal tribunal could benefit the protection of heritage.

While it might be difficult to definitively determine what kind of a case the RO is until after the implementation stages, we may take an informed guess that it

¹ Additionally, at the time of writing, no DIP for the reparations has been approved by the Trial Chamber, rendering impossible the investigation into the empirical implementation of the Order.
might be an extreme or deviant case (Flyvberg 2011: 306-7) due to its unusual qualities. It has been widely observed that the OTP’s decision to single out the destruction of property as an international crime was out of the ordinary (see inter alia Cole 2017: 398; Ellis 2017: 22; Wierczyńska & Jakubowski 2017: 696–7). No ICT had heard a case in which a single crime against property is charged, owing to the presumption that there had been many other crimes that are of more severe gravity in terms of their devastation on human beings instead of objects. This case had thus been widely heralded as “historic”, propelling a permanent ICT to the forefront of heritage protection. Analysing the construction of victims in Al Mahdi will therefore lead to understanding whether such a significant role may be justifiably attributed to the ICC and, if so, the extent to which the Court may take on that role. After all, the material jurisdiction of the ICC over heritage only covers a limited subset of buildings which may be of civilian service in armed conflict (Frulli 2011: 207, 211). This case thus presents the opportunity to measure the usefulness of the ICC and, by extension, of international criminal law for the enforcement of the protection of heritage. This degree of generalisation may be achieved due to the fact that the ICC is the only permanent ICT and that it has the potential of exercising universal jurisdiction over the occurrence of international crimes.

III.2. Data Scope and Analysis

The choice to undertake this research as a case study accordingly informs the determination of the scope of data to be collected and analysed in this dissertation, which analyses archival records and interviews.

Archival records comprise the applicable “public use files” (Yin 2015: 171), chiefly the legal instruments. The contents of the RO will be analysed in light of the
relevant (1) international legal instruments; (2) precedent consulted by the Trial Chamber; and (3) literature on heritage, international criminal law, and victimhood.

In order to complement the analysis of archival records as the primary source of data (Lune & Berg 2018: 173), interviews were conducted. The three following respondents were interviewed on account of their academic expertise on—and, in the case of one, direct involvement in—the topics of essential importance in this dissertation:

1. Marina Lostal is Lecturer at The Hague University of Applied Sciences, specialising on the international law of cultural heritage in armed conflict. Her seminal text (2017) informs the fundament of this dissertation and she was involved directly as an Expert in the production of the RO as well as the drafting of the third DIP.

2. Ana Filipa Vrdoljak is Professor at University of Technology Sydney, specialising on the international law of cultural heritage. She has written widely on the subject, including a chapter in Kockel, Logan & Nic Craith (2016) highlighting the urgency in clarifying “the international community” as part of the WHC narrative; a case note on Al Mahdi (2018); and an as-yet-unpublished conference paper on the tensions palpable across the Al Mahdi Judgment and RO arising from the intersection between international criminal law, human rights law and cultural heritage law.

3. Mijke de Waardt is Assistant Professor in Victimology and Transitional Justice at Tilburg University. Her fieldwork in Peru (2013) deals with the construction of victims and, despite having not written about the ICC, she has identified the importance of legal institutions in the determination of reparations (2016; interview 3 August 2018).
Via Skype video calls, all of the interviews were loosely structured to enable free-flowing discussions. Issue-specific themes were singled out from the notes taken during the interviews to locate information necessary for the substantiation of analyses. All of the relevant information was then reflected against prior understanding obtained from the analysis of the archival records, before finally being interpreted and written up (Roulston 2014: 304-5).
The State of the Art

There already exists an extensive body of scholarly work on the international law of cultural heritage. The range of such work is wide-reaching, from the sweeping appraisal of all the available instruments (Forrest 2010; Blake 2015) to works focusing on specific dimensions of heritage protection, such as intangible heritage (Blake 2006; 2007) and the protection regimes in armed conflict (O’Keefe 2006; Lostal 2017). All of these focus on the substance of the treaties. There also exists scholarship dedicated to seeing how the provisions of the law are enforced, most particularly Francioni and Gordley’s (2013) and Chechi (2014). The former highlights the plurality of legal orders surrounding cultural heritage and the consequent plurality of enforcement methods that follows—from restitution through negotiations, filing a suit of repatriations against a foreign country to a domestic court, to the roles of ICTs in combating crimes against cultural heritage (Lenzerini 2013). Meanwhile, Chechi (2014) focuses his frame of reference on the variety of means for the settlement of disputes concerning cultural heritage under international law. He measures the effectiveness of domestic court and considers the hypothetical establishment of a new international court to hear cultural heritage disputes. In contradistinction, this dissertation centres on the use of a specific enforcement mechanism provided under international criminal law.

The protection of cultural heritage in armed conflict under international criminal law had already been substantially scrutinised long before Al Mahdi, beginning with the critique on the lack of enforcement mechanisms prior to the establishment of the ICTY. O’Keefe (in Schneider 1992: 394) lamented the absence of a criminal tribunal in spite of the abundance of international rules penalising crimes...
against cultural heritage. Even after the ICTY was operational, this concern remained because the jurisdictional reach (“mandate”) of the Tribunal is spatially and temporally limited to the Yugoslav war (ICTY Statute, art. 1; Abtahi 2001). O’Keefe’s comment foresaw the need for an international tribunal empowered to hear cases involving the deliberate destruction of heritage independent of a war-specific mandate. It was also O’Keefe (2006; 2010) who made some of the first comprehensive reviews of the international criminal legal framework on the protection of cultural heritage, laying out all the provisions written in the treaties and unwritten within customary law. International criminal law had indeed established distinct regimes for the protection of heritage, even though its limits reveal a constricted ambit (Soderland 2013: 13). The typology of heritage destruction in armed conflict meticulously assembled by Viejo-Rose (2007) plainly reveals the considerably narrow scope of the international legal framework: the combined reach of the two ICT Statutes—and consequently the two tribunals—does not go beyond the few rudimentary forms of destruction: attack, damage, misuse, and pillaging. Accordingly, the scope of the ICC regime will delimit the findings of this dissertation concerning the usefulness of the international criminal legal regime for heritage protection.

Due to its historic qualities, *Al Mahdi* had attracted committed scholarly attention even before the Judgment was passed (Casaly 2016; Vrdoljak 2016). Analysing the OTP’s narrative to convince the Trial Chamber that Al Mahdi’s crimes were of sufficient gravity, Casaly (2016: 1200) stresses the importance of emphasising the devastating effects of the crime on the Timbuktu population, particularly on their collective sense of identity. In privileging this relativistic approach to the assessment of gravity, she proposes the abandonment of vague references to the destroyed heritage being of relevance to “all humankind”. While similarly
acknowledging the exigency of properly identifying the people of Timbuktu as victims of Al Mahdi’s crime, this dissertation diverges from what is effectively Casaly’s advocacy for the silencing of the universalistic narrative prevalent both in the Rome Statute and the WHC. It recognises that albeit vague and jargon-heavy, this narrative represents the application of the Convention, under which the destroyed buildings enjoyed protection and according to which the victims from such destruction shall consequently be identified.

From among the published works on *Al Mahdi*, some have discussed the RO and indeed touched upon victimhood to varying degrees. Cole described the “categories of harm” identified in the Order (2017: 417, 429), but did not venture further. Vrdoljak (2018: 19), on the other hand, noted the very strict applicability of the RO, in that the Trial Chamber is bound to set the terms of reparations in accordance only with the crimes for which *Al Mahdi* had been found guilty. This means, in spite of the fact that Al Mahdi’s commission of crime had also factually resulted in damage to and destruction of non-heritage civilian properties, the Order cannot grant reparation for the affected parties due to the disconnect between the harm and the crime. Identifying the RO’s “innovative element”, Capone’s work (2018) is most likely the closest to this dissertation’s core. She notes that the relevant victim groups identified not only comprise the people of Timbuktu, but also Mali and the international community (Capone 2018: 4). Nevertheless, this finding was treated descriptively and the meaning such identification poses in understanding the victims of heritage destruction was not probed into. Additionally, similar to Casaly’s (2016: 1200) unequivocal acceptance of one worldview to the total abandonment of another, Capone (2018: 8) incorrectly characterises the RO as a reversal of the relativism found in the Judgment instead of recognising both dossiers as a nuanced acknowledgment of both worldviews—a view taken in this dissertation.
While it was understandable that there has not been a substantial amount of research into the construction of victims in Al Mahdi, investigations of a more general nature into the role of the ICC in the provision of justice for victims are well documented. Exploring the procedural aspects of reparation-making, Keller (2007: 189-90) explains that it is important to talk about the ICC’s role in identifying victims because the inclusion of the mechanism to provide redress was motivated by the Court’s strive for restorative justice. The ROs become the most important units of analysis to see the commitment of the Court in actionable terms. De Waardt (2013) also notes that such a goal was the reason why scrutinising reparations regimes becomes pertinent. Not only will investigating reparations enrich the study into the practice of the ICC, but also our understanding of each crime within the ambit of the Court’s jurisdiction. The significance of investigation will accordingly be amplified when the study concerns such crime as Al Mahdi’s—one which the Court had never adjudicated before. Furthermore, de Waardt (2016; interview 3 August 2018) further cautions that due to the difficulties in defining victims, careful consideration needs to be taken by whatever apparatus is responsible for the task.

This research was conducted with the underlying premise that the provisions of the law are laid down in order to create a useful effect for the protection of heritage. The application of legal norms is therefore expected to bring about a situation that sees some degree of improvement compared to that before such application (Soderland 2013: 12). Under public international law, this is referred to as the *effet utile* doctrine, which requires that the terms set out in treaties be so interpreted as to emphasise their effectiveness (ILC Commentary to Draft Articles on the Law of Treaties 1966, p. 219; Vienna Convention on the Law of Treaties 1969 [‘VCLT’], art. 31[1]). Therefore, if the interpretation of a treaty provision leads to two results, where in one the provision becomes meaningful and in the other
meaningless, it would be reasonable to choose the former (Focarelli 2010: 130 in Lostal 2017: 74-6). From this perspective, the *Al Mahdi* case essentially concerns the application of two treaties: the Rome Statute, which empowers the ICC Trial Chamber to penalise the war crime of deliberate attack against the Protected Buildings in Timbuktu; and the World Heritage Convention, under whose provisions the destroyed buildings enjoyed protection as world cultural heritage. The RO, consequently, is seen as the result of the interpretation of these treaties, whereas the ICC—particularly the Trial Chamber in which the case was heard—is positioned as the authoritative interpreter of these treaties. Of course, these treaties were not the only legal sources interpreted by the Chamber in making the Order. However, they were the primary legal instruments governing the subject matter of the penalisation of deliberate attacks against cultural heritage in this case. This is how this dissertation aims to see the extent to which the WHC and the ICC are useful in the provision of protection for cultural heritage.
V

Victims and Cultural Heritage: Theory in Context

V.1. Threat and Implied Victims in the Protection of Heritage

The term ‘protection’ intuitively implies the pre-existence of some form of threat (Viejo-Rose, Lecture: Threats to Heritage 29 November 2017). All international legal instruments whose subject matter is protection invariably show threat—if not experiential damage—as part of what motivates their adoption. The same can be observed in the international instruments on the protection of the remains of the past in the present.

Protection here is to be understood as the broad umbrella term referring to the variety of differential treatments afforded to heritage based on the values considered attributable to it (Forrest 2010: 3). This may encompass such precautionary measures as conservation in situ, safekeeping for display in museums, documentation and inventorying, and awareness-raising through international listing. Paradoxically, protection may also manifest in curative measures applied after the dreaded threat has come to realisation and the consequent damage inflicted. Restitution of removed antiquities through peace treaties between nation-States is one example. Adjudication of cases involving competing claims over heritage sites or, indeed, international crimes against heritage, is another (Chechi 2014). These latter measures are ‘protective’ in the sense that they are responses to acts that threaten or damage heritage in one way or another—whether in the sense of lost antiquities that form part of collective identity or actual destruction of historic sites. They demonstrate that the violation of a predetermined set of rules has consequences. Additionally, some forms of these curative measures—for example, adjudication—may give rise to a deterrent effect: public trials should ideally caution
future trespassers from committing similar crimes. However, the prevalence of attacks against heritage easily shows that this is more utopian than effectual.

Heritage in all its incarnations contain information that may be useful in the present to learn about and from the past (Lowenthal 1998: 139–43; Carman 2002: 35–57). When this is translated into policy and law, the motivation for the protection of heritage is the enjoyment thereof by as many people as possible in the present and in the future (Merryman 1989; Prott & O’Keefe 1992: 310; Carman 2002: 18). Moreover, heritage may also be fundamental in the provision of meanings for identity-formation, both on the private—for example, personal and familial—level and the more public—for example, community and national—level (Anderson 1983; Darvill, Saunders, Startin 1987; Howard 2003: 4; Smith 2004: 17; Carr 2014: 292–5). In many cases, despite their significant roles for human development and statecraft, these non-renewable remnants of the past are faced with deterioration and destruction (Kirshenblatt-Gimblett 1995: 370; Sørensen 1996 in Sørensen & Carman 2009: 20; Carman 1996; Layton & Thomas 2001; Sørensen & Evans 2011: 40–4).

While threat is inevitably prevalent, however, it is not the sole rationale for the protection of heritage. Protective movements may also find their roots in celebration of the beauty of heritage and/or the human achievement represented therein (Tunbridge and Ashworth 1996: 35; Lowenthal 2015: 413). Lowenthal (ibid.) nonetheless observed that no matter the motivation, the failure to preserve the past may indeed lead to such actual harm as the stunted development of culture in the present and damage to the sense of identity. These are apart from the loss of the material representations of the past themselves. In many cases, the threat motivating the protection of heritage alludes to the emergence of some form of victim as the result of absence or failure of such protection.

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* As Elias (1993: 7–8) observes, victimisation occurs only in relation to the commission of a crime. While this criminal setting is the specific direction to which the analysis is heading, this section aims
Looking at the treaties that provide for different kinds of protection for various forms of heritage, it becomes evident that threat is the common trigger for their implementation (Lostal 2017: 57–8). The WHC requires action by its States Parties in response to threats against world cultural and natural heritage (Harrison 2015: 302–4). For example, the Convention obliges that each State Party ensure the development of skills and methods of its administration to enable the measures which may counteract the threats against world heritage. The failure to respond to threats would result in some form of harm inflicted on heritage and thus imply some form of victimisation (Cameron & Rössler 2013: 2, 11–20). The question is, who is being victimised by the failure to protect heritage? Who are these victims?

In his analysis of the different parties to whom heritage may be of value, Forrest (2010: 7–13) effectively implies that these parties may emerge as victims in the absence or failure of protection of heritage:

1. “Group or community”

Heritage may represent elements constitutive of group identity, hence the failure to protect heritage may result in the harm shared by the members of the community. Tension may occur when the members of a community do not share the same value regarding heritage, for example when the relationship to heritage is not self-generated but conjured up and imposed by such external authority as the government (Hobsbawm 1983; Winter 2007: 7–8; Sánchez-Carretero & Ortiz 2011: 111). In such a case, multi-vocality would accordingly complicate the assessment of communal harm.

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To link threat with victimhood on a more general level, interpreting the latter as the position into which certain parties are put as a result of an adverse treatment (Rock 2002: 14).

The protection under the 1954 Hague Convention, for one, requires all States Parties to undertake the necessary measures to safeguard heritage properties during peacetime to minimise risk of their damage in the event of armed conflict. The 1970 UNESCO Convention, for another, requires a national certification system in prevention of illicit transfer of movable heritage across jurisdictions. Meanwhile, the 2001 Convention prioritises preservation in situ in acknowledgment of the risk of deterioration if the underwater heritage is relocated.
2. “The nation”

Heritage has also been used as a vessel for the notion of national identity. While the contents of such identity may be auxiliary to the more important function of heritage to emphasise difference between ‘us’ and ‘them’, heritage remains an important tool in nation-building (Anderson 1983; Hall 1999; Ashplant 2004: 263). As a consequence, when there is lack of protection for the forms of heritage that carry particular significance for national identity, the State in question may emerge as a victim.

3. “The international community as a whole”.

On an even broader stage, there are objects and representations of heritage which are regarded as evident of the shared history of humankind and whose importance thus transcends national boundaries (Merryman 1986; Sørensen, Lecture: Scales of Engagement 25 October 2017). In this sense, when there is failure to protect heritage of such universal significance, “humankind” as a whole suffers the harm and therefore becomes victimised, but, echoing Vrdoljak’s (2016: 542–6) outstanding concerns, who is this community and why is it conflated with “humankind”? Is the UN, albeit covering ‘only’ 193 of the world’s nation-States, entitled to self-proclaim as representation of the humankind “as a whole”?

Harm is essential—it serves as the basis on which victims may be identified (UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, art. 1; Bottiglierio 2004: 6–7; van Boven 2009: 24–5, 35; Cassese et al. 2012: 387). Two relevant observations may hence be raised from Forrest’s exposition above. First, there are two kinds of harm that may be identified: the harm inflicted on the heritage itself and that inflicted on the persons to whom such heritage is valuable. Second, the assessment of harm will face challenging complications, especially for the State and the international community. How exactly is a nation harmed by the
failure to protect heritage? How is the damage to national identity factually harmful? Which agency(ies) of the State will be entitled to redress for its victimisation? The same complications similarly frustrate the assessment of harm for the international community. For these two entities, the harm seems to be more figurative than factual. Left unresolved, these hypothetical questions will lead to empirical complications on the face of the many, very real threats of heritage destruction, such as that posed by armed conflict in the Al Mahdi case.

The central fundament of this dissertation is that the law should be so applied as to produce a useful effect. Based on this premise, the interaction of the two applicable treaties in Al Mahdi is expected to delineate the ICC’s effort in constructing victims of the deliberate destruction of heritage sites in Timbuktu. The next sections attempts to elaborate on this interaction by analysing the respective objects and purposes of the Rome Statute and the World Heritage Convention, before summarising the effect of the latter on the former’s scope of the protection of heritage. They will in turn reveal certain expectations concerning the construction of victims in the RO.

V.2. The Threat of Armed Conflict to Cultural Heritage: the Interaction between the Rome Statute and the World Heritage Convention

Having disparate subject matters, the respective scopes of the WHC and the Rome Statutes accordingly differ. The former explicitly concerns the protection of cultural and natural heritage, whereas the latter regulates the prohibition of international crimes and adjudication of their commission. When there occurs an international crime involving the destruction of cultural heritage, it follows logically that the provisions from the instrument governing the heritage protection inform the institution tasked with the adjudication of the crime. This section will measure the
extent to which the World Heritage Convention may influence the ICC Trial Chamber’s analysis of the crime. The only treaty that legally binds the conduct of Court apparatuses is the Rome Statute, so any measurement of the extent of influence given by other treaties must take into account the limitations set within the Statute’s provisions. This measurement will be conducted by analysing the respective treaties’ “objects and purposes”, in which the aims and nature of each treaty are laid down (Villiger 2009: 427). As a contextual fence, the analyses of the object and purpose will be limited to the points which are of relevance in the Al Mahdi case.

As a customary rule, a treaty provision shall be interpreted in due consideration of the treaty’s object and purpose (VCLT, art. 31[1]). While they play the important role of explaining the use which the application of a treaty aims to achieve (Aust 2007: 235), a treaty’s object and purpose can be difficult to trace (Greig 1994 in Klabbers 1996: 252). The VCLT itself provides no reference as to which part of a treaty they may be located in, but customary practice suggests that object and purpose may be found inter alia in the treaty’s preambular paragraphs. These opening clauses normally introduce the main text of a treaty by summarising the background leading to its adoption (Aust 2007: 425), so they usually explain what difference the implementation of that treaty attempts to make. In order to substantiate the claims made in these preambles, confirmation is sought from within the operative clauses—the provisions of the treaty themselves. This cross-referencing is expected to confirm whether the opening statements introducing a treaty truly lead to normative provisions through which improvements may be heralded in, instead of being mere political poetry.
V.2.a. Object and Purpose of the World Heritage Convention

The WHC Preamble (paras. 1–2) recognises threat as a primary motivating force in the adoption of the Convention and subsequent implementation of its provisions. Importantly, it is recognised that such threat of destruction and deterioration of heritage may give rise to harm that is sustained by “all the nations of the world”. Since armed conflicts constitute a very real threat to the existence of heritage, it then follows that the Convention should be applicable in the midst of such hostility. The requirement that each State Party conduct the necessary measures to protect world heritage against all kinds of threat contains no situational qualification (WHC, art. 6[3]), so this has been interpreted as allowing for an expansive reading of the WHC’s applicability. The absence of express limitation to the contrary here means, in order to arrive at an interpretation that highlights utmost effectiveness, the Convention is intended to apply not only during peacetime, but also in the event of armed conflict (O’Keefe 2006: 312-3; Lostal 2017: 69, 73).

The preambles further acknowledge that damage or destruction of heritage does not elicit such wide-reaching harm unless it possesses outstanding universal value (‘OUV’). These heritage properties “of outstanding interest” are the ones referred to as “world” heritage (WHC, Preamble para. 6) because their significance is felt not only by a group or community or even one nation-State, but also by humankind in general. States Parties may nominate the world heritage properties in their jurisdictions for inscription onto the Convention’s international lists, in the hope that the listed properties would arouse widespread awareness of their significance and/or attract international assistance for their management. Nevertheless, as the WHC emphasises, if a heritage property is not on any of the lists, it does not mean they lack OUV. Something may indeed be considered cultural heritage having such transcendental value irrespective of its international listing.
status (WHC, art. 12). In so admitting, the Convention requires all of its States Parties to protect not just the listed heritage, but also all cultural and natural heritage within their territories. This de-emphasises the exclusionary character of the lists and elevates the proactive role of each State Party in conducting self-identification of heritage within its jurisdiction.

Lastly, the WHC is meant to bring about improvements to the conditions of heritage worldwide by mandating a set of obligations to all of its States Parties. The primary obligations are reserved for the nation-States, who shall regulate heritage protection in their respective jurisdictions. The preambles acknowledge that the efforts on the national level are often “incomplete” due to the limitation of State resources, so “it is incumbent” on “the international community as a whole” to participate in the protection of world heritage through collective assistance (WHC, Preamble paras. 3, 7). Some of these obligations require, for example, the adoption of national policy for heritage protection (WHC, art. 5[a]) or, indeed, the restraint on deliberately damaging world heritage in the territory of other States Parties (WHC, art. 6[3]). There are two problems identified on this front. The first concerns the foreshadowed lack of clarity as regards the term “international community”. Due to the transcendental significance of world heritage, the obligation to respect cultural and natural heritage is in fact owed by the States Parties to this ill-defined international community (Forrest 2010: 407; Lostal 2017: 71). This sense of obligation needs to be operationalised (Luker 2008) in order to be actionable, particularly if we were going to properly construct the victims of heritage destruction. As a contextual example, if part of a listed world heritage property is destroyed in the course of a war crime, does this entail also the responsibility of the State where such heritage is located i.e. for its failure to prevent such destruction? If so, does this mean the State is still victimised by such destruction? These are some of the gaps that need bridging.
One of the most salient features of this Convention is the dominance of States (Cameron & Rössler 2013: 155–62; Meskell 2014). On account of the transcendental values contained within heritage properties, nations clamour for their international recognition. These national and international emphases often subdue the voices of the immediate communities who may be more closely linked with the heritage (Graham & Howard 2008: 8). The WHC’s Operational Guidelines (inter alia paras. I.C.[12], I.E.[26][5], I.I.[40], II.C.[64], III.A.[123]) had indeed been adjusted to bring to the fore the roles of these local communities for heritage management, but the provisions of the Convention themselves remain generally mute.

V.2.b. Object and Purpose of the Rome Statute

The first reference to heritage may be seen in the opening preambular paragraph of the Statute, which acknowledges concern that “the delicate mosaic” of “the cultures [of all peoples] pieced together in a shared heritage” is threatened by the continuing prevalence of international crimes (para. 1, emphasis added). Considering the purpose of the Statute was to establish a tribunal for the adjudication of international crimes, this should primarily be understood as introducing how devastating those crimes could be to all peoples of the world and, hence, why there needed to be an institution to adequately act on them. Nevertheless, there is no mistaking the narrative similarity between the paragraph and the universalism in the World Heritage Convention, where the destruction of cultural or natural heritage amounts to the “harmful impoverishment of the heritage of all nations of the world” (WHC, Preamble para. 2; Cleere 2001: 24). In accordance with effet utile, this parallel cannot be deemed coincidental and has to be treated as an allusion of commitment by the ICC to respond to “the most serious crimes” which threatens “the delicate mosaic” of humanity’s shared heritage (RS, Preamble paras. 4, 5; Ellis 2017: 39). The Statute
follows through with this initial commitment by including the prohibition of crimes against cultural heritage as at least one international crime: the war crime of intentional direction of attacks against protected buildings in armed conflict (RS, art. 8[2][e][iv])—as we see in Al Mahdi. There are other crimes in which attack, damage or destruction to cultural heritage may be prohibited, for example the war crime of incidental damage inflicted on civilian objects (RS, art. 8[2][b][iv]) and, under crimes against humanity, persecution in the form of the extensive destruction of buildings based on discriminatory reasons (RS, art. 7[1][h]). At the time of writing, the Court had only confirmed that it has jurisdiction over cultural heritage through the war crime of intentional attack. Its reach through the latter two crimes thus remains mere conjecture until there is an actual case involving those crimes.

The Statute’s individualistic focus and side-lining of State barriers (art. 27[1][2]) stand in dissimilitude with the WHC’s grandiose emphases on States and internationalism. The Statute was adopted to establish a functioning Court to punish the perpetrators of international crimes. The ICC further moves beyond punishment onto the territory of restorative justice. This part of the Statute’s object and purpose may be seen through the acknowledgment of the potency of the “unimaginable atrocities” under its jurisdiction to create victims out of children, women, and men (RS, Preamble para. 2). The ICC aims at being the international tribunal that not only punishes the perpetrator of a crime, but also aims to restore the situation for the victims into that prior to the commission of the crime (de Waardt 2013: 836). The manifestation of this commitment to the realisation of restorative justice is the authority of the Court to issue Reparations Orders for the provision of redress for the victims of the crimes (RS, art. 75).
V.2.c. Effect of the Interaction with the World Heritage Convention on the Rome Statute’s Scope of the Protection of Heritage

The threat looming over heritage shall be understood in accordance with the crimes under the ICC’s jurisdiction. Thus, the limitations of the protection afforded to heritage by the Rome Statute are set by the material elements of the crimes, which, in *Al Mahdi*, pertain to war crimes under Article 8(2)(e)(iv). Two such limitations may be observed in this case.

First, the protection is granted over “buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected”. This means only a subset of world cultural heritage is covered and that, as a category, it is pooled together with other civilian-use facilities which may not factually be considered heritage, for example those where *hors de combat* are cared for.

Second, the intentional attack against the protected buildings above must have some connection with an on-going armed conflict in the territory where such an attack is launched. Consequently, while the WHC applies both during peacetime and armed conflict, the enforcement of its provisions through the ICC is limited by this armed conflict nexus. In other words, deliberate attacks against heritage conducted during *de jure* peacetime—such as those committed against the Buddha statues of Bamiyan Valley—will be out of the Court’s jurisdictional reach. In addition, this armed conflict nexus means any deliberate attack may be justified if a building became a “military objective”, defined under customary international law as objects

which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or [neutralisation], in the circumstances ruling at the time, offer a definite military advantage (Additional Protocol I to the 1949 Geneva Conventions, art. 52[2]).
This presents an exception regime to heritage protection not found within the World Heritage Convention, effectively allowing under the Rome Statute the deterioration and destruction of heritage sites if they became military objectives. The shattering of the delicate mosaic piercing together humankind’s shared heritage is rendered justified when it means gaining definite advantage over the enemy in the course of armed hostilities. This exception severely curbs the use of the ICC for the prosecution of crimes against heritage, because, if the defence counsel of the accused could successfully prove the existence of military objective, the Court would not find any crime against heritage irrespective of the devastation caused to what may have been humankind’s shared treasure.

Deliberate attacks against cultural heritage, provided it is not military objective, may thus create harm not only for a group of people, but also that which reverberates onto the State where such heritage is located and the “international community” whose heritage is impoverished by the attack (Lostal, interview 8 August 2018). This is in line with the overall tone with which the wide-reaching effects of international crimes are described and supports Forrest’s (2010: 7–13) victim classification above. The first victim group—the group of people—derives from the Rome Statute’s prohibition of war crimes, whereas the last two—the State and the “international community”—from the WHC. What is not identified through this interaction between the two treaties is how harm is properly constructed for each of these categories, though it is simply because it is not provided in either of the treaties. Therefore, it becomes the task for the Trial Chamber to define these elemental concepts in the RO.

* Military objective is a stricter, more clearly-defined limitations regime compared to that of military necessity, found under The Hague Convention and in such ICTY cases as Brdanin, Kordić & Čerkez, Strugar, and Hadžihasanović. For a detailed appraisal of the intricacies in defining this latter regime, see O’Keefe (2006; 2010).
VI
Analysis

VI.1. The World Heritage Convention in the Reparations Order

VI.1.a. Uses of WHC Provisions

The language of the World Heritage Convention is used on a general level in the RO to elaborate on the importance of “international cultural heritage” (RO, paras. 6). The Order emphasises that due to the various threats of destruction looming over cultural heritage, all the applicable international instruments condemn the deliberate destruction thereof (RO, para. 14; WHC, Preamble paras. 1, 7). It also establishes that cultural heritage represents the collective identity of a people and, in the case of the destroyed sites in Timbuktu, the essence of their faith, so its destruction may devastate not only their sense of who they are, but also what they devoutly believe in (RO, paras. 14, 15, 67, 22, 86; WHC, Preamble paras. 5, 7). Furthermore, the Order distinguishes “world cultural heritage” as “a most important category”, which attracts a “higher degree of international attention” and whose destruction severely “negates humanity” (RO, paras. 17, 22). This echoes the WHC in its acknowledgment that with respect to this category of heritage with OUV, “the international community as a whole” has to participate in the protection effort (WHC, Preamble para. 7). On the one hand, such participation translates into the duties incumbent on each State Party—as member of such community—to inter alia identify all cultural and natural heritage sites in each of their territories, enact all necessary measures for heritage protection, refrain from deliberately inflicting damage on the heritage found in the territories of other States, and provide reports to the WH Committee on conservation efforts (WHC, arts. 3, 4, 5, 6[3], 11[1], 29). On the other hand, this
participation manifests in the cooperative schemes involving all States Parties administered through the WH Committee, including the financing of the World Heritage Fund and assistance for properties listed on one of the World Heritage lists (WHC, arts. 6[1], 7, 8, 12).

More substantively, the provisions of the WHC were utilised in all components of the construction of victims: the identification of victim groups, the assessment of harm, as well as the types and modalities of reparation corresponding to the harm. The ‘type’ of reparation may be individual, collective, or both, whereas ‘modality’ refers to the “specific methods identified to address the kinds of harm requiring reparations” (ICC Rules of Procedure and Evidence ['RoP'], art. 98[1]–[3]; RO, paras. 45–6).

First, the Order identifies “the faithful and inhabitants of Timbuktu” as the “direct victims” of the crimes, and acknowledges that the effects of the heritage destruction also rippled onto the “people throughout Mali and the international community” (RO, para. 51). The group of direct victims was defined as “organisations or persons ordinarily residing in Timbuktu at the time of the commission of the crimes or otherwise closely related to the city that they can be considered part of this community at the time of the attack” (Al Mahdi RO, para. 56, emphases added). The “faithful” of Timbuktu were identified because the attacks destroyed sites of faith, whereas the “inhabitants” were identified as acknowledgement that the significance of the sites may also have been recognised irrespective of faith. The identification of these three victim groups sees a loyal adaptation of the WHC, which emphasises that the significance of cultural heritage not only reaches a localised group of people, but also humanity in general. Additionally, since the State holds the primary responsibility in the protection of the destroyed buildings, their destruction also victimises Mali. Interestingly, the
destruction was not deemed by the Trial Chamber as the failure of the State to protect world heritage or a violation of its main obligations under the WHC. This may have been due to the fact that the Convention itself is lenient—national-level protections are admitted as often being “incomplete” due to the limitations of resource (WHC, Preamble para. 3). In this case the armed conflict may have been considered as a hindrance to the deployment of Malian resource for heritage protection.

Second, regarding the assessment of harm, the Chamber found it to be “self-evident” that the people of Timbuktu had sustained “disproportionately more harm” due to the attacks, emphasising the people’s status as direct victims (RO, para. 52). Moreover, due to the “specific nature of the crime”, the Chamber also “acknowledge[d] the suffering endured by the Malian community and the international community as a whole” (Ibid., para. 53). One thing to note is that although not all of the destroyed buildings were listed World Heritage sites, the identification of relevant victims still uses the WHC language that refers to world heritage. The State of Mali and the international community were still considered harmed by the destruction of a non-listed heritage site, confirming that OUV may be present irrespective of a site’s listing status. Consequently, the WHC may be useful in the construction of relevant victims in future cases involving the deliberate attacks against non-listed sites in armed conflict.

Third, the types and modalities of reparation were also substantiated by WHC provisions. With respect to type, the Trial Chamber privileged collective reparations for the direct victims (RO, paras. 67, 82, 83, 88, 90). For each kind of harm where individual reparations are needed, the Chamber granted additional—collective—reparations addressed to the Timbuktu community generally. The reasoning for this decision flows from the WHC, which acknowledges the
significance of cultural heritage for collective units of society. Therefore, when such heritage is destroyed, the harm would be felt by the collective. The 139 applicant victims were apportioned individual reparations with supplements: their applications were to be considered on a case-by-case basis and they were each to be awarded an additional 250 Euros “to address their collective harm”. The Chamber essentially found that it would be insufficient if the harm from the destruction of heritage is measured only based on what is demanded in the applications of the direct victims. It further held that reparations would also be granted for the people in Timbuktu generally, even though no application outside the 139 were received. This proactive position of the Chamber, granting reparations even in the absence of demand, seems to have been in keeping with the ICC’s goal of restorative justice. The Chamber realised that while not everyone in Timbuktu was aware of the ICC and the procedural complexities of its apparatuses, they had nonetheless also been harmed by Al Mahdi’s crimes and were thus deserving of reparations.

Concerning reparation modalities, the Chamber ordered the rehabilitation of the destroyed sites, in keeping with the Convention’s demand that all necessary measures be undertaken for the “protection, conservation, presentation and rehabilitation” of cultural heritage (WHC, art. 5[d]). Interestingly, this provision was adopted out of context, since the Article requires those necessary measures from the State Party. In the present case, rehabilitation was ordered against an individual, who did not in fact need to carry out the measures himself since the rebuilding work had already been carried out by UNESCO (2016, para. 12). What was ordered against Al Mahdi was the reimbursement for the fees spent on UNESCO’s work, valued at 97,000 Euros (RO, paras. 117–8). An additional form of rehabilitation was ordered in the form of “memorial, commemoration or forgiveness ceremony” to address the collective moral harm of the Timbuktu population. Measures were also ordered to
rehabilitate the community economically—through awareness-raising and empowerment programmes designed in relation to the heritage sites—and morally, through the publication of Al Mahdi’s apology for his crimes.

The following table summarises the construction of victims in the Order and demonstrates the significant gaps in all of its three components, which are elaborated in the succeeding section.

<table>
<thead>
<tr>
<th>No.</th>
<th>Victim Group</th>
<th>Harm</th>
<th>Reparation</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Type</td>
</tr>
<tr>
<td>1.</td>
<td>The “faithful and inhabitants of Timbuktu”</td>
<td>Damage to the Protected Buildings</td>
<td>Collective</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Publication of excerpt of Al Mahdi’s apology to be made available on the ICC’s website, with a transcript translated to the primary languages spoken in Timbuktu</td>
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<td></td>
<td></td>
<td></td>
<td>Consequential economic loss</td>
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<td>Collective</td>
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<tr>
<td></td>
<td>Moral harm</td>
<td>Individual</td>
<td>Monetary compensation for those whose ancestors’ burial sites were damaged</td>
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<td>---------------------------------------------------------------------------</td>
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<td>---------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Collective</td>
<td>Rehabilitation for the “disruption of culture” for the people of Timbuktu, such as “a memorial, commemoration or forgiveness ceremony”</td>
</tr>
</tbody>
</table>

| 2. | The State of Mali             | ?               | Symbolic?                   | One Euro                                      |
| 3. | The “international community”? | ?               | Symbolic?                   | One Euro                                      |

**Table 1: Construction of Victims in the *Al Mahdi* Reparations Order**

### VI.1.b. Identified Gaps, Identified Achievements

The first gap in legal reasoning may be observed in the identification of victim groups. The Trial Chamber established an expansive understanding of victims, which now not only include humans and organisations—per the definition of “victims” under Rule 85(1) of the RoP—but also States and even the “international community”. While such an expansive view may be contextual considering the transcendental adverse effect of heritage destruction, properly identifying who these groups are should take precedence in our understanding of how victims are constructed by the ICC (de Waardt, interview 3 August 2018).

Attention is primarily due on the last of these groups: who is the “international community”? The Order did not spell out who factually this community was, but provides that it was “best represented” by UNESCO. This implies the Trial Chamber effectively considered the organisation representative also of its non-Member States. A more contextual interpretation would suggest that the organisation represents the international community because the phrase was taken from a legal instrument adopted by UNESCO, but this does not address the fallacy
in the presumption that it represents all countries—let alone all humankind. Nevertheless, UNESCO may indeed be the closest (“best”) representation of the international community in this case for two reasons. First, it has more Member States even than the UN, which is widely considered to be the most ‘universal’ organisation in terms of scope and membership. Second, UNESCO administers the implementation of the nearly-universally ratified World Heritage Convention, by which it propagates standard-setting efforts for the management of world heritage on a near-global level (Smith 2006: 87, 95–102; Askew 2010; Isar 2011: 39; Meskell & Brumann 2015: 22–36). Unfortunately, this necessary legal acrobatics was not found in defence of the Chamber’s identification of the international community as a victim group in the Order, rendering the phrase open to interpretations—even those that do not support the effective functioning of the WHC.

The second gap lies in the assessment of harm for Mali and the international community, and accordingly leads to the third gap observable in the substantiation of the types and modalities of their reparations. In this case, the assessment of harm normally reserved for person-victims had to be so adjusted as to accommodate the RO’s expansive view. While recognising that the State and the international community “should not be forgotten” as having also sustained harm (RO, para. 53), the Chamber did not follow this recognition with the proper appraisal of the harm of these indirect victims. Instead, it deployed an escapist strategy in two stages:

1. The Chamber established that only the reparation for the direct victims should be prioritised due to their evident closeness to the destroyed heritage (Reparations Experts Report 1, para. 27 in RO, paras. 53, 55).

2. It used the reverberation argument (Lostal, interview 8 August 2018), which insists that addressing the harm of the people of Timbuktu will “effectively address the broader harm” of the Malian State and the international community.
The Chamber went on to argue that this was why the latter two groups did not require their own reparations (RO, paras. 53–5). The table above thus makes it clear that there exists no adequate legal rationale why the Malian State and the international community each deserved its symbolic reparation of one Euro. Using escapism, the Chamber unreservedly accepted that the reparations ordered for the people of Timbuktu will “inherently” and “effectively” address the harm suffered by the other two victim groups, rendering altogether unnecessary—in its views—the separate appraisal of the latter groups’ respective harms.

This finding should in no way be understood as some form of advocacy for these groups to get more reparations than their symbolic Euro. It is unambiguously acknowledged that assigning anything more than symbolic reparations for them would have been disrespectful for the people who factually suffered quantifiable harm (Vrdoljak & Lostal, interviews 6 & 8 August 2018, respectively). What is being fulminated against here is that the necessary analysis of harm regarding these victim groups was not made explicit in the Order.

The Trial Chamber did not attempt to consult the WHC to seek the provisions with which to assist its analysis here. If the Chamber had looked but did not find assistance, it should have noted that the applicable instrument did not provide for the assessment of harm with respect to these victim groups. This non-finding would have shown that the Chamber had truly consulted the relevant sources for its assessment of this unprecedented subject matter. In other words, pointing out the fact that the WHC could not be used in this area of analysis would have paradoxically better demonstrated the use of the WHC.

In light of these identified gaps, then, what had the Court achieved through this construction of victims? Three observations may be made in recognition of the Chamber’s unavoidable accomplishments.
First, uneven analyses notwithstanding, the RO had established a categorisation of victims. Apart from the above-mentioned direct and indirect victim classes, the Order importantly identified three categories of victims arising specifically of the deliberate attack of cultural heritage: (1) local victims, comprising the immediate community affected by the destruction at both individual and collective levels; (2) national victims, comprising the State where the attacked sites were; and (3) international victims, comprising humankind “as a whole” and “best represented” by UNESCO.

Second, this categorisation offers evidence of how the Order embodies both the relativism under the Rome Statute and the universalism of the World Heritage Convention. The criminal legal regime of the ICC actually contains both of these worldviews in itself: the Statute establishes the Court’s jurisdiction over crimes which should be considered unspeakable on a universal level, but at the same time prioritises its relativistic focus on bringing individuals to justice. This may be understood in the sense of prosecuting accused individuals as well as providing reparations for the victims of the crimes (Bantekas & Nash 2007: 6–10; Mettraux 2007: 5–16; Cryer et al. 2010: 18–21). Due to these dual foci, the Chamber was not philosophically prevented from adopting the similarly grand universalistic narrative of heritage in the WHC.

Third, the RO represents the ICC’s push into transformative justice territory. As mentioned above, court-ordered reparations are the manifestation of movement beyond punishing the criminals onto serving the equally immediate need of the victims of crimes. Nonetheless, reparations would only restore the condition of the victims into that prior to the commission of the crime (Dignan 2005: 94–5; de Waardt 2013: 836). This proves problematic where, for example, crimes are committed in the midst of armed conflict. Punishing individuals by no means resolves the conflict in
connection with which their crimes were committed. This is equally problematic where the destruction of cultural heritage is at the centre of a crime. ‘Repairing’ harm implies an attempt at simply reconstructing the destroyed sites, without addressing *inter alia* why those sites came to be used in the conflict that led to their destruction and the resultant suffering of the affected community (Viejo-Rose 2011a: 54, 66; 2013).

The RO exceeded restorative expectation by not only identifying beyond the damage sustained by the buildings, but also acknowledging that the reconstruction conducted by UNESCO was independent from the Chamber’s appraisal of harm (RO, para. 65). The Chamber recognised that, where the destruction of cultural heritage has taken place, reconstruction of the sites does not by itself equal reparation. Moreover, it is evident that the mandated modalities of reparation aimed for the empowerment of the Timbuktu population through their relationship with the heritage sites, instead of simply reverting their situation to *status quo ante* following the payment of financial compensation. Since the RO puts the people of Timbuktu as the priority victims, the TFV now has to ensure that the DIP accordingly privileges them in the delivery of reparations. Rehabilitative measures have to be inclusive and participatory instead of exclusively top-down. The DIP has to additionally ensure that the “memorial, commemoration or forgiveness ceremony” which purport to address the people’s moral harm adequately acknowledge their suffering so as not to perpetuate and eternise their sense of victimhood (Ashplant, Dawson, Roper 2004: 72; Ashworth 2008: 239; Viejo-Rose 2011a; 2011b: 205–6; 2013: 137–43; Breed 2011: 246; Carr 2016: 49–51). To the extent possible, the Court needs to ensure that its transformative justice purposes be translated into an actionable DIP. It would be impossible for a solitary international tribunal to achieve transformative justice for a crime-torn community by itself.
(Durbach & Chappell 2014; Chappell 2017), but within its ambit the ICC could doubtless make a difference.

**VI.2. The Woes of Discretion**

It is observable that the Trial Chamber was not consistent in use of the WHC. In several respects it loyally utilised the Convention’s provisions, whereas in others it was hesitant at best. Analysis of the cause of this uneven behaviour may be attempted through political and legal lenses.

The ICC is a judicial institution that does not operate outside the realm of international politics, no matter how adamant its apparatuses refute this on record. As a court, it is expected to prosecute and try international criminals ‘blindly’—paying no regard to the nationality of the accused or to how the country to which he is a national reacts to his prosecution. Nevertheless, the operation of this treaty-based body depends on the good faith of States in surrendering a degree of their respective sovereignties for the Statute’s application. In a Westphalian community where nothing is deemed to be above sovereignty, there is virtually no prevention for a country to free itself from the binds of a treaty by simply withdrawing its ratification. All of the legal measures undertaken by the ICC realistically have to be so calculated as not to ‘upset’ these nations.

The Court’s politically calculated manoeuvres may also be explained by the wider agendas of international organisations and their leaders. Ever since the escalation of armed hostilities in Mali, UNESCO’s then-Director-General Bokova immediately appended the ICC in the narrative of her own institution’s response, calling for the termination of attacks committed against cultural heritage and the consequent prosecution of the perpetrators before the Court (Gigova & Brumfield

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Footnote: For a poignant appraisal of the ICC’s circumspect “power plays” in world politics, see Bosco (2014).
2015; UN News 2016a; 2016b; Bokova 2016). The Trial Chamber’s use of the WHC may have been significantly influenced by the development of this relationship between the ICC and UNESCO (Cameron & Rössler 2013: 165–74; Meskell 2015: 4). Since the relationship is heavily laden with jargonistic language (Oxford Union 2018; Turku 2018: 100), this may explain why the Chamber’s utilisation of the WHC was intermittently limited to the Convention’s jargons without similar effort equally afforded for the analysis of the more substantive provisions.

Admittedly, no conclusive causality was attempted in this dissertation when perceiving this rationale from a political lens. In investigating the reasoning behind the Chamber’s findings, only the elements of the relevant legal system were accordingly probed into. This dissertation arrives at the ICC’s discretionary powers as the source of the Trial Chamber’s inconsistency in the Al Mahdi Reparations Order. It further contends that these powers may accordingly affect the future Chambers’ decision-making process for similar cases.

The ICC apparatuses are bestowed extensive discretionary powers in carrying out their respective functions. The Court is bound almost exclusively by the Rome Statute in its operation and this is palpably evident all across its jurisprudence, including Al Mahdi. These powers are influential on two levels: the discretion of the Prosecutor with respect to its investigation and determination of the charges of crime; and the discretion of the Trial Chamber in selecting its sources for the consideration of its analysis as well as, concomitantly, the extent to which those sources are used.

As introduced briefly above, while the OTP is bound to commence investigation into a situation where there is likelihood that an international crime of sufficient gravity has been committed, it is definitively not bound to charge all of the identified individuals with all the correspondingly identified crimes in such a
situation. In other words, the Prosecutor gets to choose which individuals to charge and which crime it is going to charge them with. In *Al Mahdi*, the OTP (2016) naturally explained that the charge of war crime had indeed been of sufficient gravity and that it should not escape the Court’s attention just because it targeted monuments instead of people. This still does not explain why the singling out of Al Mahdi for this crime had to come at the expense of ignoring the other crimes that had also been allegedly conducted in Mali. It needs no reminder that these are crimes which intuitively seem to be just as grave—if not graver than—the one Al Mahdi was accused of, although evidently, this does not mean that the Court could not prosecute these crimes in the future. Nonetheless, the OTP’s decision to charge Al Mahdi with his crime first implies a degree of prioritisation that could not be adequately defended considering the occurrence of all the other identified potential crimes.

In any case, this exercise of discretion by the Prosecutor had led to a case where the interaction between the Rome Statute and the World Heritage Convention was legally warranted. Unfortunately, however, the Trial Chamber tasked to investigate such interaction was also granted with its own discretionary powers in crafting its analyses using these two Conventions.

The Chamber may use whatever document it deems relevant to substantiate its analyses. Thus, while the investigations of this dissertation all stem from the underlying premise that the WHC should be used by the Chamber in crafting its analyses, the Chamber itself was bound by no rule to use the Convention—or any other instrument outside the Statute, for that matter. Consequently, the extent to which the Chamber utilised this Convention was also affected by this free rein and it

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"At the time of writing, a second individual—Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud—had indeed been identified of suspected crimes against humanity and war crimes in the Malian situation (OTP 2018)."
owed no explanation as to why it engaged with the Convention in different intensities throughout the analyses.

The customary rule of treaty interpretation therefore becomes a vital threshold for the Court’s discretion. All its apparatuses are bound to interpret the relevant treaties in good faith in accordance with the provisions’ ordinary meaning, in context, and in light of the treaties’ respective objects and purposes—all in order to create a result that reflects the most effective application of those treaties (VCLT, art. 31[1]). Looking at the resultant regime in the table above, it was evident that in significant areas the WHC was not interpreted in such a way as to demonstrate its useful effect on the Chamber’s construction of victims of the deliberate attacks against cultural heritage. This had created an overall unfortunate precedent both for the ICC’s provision of justice for victims, as well as for its handling of war crimes against cultural heritage. On the one hand, the Court is not bound to follow its precedents, so there is likelihood that in future cases it may come up with a completely new—hopefully improved—means and methods for constructing victims. On the other hand, the absence of such an obligation to follow precedent would not prevent the Court from following the *Al Mahdi* precedent, either, in spite of all its imperfections.

VI.3. The Usefulness of the ICC for the Protection of Heritage

The ICC is empowered to respond to situations involving the deliberate destruction of heritage in accordance with its remit. *Al Mahdi* confirmed that the Court’s coverage of heritage encompasses only a subset of the “cultural heritage” category under the WHC; requires a connection between the deliberate attack and an on-going armed conflict in the territory; and recognises military advantage as justification for such an attack. The Court, nevertheless, is not entirely confined
within this remit. The discretionary powers of its appurtenances enable the Court’s engagement with the international instruments specifically on the protection of heritage, thus expanding its remit to a certain extent and playing the role of enforcer for treaties which are essentially impotent in terms of binding enforcement.

Unfortunately, it is these discretionary powers that could undermine the ICC’s role in engaging with a meaningful analysis of these heritage instruments to substantiate the expansion of its remit. The Court’s potential, as the first victim-oriented ICT, in setting out reparations in the case of the deliberate attack against an already small subcategory of heritage is thus undermined by the limitations set out by its own legal system.

Do the Court’s discretionary powers, alternatively, enable it to enforce its jurisdiction onto the other dimensions of destroyed heritage in Mali, namely the intangible? The exercise of discretion by the Trial Chamber might suggest its willingness to venture outside the Statute, but it is unlikely that the intangible heritage of Mali be within the ICC’s jurisdictional breadth. The scope of Article 8(2)(e)(iv) is very strictly inclusive only of the intentional attack against buildings. It would not be legally sound to interpret this as inclusive of attacks against the primarily human-based intangible heritage (Blake 2017: 11–21; Poulios 2010). Instead, the provision that may encompass attacks in this context is persecution under crimes against humanity, but this is not without its problems. This article penalises the

[ intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognized as impermissible under international law (RS, art. 7[1][h])

The context of this article is noticeably not the destruction of heritage; it is the gross violation of human rights on discriminatory reasons pertaining to the identity of a collective. ICTY case laws also demonstrate that in order to successfully prove the
commission of this crime under this Article, there needs to have been damage—if
not destruction—foremost on a human population, whose members have been
targeted by an attack based on discriminatory reasons, where such an attack may
include the destruction of monuments or edifices representing their collective
identity. Therefore, the Article covers crimes against humans affecting (the tangible)
heritage instead of crimes against heritage per se (ICTY — Blaskić Trial Judgment para.
203; Kupreškić et al. Trial Judgment para. 631; Abtahi 2001: 13, 21; Gottlieb 2005: 871;
O’Keefe 2010: 381). As for the crime of genocide, there indeed have been legal
endorsements that the destruction of cultural manifestations may be indicative of
genocidal intent. However, the scope of the crime itself has been pronounced as
limited to the physical destruction of a group of people (ICTY — Krstić Judgment,
Intangible heritage therefore lies outside the scope of crimes under the jurisdiction of
the Court. The responses toward the annihilation of Mali’s intangible heritage as the
result of the on-going armed conflict may accordingly be found outside the
mechanisms of ICTs.

Finally, in spite of its limitations, the ICC’s undeniable role as a figurative
“loudspeaker” must be admitted (Lostal, interview 8 August 2018). The historic
submission of Al Mahdi’s case by the OTP, the subsequent admission of his guilt, the
expedient trial, as well as the resultant Judgment and RO, had all raised
international awareness of the importance of cultural heritage and the consequences
which may arise in the event of its deliberate destruction. This may be seen inter alia
through the intense media coverage of the case all throughout the proceedings. Al
Mahdi reminded the world that crimes against cultural heritage affect not only the
attacked buildings, but also the people whose lives were intertwined with it, the

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An in-depth analysis into the incompatibility of cultural genocide within the crime of genocide
under international law may be seen in Novic (2016).
nation-State, and even the international community as a whole. As the only ICT with the potentially universal jurisdiction, the ICC’s handling of the *Al Mahdi* case was bound to have a far-reaching publication effect. The amount of consequent media attention had additionally propelled the case to the scrutiny of a wider audience, well beyond heritage enthusiasts and lawyers. Naturally, publication constitutes only an initial stage in responding to heritage destruction and preventing further destruction. Nonetheless, without embarking on this small, floundering step, no meaningful analysis could be conducted on how best to protect heritage in the future. It is therefore unmistakeable that the ICC had enabled potential giant leaps into the right direction.
VII

Conclusion

‘Legalising’ heritage carries with it certain conceptual challenges. Heritage may be too protean and overtly replete with tension, disconnect, and contradiction in order to be effectively governed by instruments whose very nature is framing, delineating, and concretising. The gradual sedimentation of national and international consciousness of heritage had partly led to the emanation of fragmented, yet oft overlapping, legal instruments. Tasked with devising legally-binding guides, judicial institutions thus need to navigate across the versatility of heritage within these instruments conscientiously. The discourse of victims arising from heritage destruction represents the crucial responsibility of a tribunal to provide justice for crime survivors, while simultaneously demonstrate the value of heritage on different tiers of relationship.

This case study set out to analyse how the Al Mahdi Trial Chamber arrived at its construction of victims, the meaning of such a construction, and why it arrived there. It found that the Trial Chamber’s adoption of the WHC provisions led to significant gaps in its victims construction, which, despite its achievements, demonstrates an inconsistent engagement with the Convention supported by escapist argumentations. The wide discretion with which ICC apparatuses are empowered is proven to be a double-edged sword that generates expansive and useful interpretation but simultaneously prevents advancement in key areas. Future Chambers faced with similar cases of deliberate attacks against cultural heritage should therefore be well mindful of the effet utile safeguard—the reminder that wide discretion does not mean limitless discretion.
The lesson learnt is that, in spite of all its limitations, the ICC may indeed be useful for the protection of heritage. The Court was exemplary in demonstrating its good faith—its willingness to reach out to other instruments to perforate through its limits. The resultant RO adds to the historic qualities of the Al Mahdi case: it established a construction of victims that pertains specifically to crimes against cultural heritage; reflects the philosophies of the two source treaties; and further pushes the Court’s restorative approach into the transformative justice territory. Correspondingly, in keeping with this exemplary behaviour, when the Court is unable to find the answers from amidst the instruments with which it is engaged, it needs to spell out its non-findings explicitly. This will make plain the extent to which the prevailing norms pertaining to a crime may be useful and, by extension, the extent to which the Court may be useful.
Bibliography


CARR, G. 2014. Legacies of Occupation: Heritage, Memory and Archaeology in the Channel Islands (Cham: Springer).

——. 2016. “‘Have You Been Offended?’ Holocaust Memory in the Channel Islands at HMD 70’ in 22 Holocaust Studies 1: 44–64.


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