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Attacks against cultural objects and the concept of victimhood in international criminal law. A critical analysis[1]

Introduction

A panoramic perspective on international criminal law (ICL), especially if it includes not only 'the law of today', but also 'the law of yesterday', unveils the constant normative flux of concepts and ideas initiated either within (i.e. by courts themselves) or outside the province of already existing international legal framework through the 'legislative activity' of the subjects of international law (i.e. states). This involves also conceptual reforms and improvements that have been gradually introduced into the model of international criminal procedure in the last 75 years of its development.[2] Nowadays, international criminal trials are no longer predicated upon the binary or triangular configurations which used to be the norm in the 1940s and 1990s, when proceedings revolved solely around judges, prosecutors and the accused.

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[2] K. Karski, *Realizacja idei ustanowienia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, no. 7, pp. 65–76.

The adoption of the Rome Statute of the International Criminal Court (hereinafter ICCSt.) in 1998[3] brought a significant normative change in this regard. It introduced a new actor, largely ignored in practice for many years, to the stage of international criminal justice. This actor – namely the victim of international crimes – has been afforded not only the right to participate and to be protected in the proceedings before the Court (Art. 68 ICCSt.), but also the right to claim reparations for the incurred harm (Art. 75 ICCSt.). At least in theory, therefore, giving victims legal recognition as 'victims of international crimes', and not merely as 'witnesses' whose only role has traditionally been to deliver evidence either to the prosecutor or to the defence, transformed international criminal justice into a more inclusive forum for the articulation of competing interests between different actors in international criminal trials. Thus, what for a long time was either a binary or a triangular model, in the late 1990s became a 'square model' of the international criminal trial. It now involves independent and impartial judges determining the guilt of the accused, prosecutors appearing before the Court in the name of the international community as a whole and representing the interests of international justice by bringing charges to the Court[4], the accused party granted various procedural rights in order to safeguard his or her position, and last but not least victims of international crimes representing their own personal interests as those whose suffering (harm) provides justification for international criminal trials.[5]

[3] Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (entered into force 1 July 2002).

[4] However, due to objective limitations resulting from the Court's mandate (i.e. lack of funds, wide jurisdiction), the prosecutor's activity is characterized by certain selectivity which justifies the opinion that the Office of the Prosecutor represents the model of '*selective justice*'. See more: H. Kuczyńska, *The Accusation Model Before the International Criminal Court. Study of Convergence of Criminal Justice System*, Heidelberg–New York–Dordrecht–London 2015, p. 96.

[5] H. Friman, for instance, accurately indicates that '[t]he determination that victims may lead and challenge evidence pertaining to guilt or innocence at trial pushes the role of the 'participant' very far, indeed so far that it is difficult to avoid the notion of their in fact being 'parties'. See H. Friman, *The International Criminal Court and Participation of Victims. A Third Party to the Proceedings?*, "Leiden Journal of International Law" 2009, no. 22, p. 500.

In showcasing this normative change, this article seeks to answer the following question: Who can be the victim of attacks against cultural objects in ICL? It follows that I am particularly interested in how the ICC makes the selection of victims in situations when charges concern crimes of a different character than crimes against person. As the Court's jurisprudence is still relatively scanty, this article will be limited to an in-depth review of one of the most recent cases of the ICC, that is of the case of *the Prosecutor vs. Ahmad Al Faqi Al Mahdi*.[6] Importantly, this case will be analysed predominantly through the prism of the concept of victimhood. I will argue that in order to properly conceptualize 'victimhood' in ICL, a precise definition of the notion of 'harm' has to be adopted first, for 'harm' is not only relevant in the process of domestic[7] and international criminalization[8], but also constitutes an indispensable mechanism for the determination of victimization and – in effect – of who should be afforded the status of a victim participant in the proceedings before the Court. Furthermore, a short analysis of the definition of victims in ICL (point II) and a query into the nature of the war crime of cultural heritage destruction (point III) will be provided below as well.

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[6] *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016 (ICC-01/12-01/15) – hereinafter *Al Mahdi JS*; Reparations Order, 17 August 2017 (OCC-01/12-01/15) – hereinafter *Al Mahdi RO*.

[7] Harm principle can be viewed either as a negative constraint, in which way it was already articulated by John Stuart Mill (*extreme liberal position*) who claimed that in the absence of harm or risk of harm a state is not obliged or entitled to criminalize certain behavior, or as a positive ground for prohibition, which – in Joel Feinberg's words (*moderate liberal position*) – signifies that '[i]t is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values'. See: J.S. Mill, *On Liberty* (eds. D. Bromwich and G. Kateb), Binghamton, New York 2003, p. 90; J. Feinberg, *The Moral Limits of the Criminal Law*, Volume 1: *Harm to Others*, Oxford 1987, p. 26. See also the recent account of the principle: A.P. Simester, A. von Hirsch, *Crimes, Harms, and Wrongs. On the Principles of Criminalization*, Oxford–Portland, Oregon 2011, pp. 35–88.

[8] B.M. Yarnold, *Doctrinal Basis for the International Criminalization Process*, "Temple International and Comparative Law Journal" 1994, no. 85, pp. 85–115; T. Meron, *Is International Law Moving Towards Criminalization?*, "European Journal of International Law" 1998, no. 9, pp. 18–31.

1. The concept of victimhood and harm in international criminal law

Rule 85 of the Rules of Procedure and Evidence of the ICC (RPE) introduces a broad binary definition of victimhood.[9] Firstly, the potential category of victims includes natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Secondly, however, the definition also refers to legal persons or – to use the original terminology – to 'organizations' and 'institutions' that have sustained harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes. Clearly, as it was already noted above, it is the notion of 'harm' which lies at the roots of the definition of victims in ICL. 'Harm' is also crucial in the determination of convicted person's liability for reparations; it is 'founded on and confined to the harm caused by the crimes of which said person was convicted'.[10] Nevertheless, 'harm' – as such – has not been defined either in the ICCSt. or in the RPE.[11]

[9] Unfortunately various international legal documents, especially those that were introduced before the establishment of the ICC, provide definitions that differ both in scope and in character. This, in turn, brings little coherence and clarity into the law. What is even worse, however, is that such plurality also facilitates the contestation of the inclusion of victims into the international criminal trial framework. Since the definition adopted by the ICC is a product of long deliberations which began already in the late 1990s, it should be treated as an epitome of the current state of international criminal law. Importantly, both an initial definition adopted during the Paris Seminar in 1999 as well as the one espoused after the meeting in Siracusa in 2000 referred to the notion of harm. See also: M. Burkhardt, *Victim Participation Before the International Criminal Court*, Dissertation zur Erlangung des akademischen Grades doctor iuris des Juristischen Fakultät der Humboldt Universität zu Berlin (unpublished doctoral dissertation), Berlin 2010, pp. 80–82.

[10] *In the case of The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, ICC-01/04-01/07, par. 31.

[11] The concept of harm, however, did not appear in the definition of victims applicable before the ICTY/ICTR. Article 2 of the ICTR/ICTY Rules of Procedure and Evidence provides that a victim is '[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.

In *Al-Mahdi*, the Chamber endorsed a definition of 'harm' adopted firstly by the Appeals Chamber in *Lubanga*, namely as denoting 'hurt, injury and damage' (par. 43).[12] It seems that this wording was not coincidental, for Article 75(1) ICCSt. also refers to '[…] the scope and extent of any damage, loss and injury […]', however without mentioning 'hurt' and 'harm' itself. Regrettably, the definition of harm from *Lubanga* brings little – if any – clarification into the area as the provided *definientia* are highly imprecise themselves. 'Hurt' is defined as 'a legal injury'[13]; 'injury' as 'any harm, damage, wrong, or injustice'[14]; and 'damage' as 'loss, injury, or deterioration'.[15] Clearly, all these words overlap at some semantic point (they all refer at least once to one another). Yet it remains unclear where exactly that point is and how it might affect (limit or expand) the Court's decisions in relation to victims' participation in practice. Indisputably, the broader a meaning of the notion of harm adopted by the ICC, the higher a chance for victims to be granted participatory rights and reparations after the verdict. Again, it is left to the discretion of the ICC's judges to determine *a casu ad casum* the precise contours of 'harm' in relation to crimes that fall under the Court's jurisdiction.

Furthermore, in *Al Mahdi* the Court added that '[f]or individuals, the harm does not necessarily need to have been direct, but it must have been personal to the victim' (par. 43). In effect, not only direct but also indirect victims (i.e. the family members of direct victims) may apply for and be granted reparations by the Court.[16] Nonetheless, the requirement of the directness of harm (to the property) is imposed on legal persons. But who exactly may qualify as a legal person before

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[12] By contrast, the Black's Law Dictionary defines 'harm' as an 'injury, loss, or detriment'. See: B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul 1999, p. 722.

[13] B.A. Garner, *Garner's Dictionary of Legal Usage*, Oxford 2011, p. 415.

[14] Ibidem, p. 458. Interestingly, the author also juxtaposes 'harm' and 'injury' and claims that 'while *harm* denotes any personal loss or detriment, *injury* involves actionable invasion of a legally protected interest'.

[15] Ibidem, p. 242.

[16] Other indirect victims and at the same potential beneficiaries of the ICC's reparations are mentioned in: *Lubanga*, Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA 03-03-2015 1/20 NM A A2 A3, par. 6.

the ICC? The Court specified that the notion includes (but is not necessarily limited to) 'non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships' (par. 41).[17] Apart from that, in *Lubanga* the Court enumerated three types of harm that victims may suffer: material, physical and psychological. They will be analysed *in extenso* in section V below.

2. Harm and the principle of legal goods (*Rechtsgüter*)

As demonstrated above, *de lege lata* 'harm' forms the conceptual basis of modern ICL. However, a comparative analysis of domestic criminal legal systems explicitly signalizes that a definition of victim can also be built upon the distinct conception of legal goods (*Rechtsgüter*). For instance, Article 49(1) of the Polish Code of Criminal Procedure stipulates that the aggrieved party (the injured person[18]) 'is either a natural or a legal person whose legal interest was infringed or threatened by an offence'.[19] It is therefore not the conception of harm but of the '*Rechtsgut*' that courts in Poland use to determine if someone has acquired the victim status (i.e. is the aggrieved party)

[17] Compare also: *Lubanga*, Order for Reparations (amended), ICC-01/04-01/06-3129-AnxA 03-03-2015 1/20 NM A A2 A3, par. 8.

[18] It is worth noticing here that different terms are used in available translations of the Polish word 'pokrzywdzony' into English. There is no doubt, however, that it has been a constant legislative practice in Poland not to use the word 'victim' in the context of procedural rights that are attributed to those who have suffered harm (or whose legal goods were threatened or violated) as a result of the commission of a crime. See: *The code of criminal procedure of Poland (Act of 6 June 1997*) – translations from 1997; also in relation to the Code of Criminal Procedure of 1969: S. Waltoś (ed.), *Code of Criminal Procedure of the Polish People's Republic*, tr. M. Abrahamowicz, Warsaw 1979, p. 93.

[19] *The Code of Criminal Procedure* = *Kodeks postępowania karnego*, tr. J.E. Adamczyk, Warsaw 2014, p. 41.

in a particular case.[20] Consequently, it could be argued that since both principles of harm and legal goods have a similar function in determining the semantic boundaries of victimhood in criminal law, they should also have a similar or even the same meaning in order to execute that function in an equally effective manner.

In the international criminal law literature, the idea to make use of the principle of legal goods together with the notion of harm in order to justify the *ius puniendi* at the international level was articulated for the first time by K. Ambos. The problem with the former principle, however, is – as Ambos himself notices – that '[d]ifferent authors have given different definitions to legal goods, some of which revolve around the function of the concept [of legal goods – P.G.] rather than around its content […]; others refer to content but are empty and circular […]'.[21] While the functionalist justification usually boils down to the limitation of the criminal law's prohibitions in the province of human rights and freedoms, the content-based justification refers to particular types of crimes and, as such, inquiries which 'good(s)' are protected by the regulations that define a particular type of crime. Unfortunately the answer is usually equally imprecise as the concept itself because, as Ambos rightly points out, the concept of legal goods 'was developed mainly as an abstract normative concept referring to values; the materialisation of these values in social realities was taken, at best, as a background fact'. It follows that an abstract legal good – identifiable through a mental exercise consisting in analyzing the textual

[20] It is worth mentioning here that crimes that fall under the jurisdiction of the ICC (crime of genocide, crimes against humanity, war crimes and the crime of aggression) are also criminalized by virtue of the Polish domestic criminal law (Chapter XVI of the 1997 Criminal Code). This means that if a Polish court were to adjudicate on the case in which a defendant is charged with, for instance, a war crime, the court would be obliged to refer to the concept of legal goods to establish if someone meets the requirement of an aggrieved party or not. This, in turn, would have direct consequences for the scope of victims' participation in such a trial. Here the problem could arise, however, whether the scope of participation determined by a domestic court is broader, equal or considerably narrower than the one adopted by the ICC in some other proceedings held at the international level.

[21] K. Ambos, *The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles. A Second Contribution Towards a Consistent Theory of ICL*, "Criminal Law and Philosophy" 2015, no. 9, p. 305.

dimension of a provision prohibiting certain acts under threat of punishment – in each and every case has to be evaluated in light of the specific factual characteristics retrieved from the available evidence. It is particularly problematic when the results of this exercise lead to general legal goods such as 'peace' or 'security of a state', for their applicability to individual victims is either remote or simply non-existent.

The remaining question at this stage concerns the conceptual relation between 'harm' and 'legal goods'. Naturally, the answer depends to a large extent on the adopted understanding of these two concepts. N. Peršak, for instance, suggests that 'the best approximation to the 'harm' itself […] could be reached *via* the Continental notion of the '*Rechtsgut*' (a legally protected good)'.[22] K. Ambos, on the other hand, argues that these two principles overlap.[23] It seems that, at least from the static semantic perspective, this is an accurate conclusion in relation to the harm principle and the principle of legal goods. Nonetheless, it is clear that 'harm' as such differs from 'legal goods' at the structural level. Harm defined as – to quote the ICC – 'hurt, injury and damage' merely indicates effects of the commission of a crime, whereas the concept of legal goods reflects values (morals) or objects that are protected either individually or collectively by penal provisions as long as these provisions remain binding. Thus, harm is a corollary of breaching the criminal law provision through violating or endangering the legal good protected by virtue of such a provision.[24]

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[22] N. Peršak, *Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts*, New York 2007, p. 104.

[23] 'The harm principle is, in some ways, fairly broad and somewhat ambiguous. This has to do with the fact that the normativising value-aspect of the harm principle has not been sufficiently developed. Yet in other ways, the harm principle seems narrower than the Rechtsgut concept: its strong naturalistic or even materialistic aspect significantly limits the scope of criminalisation' – see: K. Ambos, op. cit., p. 313.

[24] This conclusion can be upheld only if one accepts the liberal standpoint that if the wrongdoing is not harmful (to others), it should not be criminalized. Moreover, it should be noticed here that 'the harm principle' – *per analogiam* to the notion of harm – does not necessarily have to be viewed as a result of the commission of a crime, for it is feasible to evaluate whether certain conduct can be harmful without paying attention to particular effects of this conduct. This means that the harm principle and the notion of harm are not the same.

How this theoretical interdependence of these two concepts works in practice will be portrayed below in relation to the identification of victims of the 'attacks against cultural objects'.

3. Attacks against cultural objects as a war crime

Ahmad Al Faqi Al Mahdi was charged[25] with 'intentionally directing attacks against 10 buildings of a religious and historical character in Timbuktu, Mali, between around 30 June 2012 and 11 July 2012' (par. 10) amounting to the war crime (Article 8(2)(e)(iv) ICCSt.) of attacking protected objects which is committed if a person intentionally directs '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 that they are not military objectives'. More specifically, the attacks against ten of Timbuktu's historic mosques and mausoleums were carried out between 30 June and 11 July 2012 (par. 38). With the exception of one, 'all these buildings had the status of protected UNESCO World Heritage sites' (par. 39).[26] In total, eight victims participated in the trial proceedings (*Al-Mahdi JD*, par. 6). The Court had received 139 reparations applications beyond that (*Al-Mahdi RO*, par. 5).

This is a landmark case on several grounds. Firstly, this is the first case decided by the ICC where cultural heritage protection was at stake. Secondly, in *Al Mahdi* the Court normatively rearranged the previous jurisprudence of the International Criminal Tribunal for the Former

[25] *In the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Charge brought by the Prosecution against Ahmad Al Faqi Al Mahdi, 17 December 2015 (ICC-01/12-01/15). The charges were confirmed by the Pre-Trial Chamber on 24 March 2016: *Situation In The Republic Of Mali in the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi*, 24 March 2016 (ICC-01/12-01/15).

[26] For a more elaborate discussion of the conflict in Mali and the context in which these crimes were committed see: U.S. Bishop-Burney, *Prosecutor v. Ahmad Al Faqi Al Mahdi – Case Comment*, "American Journal of International Law" 2017/111/1, pp. 126–127; K. Wierczyńska, A. Jakubowski, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, "Chinese Journal of International Law" 2017, no. 16, pp. 696–699.

Yugoslavia (ICTY) where only acts of 'destruction and wilful damage' were penalized.[27] The wording adopted in the ICCSt. refers to a broader category of 'attacks' which directly leads to a conclusion that it is conduct itself, and not necessarily a result of this conduct (attacks), which may amount to the commission of the war crime of attacking protected objects. This becomes even clearer upon the reading of the ICC's Elements of Crimes which specify that for the attribution of this crime to an accused, five different elements must be proved. None of these five elements, however, refers to the results of attacking protected objects (i.e. their destruction).[28] Finally, for the first time before the ICC the accused made an admission of guilt (Art. 65 ICCSt.). On the one hand, it facilitated an expeditious trial and conviction. On the other hand, it proved that the Court operates on the basis of a multi-faceted notion of justice encompassing diverse variations of it, such as retributive and restorative justice.

Cultural property as well as places of worship have been the subject of international protection since the late 19th century, initially only during international armed conflicts and thereafter also in the course of non-international armed conflicts.[29] Nowadays, however, the legal basis for the protection of cultural property extends beyond the previous, solely treaty-based sources. State practice establishes the rule of respect for cultural protection 'as a norm of customary international law applicable in both international and

[27] ICTY, *Prosecutor v. Pavle Strugar*, Judgment, 31 January 2005 (IT-01-42-T), par. 308 (interpreting the ICTY Statute as requiring actual damage or destruction to the cultural property); ICTY, Prosecutor v. Dario Kordic & Mario Cerkez (IT-95-14/2-T), Judgment, 26 February 2001, par. 346–347. See also: Article 3(d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

[28] See: *Elements of Crimes*, 2011, p. 36 <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [accessed: 14.02.2018].

[29] Article 27 of the 1899 Hague Regulations, Article 27 of the 1907 Hague Regulations, Article 5 of the 1907 Hague Convention (IX), Article 1, 4, 19(1), 28 of the 1954 Hague Convention with Additional Protocols. See: J.M. Henckaerts, L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Volume II: *Practice*, Part I, Cambridge 2005, pp. 723–728.

non-international armed conflicts'.[30] This remains relevant also in relation to ICL, for – according to Article 21(1)(b) – the Court shall apply 'in the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'. Therefore, as for the scope of protection, one has to agree with A. Zimmermann and R. Geis who note that 'it must […] be considered a novelty that such behavior [attacking cultural objects and places of worship – P.G.] even when committed in non-international armed conflicts, is considered a war crime […]' penalized at the international level.[31] In effect, the question arises if implementing this normative novelty into the ICCSt. as well as bringing it into practice, which is epitomized by the case of *Al-Mahdi*, was indeed a justified move firstly initiated by the prosecutor and thereafter authorized by the Court?

4. Who are the victims of the attacks against cultural objects?

As it was already mentioned above, victims of international crimes (natural persons) acquire *locus standi* before the Court ('the concept of juridified victimhood'[32]) only if they have suffered personal harm as a result of the commission of an international crime. Already in *Lubanga* the Court enumerated three types of harm: material, physical and psychological. It could be said that while material harm occurs when financial damage is identified, physical and psychological harm reflects personal deterioration in victim's health in

[30] *Rule 39*, [in:] J.M. Henckaerts, L. Doswald-Beck (eds), *Customary…*, Volume I: *Rules*, p. 131.

[31] A. Zimmermann, R. Geis, *Article 8*, [in:] O. Triffterer, K. Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Baden-Baden 2016, p. 560.

[32] S. Nouwen, S. Kendall, *Representational Practices at the International Criminal Court: the Gap Between Juridified and Abstract Victimhood*, "Law and Contemporary Problems" 2014, no. 76, pp. 235–262.

relation to either his or her body or mental sphere. In its decision on victim participation, the Court also specified that 'harm' of natural persons can include 'not only physical harm, but also emotional suffering and economic loss'.[33] It follows that while natural persons in order to qualify as victims of international crimes may suffer each type of harm mentioned above, legal persons ('institutions and organizations') are *ex natura* limited to a material harm; rule 85 RPE clearly refers to a 'direct harm to any of their property'. It is unfortunate, however, that the exact meaning of these three types of harm still remains uncertain, given the fact that – as yet – the Court has not interpreted them in a comprehensive manner in any case.

In *Al-Mahdi JS,* the Court identified three groups of victims of the attacks against cultural and religious sites: the inhabitants of Timbuktu, the population of Mali, and the international community (par. 80). This signifies that all of them must have been harmed as a result of the destruction of historic buildings in Timbuktu. However, only the first group, that is the inhabitants of Timbuktu, was classified by the Court as a direct victim. Indirect victimization, on the other hand, was 'felt' by the population of Mali and the whole international community. However controversial it may sound, I believe that neither the population of Mali nor the international community can qualify as victims on the basis of a definition contained in rule 85 RPE, unless – and also with certain reservations – they are treated as an aggregate of individual victims. This, however, is conceptually feasible only for natural persons, because legal entities must sustain a direct harm to meet the requirements included in rule 85(b) RPE. Furthermore, the argumentation invoked in *Al-Mahdi RO* is also unconvincing. The ICC explicitly stated that these attacks appear to be 'of particular gravity' as the destruction of the UNESCO World Heritage sites transgresses the existing boundaries and affects people around the world. In this regard, it has been aptly noted that 'the listing process at UNESCO has been viewed as notoriously politicised and biased towards particular

[33] *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi, Decision on Victim Participation at Trial and on Common Legal Representation of Victims* (ICC-01/12-01/15), 8 June 2016, par. 20.

forms of heritage. The World Heritage List is by no means a perfect mirror of the most important cultural sites across the globe […]'.[34] Nonetheless, it could be summed up that indirect victimization of both the population of Mali and the whole international community was predicated upon the concept of gravity. In the case of Al-Mahdi, war crimes committed in Timbuktu were categorized as those of 'significant gravity' (*Al-Mahdi JD*, par. 82).[35] On the other hand, the Court also explained that 'even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons' (*Al-Mahdi JD*, par. 77). Moreover, it is also symptomatic that in relation to the two victim groups the Court made no reference to rule 85 RPE which, after all, constitutes a fundamental provision for victims' recognition. Thus, it seems that in case of 'remote victimization' it is the imprecise concept of gravity which serves as a standard for determining who should be classified as a 'victim' by the Court. Nevertheless, one may also ask rhetorically if there is any crime at all that falls under the ICC's substantive jurisdiction through the inclusion into the text of the ICCSt. and at the same time does not cross the threshold of 'significant gravity'?

Another objection that may be formulated in relation to those two indirect victims pertains to the functionalist justification. Clearly, in social reality all victims are not equally harmed even if the crime committed against them is of the same character and gravity. In other words, there is no 'average (ideal) victim' who can be used as a gauge for the determination of defendant's liability, the incurred harm or due compensation. In *Al-Mahdi RO*, the Chamber referred to this problem

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[34] S. Starrenburg, *Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi*, EJIL Analysis, 25 August 2017 <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/> [accessed: 18.02.2018].

[35] Unfortunately, the Court did not provide the full list of conditions that are taken into consideration in the determination of the gravity of the crime. Accordingly, the Chamber considers, 'in particular, the extent of damage caused, the nature of the unlawful behavior and, to a certain extent, the circumstances of the time, place and manner' (*Al-Mahdi JD*, par. 76).

by stating that 'the degree and nature of harm suffered varies for each of the three groups identified'. This signifies that the nature and the character of 'harm' among victims selected by the Court is not identical, and that some victims suffered more than others. Moreover, as stated by the ICC, '[…] the community of Timbuktu suffered disproportionately more harm as a result of the attack on the Protected Buildings' (par. 52). It still remains doubtful, however, if any harm at all may be identified in relation to those 'indirect victims'. In this regard, the Court argued that '[t]he destruction of cultural heritage erases part of the heritage of all humankind' (par. 53). Although this statement is certainly true, it is controversial if the Court should formulate and base boundaries of the concept of victimhood on such uncertain functionalist grounds. All the same, the Court in *Al-Mahdi RO* set down five different kinds of harm (par. 57 *Al Mahdi RO*) caused by the commission of this particular war crime: damage to the Protected Buildings (par. 60–67 *Al Mahdi RO*), consequential economic loss (par. 72–83), moral harm (par. 84–92 *Al Mahdi RO*), bodily harm (par. 93–99 *Al Mahdi RO*) and damage to property other than the Protected Buildings (par. 100–103 *Al Mahdi RO*). Importantly, as K. Wierczyńska and A. Jakubowski rightly indicate, '[…] it is the first case before an international criminal tribunal recognizing damage beyond purely physical harm'.[36]

Another doubt appears when the theoretical interaction between the notion of harm and the concept of international crime is analysed. As it was already mentioned above, the war crime of the attacks against cultural objects is articulated in the ICCSt. as a 'conduct crime', which leaves the result of the commission of this offence immaterial for the attribution of criminal liability. On the other hand, it could be argued that the determination of harm is less hypothetical if result-crimes are subject of the Court's judicial activity. For, with regard to result-crimes, together with the confirmation that a particular crime has been committed, the Court also has to determine the result of its commission. It seems, therefore, that such a result (i.e. destruction of property) could be equated to the harm suffered by the victims.

[36] K. Wierczyńska, A. Jakubowski, op. cit., p. 712.

In many instances, however, 'the definitions of crimes such as genocide and war crimes apply to conduct that falls short of causing actual harm' which leads to a conclusion that 'there may be a risk or harm, but no injury to the person need accrue. The relevant standard defining liability is not harm but generally accepted norms in the conduct of warfare'.[37] It follows that much coherence would be brought to ICL if the harm-based system situating the victim as a central figure were to be complemented by the result-crimes which facilitate the determination of the harm suffered by the victims.

Different layers of victimhood in ICL are also visualized by the amount of reparations allocated by the Court to each of the victim group mentioned above. The total liability of Al Mahdi was set at the level of 2.7 million euros (par. 134 *Al Mahdi RO*). Since both the Malian State (par. 106 Al *Mahdi RO*) and the international community represented by UNESCO (par. 107 *Mahdi RO*) received one euro each as a symbolic gesture, the majority of the sum was directed towards inhabitants of Timbuktu in the form of individual and collective reparations (par. 134 *Al Mahdi RO*). Therefore, it seems justified to conclude that while symbolic victims receive symbolic reparations, real victims can claim and be awarded real compensation.

Conclusions

This article was devised as an attempt to clarify several terms introduced in the Court's founding documents and employed by the Court in its jurisprudence, such as 'victim' or 'harm', as well as those legal concepts that might be of use if adopted by the Court or other international criminal tribunals in the future (i.e. the principle of '*Rechtsgut*'). Beyond that, I wanted to articulate certain criticism towards the broad interpretation of victimhood in international criminal law. To recapitulate, I argue that an overly-inclusive vision of victimhood in ICL propounded by the Court is damaging for the whole

[37] G.P. Fletcher, *The Grammar of Criminal Law: American, Comparative and International*, Volume One: *Foundations*, Oxford 2007, p. 109.

international criminal justice project as it blurs conceptual boundaries, instead of striving towards their clarification. Identification of victims who were not personally harmed should be viewed as a futile rhetorical exercise, devoid of any substantive content. This is the reason why, in my view, the Court should be more conservative in making similar determinations in the future. Therefore, in the analysed case of *Al Mahdi* only the inhabitants of Timbuktu should be classified as genuine (real) victims of attacks against cultural objects for the purposes of participation in the proceedings before the ICC. It seems that a broader perspective is feasible only in relation to the 'religious' dimension of these crimes, as the attacked objects were in fact also religious buildings. It follows that it could have been argued by the Court in *Al Mahdi* that in the destruction of the mosques and mausoleums, the scope of harm transgresses the boundaries of a particular country but – at the same time – is limited merely to those who actually profess the religion that these buildings symbolize (i.e. to true believers of Islam). Nevertheless, the Court did not dwell on that; this is not surprising, given the type of crime that Al-Mahdi was charged with, for Article 8(2)(e)(iv) protects only cultural heritage and not freedom of religion (the '*Rechtsgut*' perspective). Thus, the reorientation of the Court's reasoning towards a religious justification would require a modified accusation, perhaps with the crime of genocide as a main charge. Moreover, it was also argued that viewing the international community as a victim of attacks against primarily cultural objects – as it was presented by the Court – is an example of a figure of speech, a rhetorical justification for dealing with this case at the international level. Another criticism articulated in this article with reference to the *Al-Mahdi* judgment concerns the concept of gravity which, as it was suggested, should be utilised first and foremost in the selection of situations and cases by the Office of the Prosecutor and the Court itself, and not as a standard for determining the degree of harm suffered by those victims whose 'harm' is distant, and who could be labelled as 'remote victims' at most. Therefore, instead of employing a figurative language to justify the wide scope of exercised jurisdiction and thus promoting the vision of the World Court, the ICC should select victims on the basis of a narrowly-conceived notion of harm limited to those

who have actually suffered 'material, psychical or psychological harm' without reference to those members of the international community whose harm was remote, usually felt indirectly or even unconsciously.

Ataki przeciwko dobrom kultury i koncepcja wiktymności w międzynarodowym prawie karnym. Analiza krytyczna

Streszczenie

Artykuł ten stanowi krytyczną analizę relacji zachodzących pomiędzy koncepcją wiktymności (*victimhood*) a typem zbrodni wojennej polegającym na atakowaniu dóbr kultury. Opracowanie składa się z czterech części merytorycznych poświęconych: koncepcji wiktymności i szkody (krzywdy); relacji pomiędzy szkodą (krzywdą) a koncepcją dobra prawnego; analizie normatywnej ataków przeciwko dobrom kultury jako typu zbrodni wojennej; oraz przede wszystkim określeniu, kto jest (*de lege lata*) oraz kto powinien być (*de lege ferenda*) kwalifikowany jako ofiara ataków przeciwko dobrom kultury przez Międzynarodowy Trybunał Karny.

Zdaniem autora Międzynarodowy Trybunał Karny powinien przyjąć wąskie rozumienie pojęcia szkody (krzywdy). Zamiast przyjmowania szerokiego rozumienia wiktymności obejmującego tych, których szkoda (krzywda) jest możliwa do zidentyfikowania (np. krzywda psychologiczna osób fizycznych), albo nawet mierzalna (np. szkoda materialna osób prawnych), oraz tych, którzy zostali pokrzywdzeni wyłącznie pośrednio (np. społeczność międzynarodowa), Trybunał powinien ograniczyć przypisywanie szkody (krzywdy), a tym samym przyznawanie statusu ofiary tylko do pierwszej spośród wskazanych grup, tj. do prawdziwych ofiar zbrodni międzynarodowych. W przeciwnym razie, jeżeli MTK będzie kontynuował tę stosowaną dotychczas ekstensywną strategię, koncepcja ofiary pozostanie nieczytelna i nieprecyzyjna, co będzie działało na szkodę tych, którzy rzeczywiście zostali pokrzywdzeni wskutek popełnienia zbrodni międzynarodowej.