

# The International Criminal Court and Cultural Property

## What Is the Crime?

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### I. Introduction

This chapter examines the war crime of intentional attacks on cultural property and cultural heritage.<sup>1</sup> It does so through the lens of the policy and practice of the International Criminal Court (ICC). This is a fruitful lens for a number of reasons. The ICC Statute (the Rome Statute or simply the Statute)<sup>2</sup> prohibits as a war crime the intentional direction of attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected which are not military objectives in international (IACs)<sup>3</sup> and non-international armed conflict (NIACs)<sup>4</sup>. What is more, the ICC's third

\* Some sections herein draw from, though in places update Mark A. Drumbl, "From Timbuktu to The Hague and Beyond: The War Crime of Intentionally Attacking Cultural Property" (2019) 17 *Journal of International Criminal Justice* 77.

<sup>1</sup> For the purpose of the present chapter, the phrases "cultural property" and "cultural heritage" will be used interchangeably. We naturally recognize that uncertainty abounds within scholarship and practice about the overlaps, congruences, and differences—along with suitabilities—of each of these two terms. That said, we deploy them interchangeably. Contestations between the terms "cultural property" and "cultural heritage," however important, are dealt with elsewhere and are not a concern of this chapter, whose main goal is to set out the conceptual and semantic contributions of international criminal law, and the Rome Statute in particular. For more generalized discussion of the use of "property" and "heritage" see, inter alia, Manlio Frigo, "Cultural Property v Cultural Heritage: A 'Battle of Concepts' in International Law?" (2004) 86 *International Review of the Red Cross* 367; Janet Blake, "On Defining the Cultural Heritage" (2000) 49 *International Journal & Comparative Law Quarterly* 61; Lyndel V. Prott and Patrick J. O'Keefe, "Cultural Heritage" or 'Cultural Property'?" (1992) 1 *International Journal of Cultural Property* 307. Please note that, unless otherwise stated, sources, including cases and materials, are up to date as of May 2020.

<sup>2</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (ICC Statute).

<sup>3</sup> *ibid* art 8(2)(b)(ix).

<sup>4</sup> *ibid* art 8(2)(e)(iv).

conviction—that of Ahmad Al Faqi Al Mahdi (Al Mahdi), for conduct committed in Timbuktu, Mali—was entered solely on this charge.<sup>5</sup> Al Mahdi pled guilty and received a nine-year sentence. The ICC also has awarded reparations for the destruction of the shrines for which Al Mahdi had been convicted. The *Al Mahdi* case represents the first time that charges have been brought before the ICC for the war crime of intentional attacks on cultural property.<sup>6</sup> This means that the definitions, concepts, semantics, and vernaculars of international criminal law, as implemented through the ICC, become invoked in the quest to protect cultural property. This chapter will present, situate, and analyze this language. While beyond contemplation at the time *Al Mahdi* was decided, the responsive social distancing and lockdowns due to the COVID-19 pandemic, and concomitant burgeoning of virtuality, do challenge the ongoing “physicality” of cultural property as necessarily central to its existence and enjoyment. This chapter ends with a handful of reflections on this very recent development.

Although the term “culture” is not explicitly mentioned in the definition of the crime, Al Mahdi was prosecuted for conduct prosecutors and ICC judges characterized as attacks upon religious and historical buildings and broadly cast as targeting of “cultural property,”<sup>7</sup> a phrase that the 1954 Hague Convention<sup>8</sup> expressly invokes. On the one hand, it is somewhat vexing, from a legalist perspective, that the term “cultural” entered the lexicon of ICC proceedings even though it absents itself from the actual language of the prohibited crime in the Rome Statute. On the other hand, the use of the term “cultural property” as shorthand for the objects of the attack reveals the heart of the proceedings. The *Al Mahdi* case, moreover, forms part of a broader effort by the ICC Office of the Prosecutor (the OTP) to address cultural property crimes, which this chapter details along with other policy

<sup>5</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016). See also Marlise Simons, “Prison Sentence Over Smashing of Shrines in Timbuktu: 9 Years” *New York Times* (27 September 2016) <<https://www.nytimes.com/2016/09/28/world/europe/ahmad-al-faqi-al-mahdi-timbuktu-mali.html>> accessed 30 May 2020.

<sup>6</sup> See generally Mark S Ellis, “The ICC’s Role in Combatting the Destruction of Cultural Heritage” (2017) 49 *Case Western Reserve Journal of International Law* 23, 24.

<sup>7</sup> *Al Mahdi* (n 7) [14].

<sup>8</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215 (Hague Convention of 1954). See also its protocols: Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (Second Protocol to Hague Convention of 1999).

developments and cooperation agreements between the OTP and the United Nations Educational, Scientific, and Cultural Organization (UNESCO). Moreover, a second accused from the Mali situation, Timbuktu Islamic Police chief Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Al Hassan), is in ICC custody and faces an array of charges that includes intentional attacks on cultural property.<sup>9</sup> An ICC pre-trial chamber confirmed charges in this case,<sup>10</sup> a trial chamber has been constituted at the end of 2019,<sup>11</sup> and the trial opened on July 14, 2020.<sup>12</sup>

With the *Al Mahdi* case conceiving offenses against cultural property as autonomous, rather than merely auxiliary, crimes,<sup>13</sup> the protection of cultural property by international criminal law has garnered growing attention from the international legal arena.<sup>14</sup> To be clear, the ICC is not the first

<sup>9</sup> See the developments of the case at <<https://www.icc-cpi.int/mali/al-hassan>> accessed 30 May 2020.

<sup>10</sup> *Procureur v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18, (13 novembre 2019) (available in French only). This decision was confirmed by the ICC appeals chamber in early 2020: *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Judgment on the appeal of Mr Al Hassan against the decision of pre-trial chamber I entitled "Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense") ICC-01/12-01/18 OA (19 February 2020).

<sup>11</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Decision constituting trial chamber X and referring to it the case of The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18 (21 November 2019).

<sup>12</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Decision Setting the Commencement Date of the Trial) ICC-01/12-01/18 (6 January 2020). On April 23, 2020, the ICC Pre-trial chamber I issued a confidential decision partially granting the Prosecutor's request to modify the charges against the accused to include additional facts: *Procureur c Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf) ICC-01/12-01/18 (8 mai 2020) (available in French only). See also Press Release, "Al Hassan trial opens at International Criminal Court" (14 July 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1531>> accessed 28 August 2020.

<sup>13</sup> See also Emily McGeorge, "Prosecution of Cultural Heritage Destruction: Framework, Precedents and Recent Developments in International Criminal Law" (2016) 3 Public Interest Law Journal of New Zealand 204, 227; Philippa Webb, "Foreword. Culture at the Frontline: Addressing Attacks on Cultural Heritage" (2016) 14 Journal of International Criminal Justice 1139; Paige Casaly, "Al Mahdi before the ICC. Cultural Property and World Heritage in International Criminal Law" (2016) 14 Journal of International Criminal Justice 1199.

<sup>14</sup> See ex multis: Roger O'Keefe, "Cultural Heritage and International Criminal Law" in Sébastien Jodoin and Marie-Claire Cordonier Segger (eds), *Sustainable Development, International Criminal Justice and Treaty Implementation* (CUP 2013) 120; Roger O'Keefe, "Protection of Cultural Property" in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (OUP 2013) 425; Waseem A Qureshi, "The Protection of Cultural Heritage by International Law in Armed Conflict" (2017) 15 Loyola University Chicago International Law Review 63; Federico Lenzerini, "The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage" in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (OUP 2013) 40; Andrea Carcano, "The Criminalization and Prosecution of attacks against Cultural Property" in Fausto Pocar, Marco Pedrazzi, and Micaela Frulli (eds), *War Crimes and Conduct of Hostilities* (Edward Elgar 2013) 78; Haydee J Dijkstra, "Destruction

judicial institution to turn to international criminal law to protect cultural property in armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) did so in the context of violence in Dubrovnik, Croatia;<sup>15</sup> the International Military Tribunal at Nuremberg indicted major war criminals for destruction of cultural monuments;<sup>16</sup> and in 1947 the French Permanent Military Tribunal found a civilian guilty of a war crime for destroying a statue of Jeanne d'Arc and a monument commemorating the dead of World War I.<sup>17</sup> The *Al Mahdi* case, however, is a breakthrough in awarding reparations to afflicted populations and in underscoring that the ICC conceptualizes such offenses as war crimes.

In Section II, this chapter sets out details of this war crime as codified in the Rome Statute: it provides for an analysis of the relevant provisions under the Statute and identifies their core features and rationale; additionally, it delivers a brief overview of the ICC for readers who may not be steeped in the details of international criminal law. Section III spells out the *Al Mahdi* proceedings as indicative of the operationalization of this substantive crime. Section IV examines the OTP's conceptualization of the crime, policy initiatives, and broader developments regarding the prosecution of this crime in the future. In Section V, this chapter assumes an interrogatory tone: What role, exactly, can international criminal law play in the protection of cultural property, in the definition of what is "culture," the scope (and beneficiaries) of "protection," and the development of a victimology of cultural property war crimes, namely, who exactly is harmed by them? Section VI concludes by

of Cultural Heritage before the ICC, *The Influence of Human Rights on Reparations Proceedings for Victims and the Accused* (2019) 17 *Journal of International Criminal Justice* 391; Drumbl (n 2).

<sup>15</sup> *Prosecutor v Miodrag Jokić* (Sentencing Judgment) IT-01-42/1-S (18 March 2004); *Prosecutor v Pavle Strugar* (Judgment) IT-01-42-T (31 January 2005). Jokić was sentenced to seven years' imprisonment; Strugar to eight years' imprisonment. See however *Al Mahdi* (n 7) [16] (noting that ICTY jurisprudence is of "limited guidance" in light of the fact that the crime in the ICTY Statute "does not govern 'attacks' against cultural objects but rather punishes their 'destruction or willful damage'").

<sup>16</sup> *Trial of the Major War Criminals before the International Military Tribunal 14 November 1945–1 October 1946* (International Military Tribunal Nuremberg 1947) Vol I, 55–60, Indictment, Count Three (War Crimes), E (Plunder of Public and Private Property). One scholar notes that "[t]he [International Military Tribunal] held that confiscation and destruction of religious and cultural institutions and objects of Jewish communities amounted to persecution that was a crime against humanity": Ana F Vrdoljak, "The Criminalisation of the Intentional Destruction of Cultural Heritage" (2016) 14 <[https://works.bepress.com/ana\\_filipa\\_vrdoljak/38/](https://works.bepress.com/ana_filipa_vrdoljak/38/)> accessed 30 May 2020.

<sup>17</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London 1949) Vol IX, 67, Case No 51, Trial of Karl Lingensfelder (11 March 1947). For a discussion on the evolution of cultural heritage crimes in international criminal law, see Anne-Marie Carstens, "The Swinging Pendulum of Cultural Heritage Crimes in International Criminal Law" in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (OUP 2020) 109.

summarizing but also by opening a window upon a broader conversation, to wit: What is the interplay between criminalizing the destruction of cultural property, on the one hand, and the promotion of transitional justice, on the other, predicated as it may be on resistance to cultures of oppression and impunity? While focusing on the practice and policy of ICC, this chapter also weighs in on questions regarding the more generalizable potentialities and limits of international criminal law when it comes to curbing crimes against cultural property in armed conflict (and beyond).

## II. Law: The Rome Statute

### A. The ICC and the Crime under Art. 8 of the Court's Statute

While early proposals for an international criminal court arose as early as in 1872,<sup>18</sup> the matter only reached the UN during the 1950s.<sup>19</sup> It was not, however, until Trinidad and Tobago's proposal to reinsert the issue in the UN General Assembly's agenda in 1989 that the drafting process was effectively triggered,<sup>20</sup> ultimately leading to the adoption of the Rome Statute and the establishment of the ICC in the following decade. The wording of art. 1 of the Statute shows that the Court has been conceived as (i) a permanent institution, (ii) with jurisdiction over the most heinous international crimes, and (iii) functioning in complementarity with national and domestic criminal *fora*.<sup>21</sup> The Statute regulates the Court's functioning in every respect and it represents the Court's most relevant enabling source.

According to art. 5 of the Statute, the jurisdiction *ratione materiae* of the ICC covers the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>22</sup> Crimes against cultural heritage are subsumed under the cloak of war crimes.<sup>23</sup> In particular, arts. 8(2)(b)(ix)<sup>24</sup> and 8(2)

<sup>18</sup> James Crawford, *Brownlie's Principles of International Law* (OUP 2012) 678.

<sup>19</sup> Antonio Cassese, "International Criminal Law" in Malcolm D Evans (ed), *International Law* (OUP 2003) 721, 730. See also Malcolm Shaw, *International Law* (CUP 2008) 410.

<sup>20</sup> Crawford (n 20) 679.

<sup>21</sup> ICC Statute (n 4) art 1.

<sup>22</sup> *ibid* art 5.

<sup>23</sup> As *per* *ibid* art 8.

<sup>24</sup> The provision reads as follow: "2. For the purpose of this Statute, 'war crimes' means: . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable

(e)(iv)<sup>25</sup> address such offenses within the domain of IACs and NIACs, respectively.<sup>26</sup> The provisions are built upon other international instruments that dealt with this very issue *pendente bello*, and which, for such reason, did not necessarily adopt an international criminal perspective.<sup>27</sup> It is also noteworthy to mention that it is the ICC elements of crimes (not the Statute itself) which qualify such offenses as crimes targeting “protected objects,” perhaps suggesting that we consider the law governing them as *lex specialis*.<sup>28</sup>

When identifying offenses against cultural heritage, respectively, in IACs and NIACs,<sup>29</sup> the two provisions employ the very same terminology.<sup>30</sup> In other words, the ICC Statute does not alter its definition of crimes against cultural heritage depending on the type of armed conflict at issue, namely,

purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”

<sup>25</sup> The provision reads as follows: “2. For the purpose of this Statute, ‘war crimes’ means: . . . (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . . (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”

<sup>26</sup> Compare the provisions with Rule 156 of the ICRC Database on Customary IHL <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156#Fn\\_5496F07B\\_00144](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#Fn_5496F07B_00144)> accessed 30 May 2020.

<sup>27</sup> See Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) arts 27 and 57; Hague Convention of 1954 (n 10) arts 4, 9, 14, 19 and 28; Second Protocol to Hague Convention of 1999 (n 10) arts 6, 9, 12, 15, 22 and 38; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I to the Geneva Conventions) arts 53, 85(4)(d), (5); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II to the Geneva Conventions) art 16.

<sup>28</sup> William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2016) 267; *Prosecutor v Pavle Strugar* (Judgment) IT-01-42-A (July 17, 2008) [277]. See also *Prosecutor v Bosco Ntaganda* (Judgment) ICC-01/04-02/06 (8 July 2019) [1136], ft 3147 (distinguishing cultural objects from other protected objects).

<sup>29</sup> The distinction between international and non-international armed conflicts is complex and tangled. For the purpose of this chapter, suffice it to refer to the Geneva Conventions of 1949 common art 2 (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135; Geneva Convention relative to the Protection of Civilian Persons in time of War, 75 UNTS 287, all adopted 12 August 1949, entered into force 21 October 1950), for the former, and to the Geneva Conventions of 1949 common art 3 and to Additional Protocol II to the Geneva Conventions (n 29) art 2(1), for the latter. See also ICRC, Opinion Paper, “How is the term “Armed Conflict” defined in International Humanitarian Law?” (March 2008) <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 30 May 2020; Schabas (n 30) 228–35.

<sup>30</sup> For the drafting history of the provisions see Schabas (n 30) 268.

whether it is international or non-international in nature. With this *caveat* in mind, a joint scrutiny of the two articles follows herein.

## B. Analysis of the Provisions

International criminal responsibility is assessed at the occurrence of a material and a mental element of the offense.<sup>31</sup> Conduct falls under the ICC crime against cultural property if four criteria (two of them pertaining to the *actus reus* and two of them concerning the *mens rea*) are met.

### 1. Actus Reus

*The act must materialize the direction of an attack against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.*

This requirement is satisfied if an attack is simply directed against the enlisted buildings. Neither the Rome Statute nor the ICC elements of crime require any resulted damage.<sup>32</sup> In contrast with art. 3(d) of the ICTY Statute,<sup>33</sup>

<sup>31</sup> See, *inter alia*, Roger O'Keefe, *International Criminal Law* (OUP 2015) 122 *et seq.*

<sup>32</sup> Schabas (n 30) 268; but see *Strugar* (n 17), which required at least some actual damage. See, by contrast: Additional Protocol I to the Geneva Conventions (n 29) art 85(4)(d), (5). Compare the ICC Statute with the parallel Rules 38 and 40 of the ICRC Database on Customary IHL, which, on the one hand, require special care in order to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives and prohibit attacks only against "property of great importance to the cultural heritage of every people" unless required by imperative military necessity; and, on the other hand, forbids, *inter alia*, the destruction or wilful damage to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science. <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule38](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule38)> and <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule40](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule40)> all accessed 30 May 2020. See also *Al Hassan* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) (n 12) [519].

<sup>33</sup> ICTY Statute (UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by UN Security Council Resolution 827 of 25 May 1993) art 3(d) qualifies the "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science" as violations of the laws or customs of war which the ICTY has the power to prosecute. Please note that the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are no longer operating as they have been replaced by the International Residual Mechanism for Criminal Tribunals (IRMCT) <<https://www.irmct.org/en/about>> accessed 30 May 2020.

this certainly deserves a positive appraisal, as it allows for a more extensive safeguarding of cultural property.

The buildings which are the object of the attack must not be military objectives..

The concept of “military objective” is one of the pillars of international humanitarian law. As enshrined under art. 52(2) of API to the Geneva Conventions, it encloses “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>34</sup> By contrast, civilian objects are identified *a contrario*, that is, by way of exclusion, as all property not falling under the category of military objectives.<sup>35</sup> The principle of distinction rests on this partition between civilian and non-civilian persons and objects.<sup>36</sup>

It is also relevant to note that the ICC elements of crime specify that “[t]he presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.”<sup>37</sup> In this regard, the international scholarship is divided on whether such buildings can be protected only if located not in proximity of military objectives.<sup>38</sup> In addition to the above, it might be relevant to point out that the Statute does not feature the exception of military necessity,<sup>39</sup> but only

<sup>34</sup> Additional Protocol I to the Geneva Conventions (n 29) art 52(2). Compare this provision with the definition under Rule 8 of the ICRC Database on Customary IHL: “In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule8](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8)> accessed 30 May 2020. The provision has been mirrored in Second Protocol to Hague Convention of 1999 (n 10) art 1(f).

<sup>35</sup> See *inter alia*: Additional Protocol I to the Geneva Conventions (n 29) art 52(1) and Rule 9 of the ICRC Database on Customary IHL <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule9](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule9)> accessed 30 May 2020.

<sup>36</sup> See, generally, Rule 1 and Rule 7 of the ICRC Database on Customary IHL <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1)> and <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule7](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7)> all accessed 30 May 2020.

<sup>37</sup> ICC, Elements of Crime (2011) 23, ft 45 and 36, ft 61.

<sup>38</sup> Schabas (n 30) 268; *Prosecutor v Tihomir Blaškić* (Judgment) IT-95-14-T (3 March 2000) [185]; *Prosecutor v Mladen Naletilić et al.* (Judgment) IT-98-34-T (31 March 2003) [603]–[605]; see also *Strugar* (n 17) [310].

<sup>39</sup> However, ICC Statute (n 4) art 31(1)(c) hints at some form of exception of military necessity. See also Micaela Frulli, “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency” (2011) 22 *European Journal of International Law* 203, 214.

applies the test of military objectives, perhaps allowing for a narrower scope of the exception.<sup>40</sup>

Along the same lines, in order to identify the protected categories, arts. 8(2)(b)(ix) and 8(2)(e)(iv) eschew a cultural-value test (which would be based upon the intrinsic cultural nature of the property),<sup>41</sup> in favor of a more teleological test (which qualifies property according to how it is used in practice).<sup>42</sup> In any event, the exception of military objectives remains nebulous.<sup>43</sup>

## 2. Mens Rea

*The author must have intentionally directed the attack against the above-identified buildings.*

That the author of an ICC crime must have perpetrated it with intent (i.e., a volitional element) and knowledge (i.e., a cognitive element)<sup>44</sup> is a feature of the whole statute, pursuant to its art. 30. Since the crime against cultural property does not entail any specific circumstance or consequence to have occurred, the mental element remains limited to the engagement in the conduct.<sup>45</sup> To some extent, this requirement must be read jointly with art. 32 of the statute, according to which mistakes of fact or law might be grounds for the exclusion of criminal responsibility if they negate the mental element required by the crime or, for the latter, as provided for in art. 33.

*The author must have been aware of the factual circumstances that established the existence of an armed conflict.*

The ICC elements of crime not only require the author to have intended the above-mentioned buildings to be the target of the attack but also to have been aware of the factual circumstances of the armed conflict.<sup>46</sup> In various instances, the ICC has stated that the accused must have had knowledge of

<sup>40</sup> Ellis (n 8) 40–41; see Frulli (n 42) 215.

<sup>41</sup> See, on the cultural value approach: Frulli (n 42) 204–12.

<sup>42</sup> Yaron Gottlieb, “Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC” (2005) 23 Penn State International Law Review 857, 866.

<sup>43</sup> See also *ibid* 866–67.

<sup>44</sup> For an analysis see Schabas (n 30) 626–33.

<sup>45</sup> ICC Statute (n 4) art 30(2)(a).

<sup>46</sup> ICC Elements of Crime (n 40) art 8(2)(ix), 23, [3], [5]; art 8(2)(e)(iv), 36, [3], [5].

the existence of an armed conflict as an essential element of the crime.<sup>47</sup> The ICC elements of crimes are of aid in elucidating that the criterion does not require the perpetrator to have carried out a legal evaluation as to the existence of an armed conflict, nor, a fortiori, to have established its international or non-international character: it suffices that the accused has apprehended the occurrence of an armed conflict at the time when the act was carried out.<sup>48</sup>

### III. The *Al Mahdi* Case

On September 27, 2016, an ICC trial chamber unanimously sentenced Al Mahdi to nine-years' imprisonment after convicting him of the war crime of intentionally attacking cultural property in Timbuktu, Mali. Al Mahdi pled guilty as a co-perpetrator and received the lowest sentence issued so far by the ICC. On August 17, 2017, the trial chamber issued its reparations order. It found Al Mahdi liable for 2.7 million euros for individual and collective reparations,<sup>49</sup> with only minor amendments being brought by the appeals chamber on appeal of the victims.<sup>50</sup>

In its judgment, the trial chamber described the conduct and crimes in considerable detail. In 2012, Al Mahdi jointly organized the destruction of structures (including mausoleums) of a religious and historical character in Timbuktu. An emblematic city, Timbuktu served as a trading *entrepôt* in the fifteenth and sixteenth centuries. It constituted a focal point for the spread of Islam in the region, housing libraries and manuscripts of great intellectual and spiritual renown. Acting in the name of fundamentalist Salafism, Al Mahdi destroyed shrines to Sufi saints situated above tombs.<sup>51</sup> Many were made of mud and brick. UNESCO had recognized all but one of these

<sup>47</sup> *Prosecutor v Germain Katanga et al* (Decision on the Confirmation of the Charges) ICC-01/04-01/07 (30 September 2008) [387]; *Prosecutor v Jean-Pierre Bemba Gombo* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009) [238]–[239], [263]–[264]; see Schabas (n 30) 237.

<sup>48</sup> ICC Elements of Crime (n 40) art 8, War crimes, Introduction, 13; Schabas (n 30) 237–38.

<sup>49</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Reparations Order) ICC-01/12-01/15 (17 August 2017).

<sup>50</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment on the appeal of the victims against the "Reparations Order") ICC-01/12-01/15 A (8 March 2018) [97]–[99].

<sup>51</sup> Marina Lostal, "The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC" (2017) 1 *Inter Gentes - The McGill Journal of International Law & Legal Pluralism* 45, 50 ("Timbuktu is sometimes referred to as the "City of the 333 (Sufi) Saints" . . . It also houses thousands of sacred manuscripts, many dating back to the 13th century . . . Sufism, one of the many different currents within Islam, is accused by followers of Salafism (the creed espoused by fundamentalist groups) of being polytheist").

structures as world heritage sites. Timbuktu indeed was inscribed on the World Heritage List in 1998.<sup>52</sup> Al Mahdi was charged solely in relation to his role in demolishing these shrines, and additionally the door of a renowned mosque (Sidi Yahia) and adjacent buildings, all of which constituted conduct falling under the auspices of Rome Statute art. 8(2)(e)(iv). The devotional sites he attacked have since been rebuilt with the help of foreign financial assistance.<sup>53</sup>

Armed violence became endemic in Mali beginning in January 2012. A complex situation arose. Armed groups took control of the north of the country following the retreat of official Malian forces. Among these armed groups were Al Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine (“defenders of faith”). Al Mahdi was associated with Ansar Dine. These groups sought the establishment of an independent country, called Azawad, under the control of Ansar Dine. Between April 2012 and January 2013, AQIM and Ansar Dine “imposed their religious and political edicts on the territory of Timbuktu and its people . . . through a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade . . . called the *Hesbah*.”<sup>54</sup> *Hesbah* enforced *sharia* and was tasked with “preventing, suppressing and repressing anything perceived by the occupiers to constitute a visible vice.”<sup>55</sup>

Al Mahdi (also known as Abu Turab, his *nom de guerre*)—a teacher and an ethnic Tuareg—was born in Agoune in the region of Timbuktu and, at the time of his trial, was believed to be between thirty and forty years old.<sup>56</sup> He had received Koranic education since childhood and “belongs to a family recognised in his community for having a particularly high knowledge of Islam.”<sup>57</sup> Although he was the head of the *Hesbah* until September 2012, he

<sup>52</sup> Convention for the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (also known as World Heritage Convention). For discussion of selection criteria and processes for the World Heritage List, which is established by this Convention, see section V(B) of this chapter (UNESCO and its Lists).

<sup>53</sup> *Al Mahdi* (n 52) [63] (“Since the attacks, UNESCO – together with other stakeholders – has rebuilt or restored each of the Protected Buildings”), [116]. See also Maeve Kennedy, “Timbuktu’s Historic Tombs Restored in Show of Confidence for War-Ravaged Mali” (*The Guardian*, 20 July 2015) <<https://www.theguardian.com/world/2015/jul/20/timbuktus-historic-tombs-restored-in-show-of-confidence-for-war-ravaged-mali>> accessed 30 May 2020.

<sup>54</sup> *Al Mahdi* (n 7) [31] (emphasis in original). For a poignant, painful, and utterly dignified cinematographic treatment of life in Mali under Ansar Dine in 2012 see *Timbuktu* (2014), a Franco-Mauritanian drama feature film directed by Abderrahmane Sissako.

<sup>55</sup> *Al Mahdi* (n 7) [33].

<sup>56</sup> *ibid* [9].

<sup>57</sup> *ibid*.

also reported to Ag Ghaly (leader of Ansar Dine) and Abou Zhed (governor of Timbuktu).

Al Mahdi had been arrested in Niger by French troops, from where he was sent to The Hague.<sup>58</sup> He reached a plea agreement with the OTP on February 18, 2016.<sup>59</sup> His trial was held between August 22 and 24, 2016.<sup>60</sup> In *Al Mahdi*, a total of eight victims participated in the trial proceedings.<sup>61</sup>

At trial, judges noted Al Mahdi's initial reluctance to demolish the mausoleums, a decision that had been made by his superiors.<sup>62</sup> While Al Mahdi believed that any construction over a tomb was prohibited by Islamic law, he initially recommended "not destroying the mausoleums so as to maintain relations between the population and the occupying groups."<sup>63</sup> Nonetheless, as time passed, he agreed to conduct the attack "without hesitation" when instructed, prepared a sermon dedicated to the destruction of the mausoleums, and "personally determined the sequence in which the buildings/monuments were to be attacked."<sup>64</sup> Al Mahdi was also well aware—for it was common knowledge—that mausoleums of saints and mosques of Timbuktu comprise "an integral part of the religious life of its inhabitants," are frequently visited, serve as places of pilgrimage, and "constitute a common heritage for the community."<sup>65</sup>

The sites were razed publicly and with great force. Security cordons protected the attackers. The door of the Sidi Yahia Mosque was "opened" with pick-axes that Al Mahdi had bought with *Hesbah* funds.<sup>66</sup> According to legend, that door had not been opened for 500 years. It guarded against the "evil eye."<sup>67</sup> Opening it would lead to the Last Judgment. Deriding these legends as "superstition," Al Mahdi explained to journalists that destruction of the doors was one way to eradicate idolatry and heresy, while also dispelling myths which *Hesbah* "fear[ed] will invade the beliefs of people . . . who,

<sup>58</sup> A single ICC judge issued his arrest warrant on 18 September 2015, *ibid* [1].

<sup>59</sup> *ibid* [3].

<sup>60</sup> *ibid* [7].

<sup>61</sup> *ibid* [6].

<sup>62</sup> For the argument that it remains unclear whether Al Mahdi is the "most responsible" for the crimes, see Milena Sterio, "Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case" (2017) 49 *Case Western Reserve Journal of International Law* 63.

<sup>63</sup> *Al Mahdi* (n 7) [36].

<sup>64</sup> *ibid* [37].

<sup>65</sup> *ibid* [34].

<sup>66</sup> *ibid* [38(viii)].

<sup>67</sup> *Lostal* (n 54) 49.

because of their ignorance and their distance from religion, will think that this is the truth.”<sup>68</sup>

The OTP did not hesitate to qualify the crime as a war crime under the provision of art. 8(2)(e)(iv) of the ICC Statute.<sup>69</sup> The trial chamber explicitly (and approvingly) noted the OTP’s specific decision not to charge Al Mahdi with the general crime, also proscribed by the Rome Statute, of attacking civilian property.<sup>70</sup> Judges differentiated the protection of cultural objects from generic protections offered to civilian objects (pillage). Following this rationale, it is exactly the specific feature of the intentional destruction of cultural property, “aimed at erasing the cultural identity and heritage of a population,”<sup>71</sup> which renders this very crime inherently serious in nature.<sup>72</sup> A focal aspect in the OTP analysis was played by the nonmaterial harm<sup>73</sup> which the attacks brought about, including the eradication of a culture’s people, identity, and soul.<sup>74</sup>

Based on the admission of guilt and related facts, the three trial judges determined that Al Mahdi supervised the execution of the operations; collected, bought, and distributed the necessary tools; was present at all of the attack sites where he gave instructions and moral support; was responsible for justifying the attacks to journalists; and personally participated in the destruction of at least five sites.<sup>75</sup> Judges noted that nine of the sites were designated by UNESCO as important to international cultural heritage. Although these designations are supposed to protect cultural property, in the case of the Timbuktu shrines these designations may paradoxically have imperiled them. Al Mahdi, for instance, directly invoked the UNESCO protections as a reason to wreck one mosque: “Those UNESCO jackasses . . . they think that this is heritage. Does ‘heritage’ include worshipping cows and trees?” he said.<sup>76</sup>

<sup>68</sup> *Al Mahdi* (n 7) [38(viii)].

<sup>69</sup> See ex multis: *Procureur c Ahmad Al Faqi Al Mahdi* (Chef d’accusation retenu par l’Accusation contre Ahmad Al Faqi Al Mahdi) ICC-01/12-01/15 (17 Décembre 2015) (available in French only) [1], [23].

<sup>70</sup> *Al Mahdi* (n 7) [12].

<sup>71</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Public redacted version of “Prosecution’s submissions on sentencing,” 22 July 2016, ICC-01/12-01/15-139-Conf) ICC-01/12-01/15 (21 August 2016) [18].

<sup>72</sup> *ibid* [16]–[23].

<sup>73</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Public redacted version of “Prosecution’s Submissions on Reparations,” ICC-01/12-01/15-192, 2 December 2016) ICC-01/12-01/15 (6 December 2016) [14]–[18].

<sup>74</sup> See *Al Mahdi* (n 74) [18], [24]–[29], [62]–[63].

<sup>75</sup> *Al Mahdi* (n 7) [40].

<sup>76</sup> *ibid* [46].

In terms of the gravity of Al Mahdi's crime, a central calculus in sentencing, the trial chamber observed that he is unlike other accused the ICC has convicted in that he was never charged with crimes against persons.<sup>77</sup> Although the judges noted that crimes against property "are generally of lesser gravity than crimes against persons,"<sup>78</sup> they also underscored the symbolic value, religious salience, and affective attachment generated by the Timbuktu shrines.<sup>79</sup> They were quite responsive to Prosecutor Bensouda's argument, delivered initially in the confirmation of charges hearing, that "[w]hat is at stake here is not just walls and stones."<sup>80</sup> Judges hovered around the UNESCO designation: attacking such designated sites was found to be of particular gravity. On this note, perhaps, the judges not only valued UNESCO assessments as to what kind of culture is worth protecting, but also saw Al Mahdi's attacks as aimed against the international community and its organizations. The judges toggled back to the national one, however, underscoring that "the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place."<sup>81</sup> The trial chamber also separately identified Al Mahdi's "discriminatory religious motive" as additional evidence of the gravity of the impugned conduct.<sup>82</sup>

In terms of the second step of sentencing, the individualization stage, judges found no aggravating circumstances. They however acknowledged five mitigating factors: admission of guilt; cooperation with prosecutors; demonstration of remorse and empathy; Al Mahdi's initial reluctance to carry out the destruction and the fact that he stopped the use of bulldozers at all but one of the shrines, which thereby limited overall damage; and his good behavior in detention.<sup>83</sup> Al Mahdi had (after the fact) issued a formal statement that "begged" the people of Timbuktu for forgiveness and that affirmed that he had lost his way when he had joined the *jihadist* group.<sup>84</sup>

<sup>77</sup> *ibid* [77].

<sup>78</sup> *ibid*.

<sup>79</sup> *ibid* [78].

<sup>80</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Transcript) ICC-01/12-01/15 (1 March 2016) 13.

<sup>81</sup> *Al Mahdi* (n 7) [80]. The trial chamber relied on the testimony of two witnesses (a Malian expert in cultural matters and a UNESCO witness). See Uzma S. Bishop-Burney, "International Decisions: Prosecutor v Ahmad Al Faqi Al Mahdi" (2017) 111 *American Journal of International Law* 126, 131.

<sup>82</sup> *Al Mahdi* (n 7) [81].

<sup>83</sup> *ibid* [109].

<sup>84</sup> Simons (n 7). At trial, Al Mahdi stated: "I am really sorry. I am really remorseful and I regret all the damage that my actions have caused": Ellis (n 8) 29; for the original statement see *Prosecutor v Ahmad Al Faqi Al Mahdi* (Transcript) ICC-01/12-01/15 (22 August 2016) 8.

The reparations order—issued approximately one year later—found Al Mahdi liable for 2.7 million euros in expenses for individual and collective reparations for (a) the damage caused by the attack on nine mosques and the Sidi Yahia Mosque door; (b) the economic loss caused to the individuals whose livelihoods depended upon the tourism and maintenance of these protected buildings and to the community of Timbuktu as a whole; and (c) the moral harm caused by the attacks.<sup>85</sup>

The trial chamber identified three sets of “victims”: the inhabitants of Timbuktu (the direct victims of the crime), the population of Mali, and the international community. The reparations order echoed some of the themes pertinent to assessing the value of cultural property that previously suffused the criminal conviction. That said, when it comes to tensions between internationalist justifications for protecting cultural property, on the one hand, and nationalist ones, on the other, the reparations order—while at times underscoring the value of international “interest” as a proxy for value<sup>86</sup>—also allocated considerable relevance to nationalist approaches. Interestingly, this order even transcends national approaches by referencing the reparative rights of local communities and populations.<sup>87</sup> The people of Timbuktu were able to assert reparative rights in the destruction of “their” cultural property and “their” cultural heritage and received nearly all the reparations for damage to protected buildings, consequential economic loss, and moral harm. The Malian State received one symbolic euro. The trial chamber also granted “one symbolic euro . . . to the international community, which is best represented by UNESCO.”<sup>88</sup>

The Reparations Order of trial chamber VIII was subsequently amended to a limited extent by the appeals chamber only insofar as it concerned the trial chamber determination of eligibility for individual reparations and the disclosure of identifying information on applicants to Al Mahdi.<sup>89</sup> For the most part the appeals chamber confirmed the previous Reparations Order.

<sup>85</sup> Al Mahdi is impecunious. So the Trust Fund for Victims could step in. For a discussion on the reparations ordered in this case, see also Karolina Wierczyńska and Andrzej Jakubowski, “The Al Mahdi Case: From Punishing Perpetrators to Repairing Cultural Heritage Harm” in Anne-Marie Carstens and Elizabeth Varner (eds), *Intersections in International Cultural Heritage Law* (OUP 2020) 133, 145–56.

<sup>86</sup> *Al Mahdi* (n 52) [17] (“Greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern”).

<sup>87</sup> *ibid* [14] (“[C]ultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future”).

<sup>88</sup> *ibid* [107].

<sup>89</sup> *Al Mahdi* (n 53) [97]–[99].

On March 4, 2019, trial chamber VIII issued its decision on the Updated Implementation Plan from the Trust Fund for Victims, approving the selection of projects presented by the Trust Fund for Victims in its updated plan, subject to certain conditions.<sup>90</sup>

Elemental among debates within cultural property theory is whether the protective impulse is internationalist or nationalist in motivation.<sup>91</sup> The 1954 Hague Convention,<sup>92</sup> for example, reflects a cosmopolitan approach that envisions the primary significance of cultural property in that it contributes to the cultural heritage of all of humanity. For the internationalist vision, the term “heritage,” in particular common heritage of humanity, is preferred over the term “property” with its connotations of material ownership and rights of exclusion. Another major international instrument on cultural property is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>93</sup> This instrument deals with the different context of looting and sale. It ties the importance of cultural property to individual States because that property expresses “the collective genius of . . . the State concerned.”<sup>94</sup> This instrument

<sup>90</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12-01/15 (4 March 2019).

<sup>91</sup> John H Merryman, “Two Ways of Thinking about Cultural Property” (1986) 80 *American Journal of International Law* 831. See also *ibid* 853 (contrasting retentive nationalism with cultural internationalism; Merryman favors cultural internationalism owing to its emphasis on “preservation, integrity and distribution/access”). For critique of Merryman’s views, see Lyndel V Prott, “The International Movement of Cultural Objects” (2005) 12 *International Journal of Cultural Property* 225.

<sup>92</sup> Hague Convention of 1954 (n 10). This Convention descends from the 1863 Lieber Code (Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, adopted 24 April 1863), the 1899 Hague Conventions (adopted 29 July 1899, entered into force 4 September 1900) and 1907 Hague Conventions (adopted 18 October 1907, entered into force 26 January 1910), and the 1935 Roerich Pact (Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, adopted 15 April 1935, entered into force 26 August 1935). In art 1, it defines cultural property as “moveable or immovable property of great importance to the cultural heritage of every people” and, in its preamble, affirms that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.” Destruction of a culture’s property, therefore, is seen as eliminating part of the biodiversity of humanity. This Convention requires the affixing of a “distinctive emblem” (a blue and white shield), either three times or one time depending on the level of protection or identification, see Hague Convention of 1954 (n 10) arts 16, 17. Art 28 obliges States Parties to criminalize breaches of the Convention. See generally Patty Gerstenblith, “The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?” (2016) 15 *John Marshall Review of Intellectual Property Law* 336, 346; Roger O’Keefe, “Protection of Cultural Property Under International Law” (2010) 11 *Melbourne Journal of International Law* 339 (noting that no charges have been laid within the meaning of art 28).

<sup>93</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

<sup>94</sup> *ibid* art 4(a).

thereby reflects a sense of cultural nationalism in that it attributes national character to the property in question, seeks its retention in its place of origin and traditional setting, and its repatriation in the case of illicit removal.<sup>95</sup> *Al Mahdi* offers little in the way of mindful reference to either of these overarching theories. In the end, the judgment—without assignation and with oscillation—places the Rome Statute provision somewhere between these two poles of cultural property theory: though inclining more toward the internationalist justification for protection in the case of the penal sanction and toward the nationalist justification in the reparations order. The reparations decision could in fact be read to impliedly gesture toward a third approach, namely a “localist” vision of cultural property protection in that nearly all the ordered funds were intended for the population of Timbuktu.

*Al Mahdi* was transferred to a Scottish prison on August 29, 2018, to serve his sentence.<sup>96</sup> As *per* art. 103 of the ICC Statute, accused convicted by the ICC will serve their sentences in a State designated by the Court from a list of states which have previously indicated their willingness to accept those persons to serve their sentence.<sup>97</sup> Accordingly, *Al Mahdi*’s transfer was conducted pursuant to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court.<sup>98</sup>

#### IV. OTP Policies and Goals

The ICC is composed of four primary organs: the Presidency, the Judicial Divisions (an Appeals Division, a Trial Division, and a Pre-Trial Division), the OTP, and the Registry.<sup>99</sup> Part 4 of the Statute concerns the composition and administration of the Court and also its organs’ tasks and mandates.<sup>100</sup>

<sup>95</sup> Merryman (n 94) 832, 846.

<sup>96</sup> See Press Release, “Ahmad Al Faqi Al Mahdi Transferred to UK Prison Facility to Serve Sentence” (3 May 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1451>> accessed 30 May 2020.

<sup>97</sup> ICC Statute (n 4) art 103(1)(a).

<sup>98</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court, ICC-PRES/04-01-07 (adopted 8 November 2007, entered into force 8 December 2007) <<https://www.icc-cpi.int/Pages/item.aspx?name=icc-uk>> accessed 30 May 2020.

<sup>99</sup> ICC Statute (n 4) art 34.

<sup>100</sup> *ibid* Part 4, arts 34–52.

According to art. 42 of the ICC Statute,<sup>101</sup> the OTP is a separate organ of the court, entrusted with the mandate of receiving referrals, examining them, and investing and prosecuting the crimes within the Court's jurisdiction.<sup>102</sup> It is composed of the prosecutor, who acts as the head of the office, and one or more deputy prosecutors.<sup>103</sup> Other sub-paragraphs of the same provision deal with procedural aspects of the functioning of the OTP, such as, inter alia, the competence of the prosecutor and of the Deputy Prosecutors, their election, independence, impartiality, and disqualification.<sup>104</sup>

In particular, the ICC website explains that three main Divisions form the OTP, namely, the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division, and the Prosecution Division.<sup>105</sup> The main functions of each Division entail, respectively, the conduct of preliminary examinations, the offer of advice on matters such as jurisdiction, admissibility, and cooperation, the coordination of judicial cooperation, and the management of the OTP's external relations; the direction of investigations, the endorsement of security plans and protection policies, and the examination of the relevant information and evidence; the preparation of litigation strategies and carrying out of prosecution, which might include applying for an arrest warrant or summons to appear as a first stage.<sup>106</sup>

There are three ways in which a case may be brought before the ICC and all of them involve the OTP prosecutor, to a different extent: (i) a State Party may refer to the prosecutor a situation where crimes within the ICC jurisdiction have allegedly been perpetrated;<sup>107</sup> (ii) the UN Security Council may act under Chapter VII of the UN Charter<sup>108</sup> and refer a situation to the prosecutor;<sup>109</sup> or (iii) the Prosecutor may initiate investigations *proprio motu* on the basis of the information received by the Court.<sup>110</sup> In all such cases, the role of the Prosecutor is focal for the exercise of the ICC jurisdiction.

<sup>101</sup> *ibid* art 42(1).

<sup>102</sup> For an analysis see Schabas (n 30) 736–48. See also Fatou Bensouda, "Looking Back, Looking Ahead - Reflections from the Office of the Prosecutor of the ICC" (2012) 11 Washington University Global Studies Law Review 437.

<sup>103</sup> ICC Statute (n 4) art 42(2).

<sup>104</sup> *ibid* art 42(3)–(9).

<sup>105</sup> ICC website <<https://www.icc-cpi.int/about/otp>> accessed 30 May 2020.

<sup>106</sup> *ibid*.

<sup>107</sup> ICC Statute (n 4) arts 13(a) 14. This was the case for Democratic Republic of the Congo, Uganda, Central African Republic on two occasions, and Mali; see <<https://www.icc-cpi.int/about/otp>> accessed 30 May 2020.

<sup>108</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

<sup>109</sup> ICC Statute (n 4) art 13(b). This was the case for Darfur and Libya, see <<https://www.icc-cpi.int/about/otp>> accessed 30 May 2020.

<sup>110</sup> ICC Statute (n 4) art 13(c), 15. This was the case for Kenya, Côte d'Ivoire, and Georgia; see <<https://www.icc-cpi.int/about/otp>> accessed 30 May 2020.

## A. The OTP Approach to Crimes against Cultural Heritage

The posture of the OTP toward crimes concerning cultural heritage can be appreciated following at least three directives. First, the policy papers published by the OTP must be taken into account in order to properly identify the public commitment that the OTP has undertaken with respect to such category of crimes. Second, the conduct of the OTP must be addressed with regard to the big picture, that is, in its cooperation with other UN agencies. Third, and more importantly, the OTP attitude must be assessed in practice, through a detailed analysis of how the Office dealt with cultural heritage crimes in the cases brought before the ICC. Finally, this section also ponders the stance of the OTP toward this category of crimes and anticipates its future developments.

### 1. The Approach of the OTP through its Policy Papers

The increasing interest crimes against cultural property have been attracting in the last decades has also been reflected in the OTP policy paper on case selection and prioritisation<sup>111</sup> and in the ICC Strategic Plan 2019–2021.<sup>112</sup> As to the former, the OTP explains that it will pay particular attention to, among others, crimes against cultural objects.<sup>113</sup> The latter document clarifies that the OTP aims at finalizing its current work “toward the adoption of a comprehensive policy on the protection of cultural heritage within the Rome Statute legal framework, which will also cover the important issue of victimization.”<sup>114</sup>

Furthermore, it might be useful to recall that the ICC has issued a code of conduct for the office of the prosecutor, entered into force on September 5, 2013.<sup>115</sup> Fundamental rule n. 4 and art. 8(h) of this code place respect for human rights and fundamental freedoms recognized by international law at the heart of the OTP action.<sup>116</sup> While this human rights-friendly standpoint

<sup>111</sup> OTP policy paper on case selection and prioritisation (15 September 2016) <<https://www.icc-cpi.int/Pages/item.aspx?name=policy-paper-on-case-selection-and-prioritisation>> accessed 30 May 2020.

<sup>112</sup> ICC Strategic Plan 2019–2021 (17 July 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=20190726-otp-sp>> accessed 30 May 2020.

<sup>113</sup> OTP policy paper on case selection and prioritisation (n 114) 15 [46].

<sup>114</sup> ICC Strategic Plan 2019–2021 (n 115) 5, Strategic goal 4; see also *ibid* 24 [37].

<sup>115</sup> ICC, code of conduct for the office of the prosecutor (entered into force 5 September 2013) <<https://www.icc-cpi.int/Pages/item.aspx?name=Code-of-Conduct>> accessed 30 May 2020. For an examination see Lawrence Pacewicz, “International Criminal Court Code of Conduct for the Office of the Prosecutor” (2014) 53 *International Legal Materials* 397.

<sup>116</sup> ICC, code of conduct for the office of the prosecutor (n 118) Introduction, Fundamental Rule n 4 and art 8(h).

remains a general trait of the overall functioning of the OTP, it does in fact also apply to the prosecution of the crimes here at stake.

## 2. The Approach of the OTP through Its Cooperation with Other Bodies

Specifically tailored developments in the OTP approach toward crimes against or affecting cultural heritage still have to see the light. Having said this, it is also commendable that the ICC OTP and UNESCO have joined their forces in order to strengthen cooperation in response to cultural cleansing and prevention of attacks on culture. In particular, they co-organized panels and events eventually leading to the drafting and signing of a Letter of Intent on November 6, 2017.<sup>117</sup> Arguably, mutual respect and synergy between different UN organs implies stronger funds and combined efforts toward the accomplishment of shared mandates.

## 3. The Approach of the OTP through the ICC Case Law

Some aspects of the OTP approach in *Al Mahdi* have already been analyzed in Section III of the present chapter. The OTP had a central role in the effort of making attacks directed against cultural property war crimes under the ICC jurisdiction. And indeed, cultural property possesses a special trait which differentiates it from the realm of goods and rights which international law aims at defending for at least two reasons. On the one hand, the protection of cultural heritage and property surpasses the idea that only tangible goods can be the object of safeguard. In this sense, logically, cultural property deserves to be shielded from any sort of jeopardy for the material and manifest significance it carries, for the aesthetic value it embodies, and for the technical advancement it encourages. But relics must also be preserved for the emotional weight they bear, for their symbolic essence, and their evocative power.<sup>118</sup> On the other hand, over and above, culture as a generic term is what ultimately brings individuals together, for its ability to create bonds and entrench enduring relationships. Cultural cleansing undermines the

<sup>117</sup> For the panel see <<https://en.unesco.org/events/responding-cultural-cleansing-preventing-violent-extremism>> and <<https://en.unesco.org/news/unesco-and-partners-stand-against-cultural-cleansing-and-violent-extremism>>; for the letter of intent see <[http://www.unesco.org/new/media-services/single-view/news/international\\_criminal\\_court\\_and\\_unesco\\_strengthen\\_cooperation\\_protection\\_cultural\\_heritage](http://www.unesco.org/new/media-services/single-view/news/international_criminal_court_and_unesco_strengthen_cooperation_protection_cultural_heritage)>and <[https://www.icc-cpi.int/Pages/item.aspx?name=171106\\_OTP\\_Unesco](https://www.icc-cpi.int/Pages/item.aspx?name=171106_OTP_Unesco)> all accessed 30 May 2020.

<sup>118</sup> See on this point: *Al Mahdi* (n 7) [79].

associative existence of society whose pillars ground themselves upon cultural ties.

Especially with respect to reparations, the role of the OTP in *Al Mahdi* has been pivotal in the identification of the victims (direct and indirect, natural and legal persons, individual and group victims),<sup>119</sup> in the assessment of the harm suffered by those very victims (material, physical or psychological, direct or indirect),<sup>120</sup> in the ascertainment of the appropriate standard of proof and causation,<sup>121</sup> and in the establishment of the types and modalities of reparations.<sup>122</sup> Particularly on this latter point, the OTP strongly encouraged the issuance of collective reparations, “including modalities of reparation of preventive, transformative and symbolic value.”<sup>123</sup>

An impending case is *Al Hassan*.<sup>124</sup> According to the information made available on the ICC website,<sup>125</sup> Al Hassan was an alleged member of Ansar Eddine and de facto chief of Islamic police and he is alleged to have been involved in the work of the Islamic Court in Timbuktu.<sup>126</sup> On September 30, 2019, the ICC pre-trial chamber I issued a confidential decision whereby it concluded that there were substantial grounds to believe that Al Hassan had performed, among others, an intentional direction of attacks against buildings dedicated to religion and historic monuments.<sup>127</sup> As noted earlier in this chapter, the pre-trial chamber decision was confirmed by the appeals chamber,<sup>128</sup> a trial chamber has been constituted at the end of 2019,<sup>129</sup> and the trial opened on July 14, 2020.<sup>130</sup>

<sup>119</sup> *Al Mahdi* (n 76) [6]–[11].

<sup>120</sup> *ibid* [14]–[18].

<sup>121</sup> *ibid* [19], [20].

<sup>122</sup> *ibid* [25]–[27].

<sup>123</sup> *ibid* [26].

<sup>124</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18. For the developments of the case see <<https://www.icc-cpi.int/mali/al-hassan>> accessed 30 May 2020.

<sup>125</sup> *ibid*.

<sup>126</sup> For the facts of the case, please refer to the case information sheet: <https://www.icc-cpi.int/mali/al-hassan> accessed 30 May 2020.

<sup>127</sup> *ibid*.

<sup>128</sup> *Al Hassan* (Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) (n 12). This decision was confirmed by the ICC Appeals Chamber in early 2020: *Al Hassan* (Judgment on the appeal of Mr Al Hassan against the decision of pre-trial chamber I entitled “Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense”) (n 12).

<sup>129</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Decision constituting trial chamber X and referring to it the case of The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud) ICC-01/12-01/18 (21 November 2019).

<sup>130</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Decision Setting the Commencement Date of the Trial) ICC-01/12-01/18 (6 January 2020). On April 23, 2020, ICC pre-trial chamber I issued a confidential decision partially granting the Prosecutor’s request to modify

As a suspect of crimes against humanity and war crimes allegedly committed in Timbuktu, Mali, between 2012 and 2013, Al Hassan is currently being kept in ICC custody.<sup>131</sup>

As regards attacks against cultural property, the OTP gives special attention to the examination of the term “attack” within the meaning of art. 8(2)(e) (iv) which, in its opinion, “has a ‘special meaning’ in the sense of the Vienna Convention, which differs from other uses of the term ‘attack’ in article 8.”<sup>132</sup>

Besides this, the OTP arguably endorses a subtended link between the destruction of the sites concerned and the identity and dignity of the city of Timbuktu and its inhabitants.<sup>133</sup> While the OTP underscores the relevance of such sites for the religious, social, and cultural life of the people of Timbuktu,<sup>134</sup> it also stresses the much more extended grievance of Africa and the international community as a whole for the destruction of cultural objects which embodied memories of the past that should have been handed down to future generations.<sup>135</sup> Furthermore, this suggests a flexible interpretation of terms such as “religious”<sup>136</sup> or “historic”<sup>137</sup> buildings, which basically rejects a restrictive approach to the aforementioned criteria.<sup>138</sup>

In addition to the cases of Al Mahdi and Al Hassan, also in other cases the ICC had to deal with attacks against protected objects within the meaning of art. 8(2)(e)(iv) of the Statute (i.e., a category which requires a higher threshold than the mere nonmilitary nature of the attacked objects) in the context of NIACs, but none of them concerned attacks against cultural heritage as such.<sup>139</sup>

the charges against the accused to include additional facts: *Al Hassan* (Version publique expurgée du Rectificatif de la Décision portant modification des charges confirmées le 30 septembre 2019 à l'encontre d'Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 23 avril 2020, ICC-01/12-01/18-767-Conf) (n 14). See also Press Release (n 14).

<sup>131</sup> See <<https://www.icc-cpi.int/mali/al-hassan>> accessed 30 May 2020.

<sup>132</sup> *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Public redacted version of the “Prosecution’s final written observations regarding confirmation of the charges”, 24 July 2019, ICC-01/12-01/18-430-Conf) ICC-01/12-01/18 (10 October 2019) [143]. See also *Procureur c Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Version publique expurgée de la “Version amendée et corrigée du Document contenant les charges contre M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,” ICC-01/12-01/18-335-Conf-Corr, 11 mai 2019) ICC-01/12-01/18 (2 juillet 2019) (available in French only) [687–[703].

<sup>133</sup> *Al Hassan* (Version publique expurgée de la “Version amendée et corrigée du Document contenant les charges contre M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud,” ICC-01/12-01/18-335-Conf-Corr, 11 mai 2019) [685].

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid* [686].

<sup>136</sup> *ibid* [705]–[708].

<sup>137</sup> *ibid* [709]–[713].

<sup>138</sup> See, particularly: *ibid* [709].

<sup>139</sup> See *Ntaganda* (n 30) and *Prosecutor v Patrice-Edouard Ngaïssona et al.* (Public redacted version of “Document Containing the Charges”, ICC-01-14/01-18-282-Conf-AnxB1, 19 August 2019) ICC-01/14-01/18 (18 September 2019).

## B. The OTP Approach *in fieri*: Toward a Human Rights Approach to Crimes against or Affecting Cultural Heritage?

As it has been underpinned by the UN Special Rapporteur in the field of cultural rights, Karima Bennouna, in various instances,<sup>140</sup> only a “human rights approach to cultural heritage obliges one to go beyond preserving and safeguarding an object or a manifestation in itself to take into account the rights of individuals and groups in relation to such object or manifestation and to connect cultural heritage with its source of production.”<sup>141</sup> Turning to the context of international criminal law, a human rights approach<sup>142</sup> enhances accountability and the fight against impunity,<sup>143</sup> justly because it allows for a focus on the cultural rights defenders<sup>144</sup> and on the victims’ rights,<sup>145</sup> which, when violated, merit to be repaired.<sup>146</sup> In the words of Judge Cançado Trindade of the International Court of Justice: “the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole.”<sup>147</sup> Along this line, the Special Rapporteur welcomed the initiative of the ICC OTP in the *Al Mahdi* case to charge such crimes as “stand-alone war crime[s],”<sup>148</sup> rather than mere auxiliary ones.<sup>149</sup> Hence, the prioritization of such crimes enables their prosecution, by the OTP and the judges alike, with a deeper pivot on the victims’ perspective: on their rights which have been

<sup>140</sup> See among others: UNGA, Report of the Special Rapporteur in the field of cultural rights, Karima Bennouna, UN Doc A/71/317 (9 August 2016) [52]–[58].

<sup>141</sup> *ibid* [53], also referring to UNGA, Report of the independent expert in the field of cultural rights, Farida Shaheed, UN Doc A/HRC/17/38 (21 March 2011) [2].

<sup>142</sup> See also, for example: UNGA, Report, Karima Bennouna (August 2016) (n 144) [6]–[13], [52]–[75]; UNGA, Report of the Special Rapporteur in the field of cultural rights, Karima Bennouna, UN Doc A/HRC/31/59 (3 February 2016) [47]–[51], [69]–[85]; UNGA, Report, Farida Shaheed (March 2011) (n 145) [4]–[8]; Brief by Ms Karima Bennouna, UN Special Rapporteur in the field of Cultural Rights, Expert Appointed by the International Criminal Court in the Case of The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Reparations Phase (27 April 2017) 11–18, 36–37. See also UN Human Rights Council, Resolution 33/20, UN Doc A/HRC/RES/33/20 (adopted 30 September 2016).

<sup>143</sup> UNGA, Report, Karima Bennouna (August 2016) (n 144) [54].

<sup>144</sup> UNGA, Report, Karima Bennouna (February 2016) (n 146) [74]–[75] and, more generally: UNGA, Report, Karima Bennouna (August 2016) (n 144) [68]–[75]; Brief by Ms Karima Bennouna (n 146) 17.

<sup>145</sup> On the identities of the victims see Brief by Ms Karima Bennouna (n 146) 25–28.

<sup>146</sup> On the reparation of the victims’ rights see *ibid* 36–46.

<sup>147</sup> *Request for Interpretation of the Judgement of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)*, Order of 18 July 2011, Separate Opinion of Judge Cançado Trindade [2011] ICJ Rep. 566 [114] (emphasis in original), also quoted in: UNGA, Report, Karima Bennouna (February 2016) (n 146) [48].

<sup>148</sup> UNGA, Report, Karima Bennouna (August 2016) (n 144) [54]. See also, previously, UNGA, Report, Karima Bennouna (February 2016) (n 146) [78].

<sup>149</sup> (n 36) 125, 132.

infringed and on the restoration which will have to follow.<sup>150</sup> Accordingly, a holistic strategy,<sup>151</sup> which takes into account and, to some extent, promotes the viewpoint of those whose rights have been offended, shall be favored.

In the brief she submitted in the *Al Mahdi* case as an appointed expert of the ICC,<sup>152</sup> Prof. Bennoune highlighted that the harm caused by intentional destruction of property of cultural significance transcends the mere material damage<sup>153</sup> and endorsed the need for an overarching approach toward this type of crime, which takes into consideration the human rights impact of the acts at stake.<sup>154</sup> As a consequence, this widens the number and categories of victims affected by the above-mentioned crime, which cease to be limited to those who can claim direct and material damage and extends to the local, national, regional, and international communities in a broad sense.<sup>155</sup> Naturally, this will also carry implications on the reparations phase.<sup>156</sup>

## V. Some Normative Takeaways

### A. Anthropocentrism

The *Al Mahdi* judgment (notably on the matter of sentencing and reparations order) measured the gravity of the harm from the perspective of how much that property meant to people in real time. The usual premise is that crimes against persons are more “serious” than crimes against objects and things. Hence, when it came to the seriousness of the attacks in Timbuktu, judges emphasized that these attacks affected human beings and triggered suffering in the lives they live. The trial chamber thereby adopted a somewhat anthropocentric model of culture and loss. It measured the value of heritage in a relational sense and not in an intrinsic sense. On the one hand, this move seems natural, self-evident, and textually faithful to the language of the Rome Statute and approaches to gravity that are commonplace within the criminal

<sup>150</sup> Cf. UNGA, Report, Karima Bennoune (August 2016) (n 144) [54], quoting, at ft 42, Richard Goldstone, “The War Crime of Destroying Cultural Property” (*International Judicial Monitor*, Summer 2016) <<http://www.judicialmonitor.org/summer2016/globaljudicialperspective.html>> accessed 30 May 2020.

<sup>151</sup> UNGA, Report, Karima Bennoune (August 2016) (n 144) [57].

<sup>152</sup> Brief by Ms Karima Bennoune (n 146).

<sup>153</sup> *ibid* 23–25.

<sup>154</sup> *ibid* 24–25.

<sup>155</sup> See eg *ibid* 25–28.

<sup>156</sup> See eg *ibid* 36–49 and, specifically, 37–38.

law. On the other hand, this shift also belies far thicker and richer questions as to how to value cultural property and what exactly to protect.

Central to the *Al Mahdi* case, therefore, is that nearly all of the destroyed sites also had been routinely used by the residents of Timbuktu for religious purposes.<sup>157</sup> But what if the property was no longer being used? What if it served no religious or worship purpose? What if the property was ugly, unappreciated, ignored, dusty, dismal, and forlorn? Privately owned? What if a local population declared by democratic vote to reject the property as “cultural” in nature? Ironically the more that cultural property is loved and used, the higher the likelihood that it would be rebuilt. The gravest harms, after all, tend to befall the unloved and unappreciated and unkempt. While observers may quibble about whether cultural property ever can be truly rebuilt,<sup>158</sup> the fact remains that property that is marginal is more likely not to be rebuilt and therefore may simply disappear. What is more, if the will of the local community not (or no longer) to present something as cultural property is to be respected, so too must the will of the community to affirmatively designate something as cultural property. Such protective moves are commonplace. The Dutch, for example, have officially placed the Sinterklaas Festival and Black Pete on the National Inventory of Intangible Cultural Heritage.<sup>159</sup>

What about cultural property from a culture that no longer exists? Or a culture that moved away, leaving its property behind? Marina Lostal ties these questions to the *Al Mahdi* judgment’s reasoning, which she chides as anthropocentric. Lostal specifically identifies as an example the destruction of the Bamiyan Buddhas by the Taliban in 2001. The Bamiyan Buddhas were two enormous statues built around the fifth to seventh century in a valley in what is now Afghanistan. The statues oversaw a community of Buddhist monasteries. Roughly 1,500 years later, the Taliban (who controlled Afghanistan) decreed these statues as the product of an infidel religion and dynamited them. The Bamiyan Buddhas, unlike the mausoleums in Timbuktu, were

<sup>157</sup> Interestingly, the emphasis on religion was less singular in the Hague Convention of 1954 (n 10), art 1(a) of which explicitly protected property “whether religious or secular.”

<sup>158</sup> Prosecutor Bensouda, in her opening statement in *Al Mahdi*, submitted that, “Once destroyed, as noted by the UN International Criminal Tribunal for the former Yugoslavia, the restoration of cultural heritage never brings back its inherent value”: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Mr Ahmad Al-Faqi Al Mahdi (22 August 2016) <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822>> accessed 30 May 2020.

<sup>159</sup> Lucas Lixinski, “Confederate Monuments and International Law” (2018) 35 *Wisconsin International Law Journal* 549, 578, noting “‘Black Pete’ (*Zwarte Piet*)” as a ‘Christmas tradition which includes a “helper” of Santa Claus as a black-face or just black person, who was once historically Santa Claus’s African slave’ (emphasis in original).

not used by local populations in religious practices— “there are no records indicating the presence of Buddhism in Afghanistan after 1336.”<sup>160</sup> Hence, according to Lostal, “their destruction could not affect the social practices and structures or the cultural roots of the local people.”<sup>161</sup> She adds: “It would lack what the Chief Prosecutor has pointed to as the common denominator of all crimes detailed by the ICC Statute—that is, that ‘[t]hey inflict irreparable damage to the human persons [*sic*] in his or her body, mind, soul and identity.’”<sup>162</sup> Palmyra in Syria constitutes a similar example.<sup>163</sup> So, too, does the ancient city of Sabratha: “once a jewel of the Roman Empire,” currently pockmarked with mortar and small arms fire from armed conflict in Libya and which is now “used” (in real-time) as a chaotic camp of departure for refugees—chased by smugglers and militias—fleeing across the Mediterranean.<sup>164</sup>

## B. UNESCO and Its Lists

In *Al Mahdi*, the human “value” of the shrines could be established with relative ease through deployment of proxies. Nearly all of the shrines were protected by UNESCO as heritage sites (inscribed on the World Heritage List).<sup>165</sup> The UNESCO designations weighed heavily in the minds of the judges (and in the OTP submissions).<sup>166</sup> Within the umbrella of UNESCO,

<sup>160</sup> Lostal (n 54) 56.

<sup>161</sup> *ibid* 56–57

<sup>162</sup> *ibid* 57 (citation omitted).

<sup>163</sup> See eg Helga Turku, “When Cultural Property Becomes a Tool of Warfare: Law, Politics, and International Security” (2017) 1 *Inter Gentes - The McGill Journal of International Law & Legal Pluralism* 3, 16 (“Questions can be raised as to whether the pre-Islamic Roman Era ruins of Palmyra or the Assyrian city of Nimrud have anything in common with the predominantly Arab population that inhabits the region today. . . . Or do these historical sites partly represent the heritage of some people who lived there once in the past?”). ISIS also has targeted the ancient city of Dura Europos, located on the banks of the Euphrates river near the Syrian and Iraqi border.

<sup>164</sup> “‘Jewel of Roman Empire’ Faces Libya Dangers’ (France 24, 3 October 2018) <<https://www.france24.com/en/20181003-jewel-roman-empire-faces-libya-dangers>> accessed 30 May 2020.

<sup>165</sup> For the up-to-date list see <<https://whc.unesco.org/en/list/>> accessed 30 May 2020.

<sup>166</sup> *Al Mahdi* (n 7) [46]. The fourth sentence of the Prosecutor’s Opening Statement begins: “They were a major part of the historic heritage of this ancient city. They were also more generally a part of the heritage of Mali, of Africa and of the world. All, except one, were inscribed on the World Heritage List,” Statement of the Prosecutor at the opening of *Al Mahdi* Trial (n 162). In ICTY proceedings for destruction or willful damage of cultural property (rather than attacks), individuals were charged with and convicted for the destruction of the old town of Dubrovnik, also listed as a UNESCO World Heritage Site, and charged with but ultimately acquitted regarding the Stari Most bridge (as civilian property), which became formally listed with UNESCO in 2005 but had been listed as a “UN World Heritage Site” at the time of the attacks: Bishop-Burney (n 84) 130.

the World Heritage Committee has the final say on whether a property is inscribed on the World Heritage List. This Committee meets once a year. It consists of representatives from twenty-one of the States Parties to the World Heritage Convention.<sup>167</sup> Pursuant to art. 11(1) of this Convention, the Committee shall establish, keep up to date, and publish this list of properties forming part of the cultural heritage and natural heritage which it considers as having outstanding universal value in terms of such criteria as it shall have established. Outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.<sup>168</sup> As of August 2020, the twenty-one States on the World Heritage Committee are Australia, Bahrain, Bosnia and Herzegovina, Brazil, China, Egypt, Ethiopia, Guatemala, Hungary, Kyrgyzstan, Mali, Nigeria, Norway, Oman, Russian Federation, Saint Kitts and Nevis, Saudi Arabia, South Africa, Spain, Thailand, Uganda.<sup>169</sup>

In many quarters, however, the UNESCO listing process “has been viewed as notoriously politicised and biased toward particular forms of heritage.”<sup>170</sup> On this note, one observer has called for the “identification of objective criteria independent of UNESCO designation.”<sup>171</sup> UNESCO has nonetheless been energized by the *Al Mahdi* judgment. As recalled in the above,<sup>172</sup> on November 6, 2017, its director-general, Irina Bokova, signed a letter of intent with Chief Prosecutor Bensouda to continue to collaborate including on a new policy initiative on cultural heritage.<sup>173</sup> The stakes for what UNESCO determines therefore seem to be rising. So, if UNESCO expert designations now are key elements of gravity in the application of international criminal law, perhaps the process by which UNESCO “experting” is developed should become split open or spruced up.

<sup>167</sup> Convention for the Protection of the World Cultural and Natural Heritage (n 55).

<sup>168</sup> See the Operational Guidelines for the Implementation of the World Heritage Convention, Guideline 49 <<https://whc.unesco.org/en/guidelines/>> accessed 30 May 2020 (all of which also provide details on procedures).

<sup>169</sup> See <<https://whc.unesco.org/en/committee/>> and <https://whc.unesco.org/en/sessions/44COM/> accessed 29 August 2020.

<sup>170</sup> Sophie Starrenburg, “Who Is the Victim of Cultural Heritage Destruction? The Reparations Order in the Case of the Prosecutor v Ahmad Al Faqi Al Mahdi” (*EJIL: Talk!*, 25 August 2017).

<sup>171</sup> Bishop-Burney (n 84) 132.

<sup>172</sup> See section IV(A)(2) of this chapter (The approach of the OTP through its cooperation with other bodies).

<sup>173</sup> Press Release, “International Criminal Court and UNESCO Strengthen Cooperation on the Protection of Cultural Heritage” (6 November 2017) <<https://whc.unesco.org/en/news/1742>> accessed 30 May 2020.

### C. Whither Protection? Whither Deterrence? Questions of Legalisms and Legalities

An ongoing issue within the protection of cultural heritage in armed conflict is that international criminal law can only provide for ex post facto measures, rather than preventative mechanisms.<sup>174</sup> But can it function also as a deterrent for future violations, dissuading the condemned to repeat the crime (specific deterrence) and discouraging everyone else from engaging in similar conducts (general deterrence)?<sup>175</sup> This section analyzes the deterrent value of the international crime against cultural heritage at the ICC along two lines. First, it posits the shortcomings of the Rome Statute itself and suggests feasible areas of improvement. Secondly, it formulates several challenges to the ICC's preventative capacity.

Albeit declaring its consciousness that “[a]ll peoples are united by common bonds, their cultures pieced together in a shared heritage and concerned that this delicate mosaic may be shattered at any time,”<sup>176</sup> and as recalled in the above, the Statute does not employ the term “culture” in any of its declarations when identifying war crimes against cultural heritage. Rather, it replicates the terminology of the 1907 Hague Convention and the 1949 Geneva Conventions.<sup>177</sup> Hence, the drafters of the Statute missed the opportunity to sanction offences against “culture” per se<sup>178</sup> and to dignify cultural property by according it a stronger degree of protection than that afforded to any other type of civilian property.<sup>179</sup>

<sup>174</sup> See, inter alia, Erin Collins, “Preventing Cultural Heritage Destruction and the Responsibility to Protect” (2018) 13 *Intercultural Human Rights Law Review* 299, 300.

<sup>175</sup> For a brief survey on specific and general deterrence see, for example, *Al Mahdi* (n 7) [67]; David Wippman, “Atrocities, Deterrence, and the Limits of International Justice” (1999) 23 *Fordham International Law Journal* 473, 476; Payam Akhavan, “Justice in the Hague, Peace in the Former Yugoslavia - A Commentary on the United Nations War Crimes Tribunal” (1998) 20 *Human Rights Quarterly* 737, 746–47.

<sup>176</sup> ICC Statute (n 4) first preambular paragraph; Knut Dörmann, “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes” in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Brill 2003) vol 7, 341, 356–63, 377–78, 396–98, 400.

<sup>177</sup> The Hague Conventions of 1907 (n 95); Geneva Conventions of 1949 (n 31); Gottlieb (n 45) 865, also mentioning *Strugar* (n 17) [229].

<sup>178</sup> See Schabas (n 30) 268.

<sup>179</sup> *ibid* 267–68, quoting Michael Bothe, “War Crimes” in Antonio Cassese, Paola Gaeta, and John RWD Jones (eds), *The Rome Statute of the International Criminal Court* (OUP 2002) 379, 410; Carcano (n 16) 86–87. See also *Kordić et al* (Judgment) IT-95-14/2-A (17 December 2004) [92], where the ICTY ultimately accepted the destruction of schools as constituting, in any event, destruction of enemy property found in the Hague Convention (IV) of 1907 (n 29) art 23(g). Compare the provisions with the war crime of attacking civilian objects under ICC Statute (n 4) art 8(2)(b)(ii).

Moreover, it must be observed that the provisions on the table are limited in scope to immovable cultural properties,<sup>180</sup> that is, to edifices or constructions capable of being used, in principle, for military purposes. Articles 8(2)(b)(ix) and 8(2)(e)(iv) do not cover movable cultural objects, nor do they provide for any legal nor logical rationale to justify such difference in treatment.

The Statute omits to penalize the conduct of those who use cultural property in support of military action or for any other criminal goal<sup>181</sup> and, even more so, the acts of those who turn such very property into a military objective and, by consequence, deprive it of legitimate protection.<sup>182</sup>

On a final note, it can also be pointed out that the Statute does not shed any light on whether crimes against cultural property could amount to crimes against humanity, which is a recurring question within international criminal law.<sup>183</sup> In this respect, the Statute is of little avail in allowing the ICC to align (or not) with the practice of the ICTY.<sup>184</sup>

Let us now turn to the deterrent efficacy of the ICC as regards attacks on cultural property. Whether international criminal law, in this case through the ICC, serves a deterrent function is a hotly debated and largely unsettled question.<sup>185</sup> In *Al Mahdi*, ICC judges were pithily confident in the deterrent

<sup>180</sup> Gottlieb (n 45) 866; Frulli (n 42) 212–13.

<sup>181</sup> Gottlieb (n 45) 867; compare the provision with the much broader scope of Second Protocol to Hague Convention of 1999 (n 10) art 15, with Additional Protocol I to the Geneva Conventions (n 29) art 53, with Additional Protocol II to the Geneva Conventions (n 29) art 16 and with Rule 39 and Rule 41 of the ICRC Database on Customary IHL <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule39](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule39)> and <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule41](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule41)> all accessed 30 May 2020.

<sup>182</sup> Frulli (n 42) 215–16.

<sup>183</sup> See, on this point, Sebastián A. Green Martínez, “Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?” (2015) 13 *Journal of International Criminal Justice* 1073; McGeorge (n 15) 214, 222–23. See also Lenzerini (n 16) 63–64; Gottlieb (n 45) 888–91; Gerstenblith, (n 95) 390.

<sup>184</sup> McGeorge (n 15) 219; *Blaškić* (n 41) [227]; *Prosecutor v Krajišnik* (Judgment) IT-00-39-T (27 September 2006) [840]; *Prosecutor v Kordić et al.* (Judgment) IT-95-14/2-T (26 February 2001) [207]. See also *Prosecutor v Brđanin*, (Judgment) IT-99-36-T (1 September 2004) [1050]; *Prosecutor v Martić* (Judgment) IT-95-11-T (12 June 2007) [399]; *Prosecutor v Milutinović et al.* (Judgment) IT-05-87-T (26 February 2009) [205]; *Prosecutor v Đorđević* (Judgment) IT-05-87/1-T (23 February 2011) [1771]. See also *Prosecutor v Blaskić* (Judgment) IT-95-14-A (29 July 2004) [144]–[149] and *Prosecutor v Gotovina et al* (Judgment) IT-06-90-T (15 April 2011) [1830]. See also O’Keefe, “Protection of Cultural Property under International Criminal Law” (n 95) 380–85.

<sup>185</sup> For a few examples see Mark A. Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007); Sang-Hyun Song, “Preventive Potential of the International Criminal Court” (2013) 3 *Asian Journal of International Law* 203; Jan Klabbers, “Just Revenge - The Deterrence Argument in International Criminal Law” (2001) 12 *Finnish Yearbook of International Law* 249; Christopher W Mullins and Dawn L Rothe, “The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment” (2010) 10 *International Criminal Law Review* 771. On specific and general deterrence see, for example, *Al Mahdi* (n 7) [67].

value of the conviction in the specific area of protection of cultural property. In the determination of the *Al Mahdi* sentence, the ICC mentioned retribution and deterrence “as the primary objectives of punishment at the ICC.”<sup>186</sup> It referred to the necessity that the sentence be adequate “to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence).”<sup>187</sup> Interestingly enough, trial chamber VIII also considered Al Mahdi’s admission of guilt as being potentially capable to deter others tempted to engage in similar crimes “in Mali and elsewhere.”<sup>188</sup> The OTP too, on its part, made reference to deterrence as one of the two primary functions of sentencing at the ICC (the other one being retribution) and pushed forward with its two-tiered nature of special and general deterrence.<sup>189</sup> Furthermore, the OTP claimed the deterrent role of collective measures such as the wide dissemination of the Judgment and Sentence.<sup>190</sup> Its most vocal point on deterrence remains, in any event, its invocation of other conflict scenarios where cultural heritage is under particular threat. In the OTP’s words: “[d]estruction of cultural property during armed conflict is not only inherently very serious; it is also an issue of current and ongoing concern. The desecration of ancient sites in Syria and Iraq is only the most recent reminder that cultural heritage remains at risk, particularly in conflict zones. Hence the need for a sentence in this case that furthers general as well as specific deterrence.”<sup>191</sup>

It is also perplexing to ponder whether the categorization of cultural property as “international” or “cosmopolitan” might paradoxically trigger violence. In Al Mahdi’s case, for example, there is evidence that he was able to rally some support around the attacks because he mocked the fact that “UNESCO jackasses”<sup>192</sup>—the distant international community—designated the shrines as worthy of protection. Al Mahdi in a sense galvanized some support around notions of international intervention, colonial

<sup>186</sup> *Al Mahdi* (n 7) [66]. The Court also referred to *Prosecutor v Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07 (23 May 2014) [37]–[38]; *Prosecutor v Jean-Pierre Bemba Gombo*, (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08 (21 June 2016) [10].

<sup>187</sup> *Al Mahdi* (n 7) [67].

<sup>188</sup> *ibid* [100].

<sup>189</sup> *Al Mahdi* (n 74) [11].

<sup>190</sup> *Al Mahdi* (n 76) [27]. The OTP also referred, at ft 74, to: *Prosecutor v Thomas Lubanga Dyilo* (Order for Reparations (amended)) ICC-01/04-01/06 (3 March 2015) [43].

<sup>191</sup> *Al Mahdi* (n 74) [20].

<sup>192</sup> *Al Mahdi* (n 7) [46].

favoritism,<sup>193</sup> and perceptions of elite preferentialism of supposed aesthetics over actual religious content and meaning.

A final note arises within the reparations phase of the case of *Al Mahdi* and the human rights approach adopted by the OTP and the ICC more broadly.<sup>194</sup> Among other things, the ICC put emphasis on the aspect of guarantees of non-repetition, on the heels of the jurisprudence of the Inter-American Court of Human Rights.<sup>195</sup> In this sense, then, the reparative elements of the Rome Statute might also be connectable to preventative goals. Once again, however, deterrence is extremely hard to establish. It implies an evaluation of what “has been prevented from happening” or of what “has happened but with less intensity than it could have had.” Both assessments weigh the “unknown,” which, at least to some extent, goes beyond a strictly legalistic perspective. But, upon the uncertain assumption that the ICC judgment in *Al Mahdi* does have a deterrent effect, then, a set of unanticipated consequences might emerge. In its conclusion, which immediately follows, this chapter gestures toward some of those tricky questions.

#### D. Victimology: Who, Exactly, Is Hurt When Cultural Property Is Attacked?

The institutional regime created by the Rome Statute aspires to deliver justice for victims.<sup>196</sup> A comprehensive framework is established in this regard. The inclusion of reparations, for example, in the Rome Statute was intended to remedy a gap insofar as preexisting international criminal tribunals did not or were not able to pursue these restorative goals.

<sup>193</sup> See generally Charlotte L. Joy, *The Politics of Heritage Management in Mali: From UNESCO to Djenné* (Routledge 2013).

<sup>194</sup> See section IV(B) of this chapter (The OTP Approach *in fieri*: Towards a Human Rights Approach to Crimes against or Affecting Cultural Heritage?).

<sup>195</sup> Francesca Capone, “An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements. Redress for Victims of Crimes against Cultural Heritage” (2018) 16 *Journal of International Criminal Justice* 645, 656–59.

<sup>196</sup> ICC Statute (n 4) preamble (“during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”). See also the Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the trial in the case against Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (14 July 2020) <<https://www.icc-cpi.int/Pages/item.aspx?name=200714-otp-statement-al-hassan>> accessed 28 August 2020.

Paradoxically, the victimology of international crimes remains one of the most undertheorized areas of international criminal law.<sup>197</sup> Who is the victim? All sorts of distinctions abound—direct victims, indirect victims, natural persons, the international community as a whole.<sup>198</sup> Are these victims to be constructed as all equal or, perhaps inevitably, will hierarchies arise, to wit: Are some categories of victims more deserving of protection than other categories of victims?

The *Al Mahdi* proceedings demonstrate just how complex these categorizations of victims may become. As a starting point, all judgments and decisions in the *Al Mahdi* proceedings insist that the harm of his intentional attacks in Timbuktu is grave, serious, and severe: these trigger emotional, spiritual, and mental harm. The harm to victims, then, pushes cultural property crimes into the conceptual space of massive crimes physically committed against individuals and their bodies. At this point, however, the victimology becomes more muddled. As mentioned earlier, in the case of cultural property destruction, cosmopolitan approaches see the principal victim as the international community while retentionist approaches see the principal victim as the national or local community. Tensions among these approaches particularly arise in the context of reparations orders, since some individuals or some entities have to actually receive any funds that are awarded and disbursed. On this latter note, in the *Al Mahdi* case a localist approach was pursued in that nearly all the funds went to the population of Timbuktu. If affected victims are to be measured from the perspective of to whom a perpetrator apologizes, well, in *Al Mahdi*'s case his apology extended to a broader spectrum: from the international community down to the local population.

If international war crimes are seen mostly as affecting local populations, then ostensibly this suggests that primary places (and ways) where and how these crimes are to be punished and remedied should also empower local communities and be run by locals. If international war crimes are seen mostly as affecting the global community, then ostensibly internationals should be the ones prosecuting in the hegemonic places and spaces

<sup>197</sup> See generally Drumbl (n 189).

<sup>198</sup> The baseline definition of "victim" is found in ICC Rules of Procedure and Evidence, Rule 85: "(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct 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."

of globalism. Cultural property crimes, therefore, might help (re)situate the question of who should decide and enforce based on who has principally been hurt. On this note, however, the scattered and divergent approaches of the *Al Mahdi* sentencing judgment and the reparations order fail to offer a coherent approach.

This scenario becomes even more entangled in light of the latest developments in the *Al Mahdi* and *Al Hassan* cases. As evidenced by the ICC Prosecutor, applicants for reparations in the former case might include prosecution witnesses in the latter case precisely “due to the linkage between the two cases regarding the war crime of attacks against cultural property.”<sup>199</sup> The “dual function” of the same individuals as victims and prosecutorial witnesses in two separate but related cases is very likely to raise due process concerns for the defendants in the first place. But what can this suggest in the context of crimes against cultural property? While the “dual function” of certain subjects of criminal proceedings cannot be limited to the limb of crimes against cultural heritage, it does acquire an outstanding significance in this area, for the primary role played by the identification of victims of those crimes, as this chapter posits.

The ICC has certainly made a step toward the acknowledgment that offenses to cultural heritage entail international crimes. As the above discussion has shown, however, more can ensue from this starting point so that victims are effectively repaired and dignified, the crime is more steadily and consistently interpreted, and justice is done.

## VI. Conclusion

The discussion of the war crime against cultural heritage in the context of the ICC prompts a series of interrelated issues, one of which concerns the determination of which culture to protect and another one of which refers to the limits and exceptions to this very protection.

<sup>199</sup> *Prosecutor v Ahmad Al Faqi Al Mahdi* (Prosecution’s Request regarding applications for individual reparations) ICC-01/12-01/15 (20 February 2020) [2]. See also *Prosecutor v Ahmad Al Faqi Al Mahdi* (Public redacted version of “Trust Fund’s response to the “Prosecution’s Request regarding applications for individual reparations” (ICC-01/12-01/15-345)”) ICC-01/12-01/15 (25 March 2020) [10]. Trial chamber VIII delivered a decision on this request; see *Prosecutor v Ahmad Al Faqi Al Mahdi* (Decision on Prosecution’s Request for Provision of Certain Individual Reparations Applications) ICC-01/12-01/15 (28 February 2020).

Activists assume that cultural property is attractive (or at a minimum benign) and comforting for people. The UNESCO Constitution proclaims that “the wide diffusion of culture, and the education of humanity for justice and liberty and peace are *indispensable* to the dignity of man and constitute a sacred duty which all the nations must fulfil.”<sup>200</sup> A “culture is great” narrative justifies the entire content of cultural property protection. Hence, cultural property and heritage deserves to be shielded from destruction. But, at least to some extent, this is a naïve assumption. Oppressive cultures have their heritage and property and monuments too: a lot of monuments, statues, commemorations, and sites of worship are awful reminders to people of their own subordination. If prosecuting Al Mahdi deters destruction of cultural property, a question arises as to whether it would not do so ostensibly across the board, unless the judges appointed to international tribunals hoist upon themselves the tremendous power to determine which “cultures” are worthy of protection and which are not?

Outside the discussion of the ICC’s deterrent effect, protection of cultural property may also come to interface awkwardly with transitional justice. Posner notes that “The history of iconoclasm is long: Are all iconoclastic movements to be condemned because they destroy cultural property?”<sup>201</sup> When Lemkin initially proposed the crime of “vandalism” in 1933, Aron Trainin, professor of criminal law at Moscow University, denounced this suggested crime because “revolutionary fighting was incompatible with the protection of historical monuments.”<sup>202</sup> How to distinguish intentional attacks on Sufi shrines by Salafists, declared a crime in *Al Mahdi* and condemned in The Hague? How to analogize? Who to convict? Who not to charge? Following the *Al Mahdi* case, it may be that the international legal imagination offers less in the way of support for toppling and destroying cultural property which comes to be seen in the prevailing *Zeitgeist* as offensive, degenerate, or abusive. What is the interplay between criminalizing the destruction of cultural property, on the one hand, and transitional justice, on the other?

<sup>200</sup> Constitution of the United Nations Educational, Scientific and Cultural Organization (adopted 16 November 1945, entered into force 4 November 1946) 4 UNTS 275, fourth preambular paragraph (emphasis added). See also Prosecutor Bensouda’s invocation that “[c]ulture is who we are”: Statement of the Prosecutor at the opening of Al Mahdi Trial (n 162).

<sup>201</sup> Eric A Posner, “The International Protection of Cultural Property: Some Skeptical Observations” (2006) University of Chicago Public Law & Legal Theory, Working Paper No. 141, 9.

<sup>202</sup> Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (University of Wisconsin Press 2017) 14. For discussion rooted in the South African experiences of colonialism and apartheid, see Lucas Lixinski, “Cultural Heritage Law and Transitional Justice: Lessons from South Africa” (2015) 9 International Journal of Transitional Justice 278.

Developments within international criminal law therefore link to the broader philosophical concerns that Duncan MacIntosh raises in this volume. Somewhat like Trainin, MacIntosh posits that, under certain circumstances, destruction and plundering may constitute morally reasonable acts such that the protection of cultural heritage should not be absolute. It may well be, MacIntosh argues, that theft and destruction of cultural property may be a weapon of self-defense or liberation by the oppressed facing unjust and oppressive cultures and, hence, that destruction could be constructed as “morally appropriate.”<sup>203</sup> The work of the ICC, notably *Al Mahdi*, hardens the protection of cultural property, but a question emerges as to whether the law might allow some exceptionalism and suppleness, for example, when it comes to acts of resistance to cultural oppression, and a necessary injection of judgmentalism in terms of whose cultural property to protect and whose cultural property to permit to be deliberately pummeled. Or else, as I have extensively argued elsewhere,<sup>204</sup> the law may be used in assistance of those who seek to protect cultural property that lords over others and that entrenches hierarchy and exclusion. The law then may impede rather than ease transitional justice movements. Examples abound in the context of settler colonialism and “lost causes” (like Confederate memorials in the United States).

In a certain sense, it all comes down to the essential queries of “what is culture?” and “whose culture to protect from what?” This chapter explores these questions from the legal perspective. This perspective, however, must also connect to a variety of interdisciplinary angles so that law can be harmonized with and sensitive to a wider set of aspirations and remain mindful of far-flung concerns.

Any such perspective, moreover, must also adjust to two dynamics. First: the way in which people “view,” “enjoy,” or “appreciate” cultural property. Here, norms may rapidly be changing. Second: to recognize rapid technological developments such that cultural property may become indestructible through digitization and virtualization while remaining always accessible. If COVID-19 (or other pandemics) mean that, at least for a while, it no longer is safe to visit cultural property in real time, if it no longer is

<sup>203</sup> MacIntosh additionally contends that “since cultural objects can be both tools and symbols of unjust oppression, their theft and destruction ought to be seen as appropriate when this would be a means of overcoming oppression.”: Duncan MacIntosh, Chapter 4 of this volume (“Weaponizing Culture: A Limited Defense of the Destruction of Cultural Heritage in War”).

<sup>204</sup> Drumbl (n 2).

possible to worship onsite, if it is no longer possible to walk through a museum or look at a sculpture three-dimensionally with one's own eyes, if the musky scent of a chapel housing an ancient fresco can no longer be experienced, what does that imply for the gravity of destroying the actual original physical site assuming it has been digitized? It seems less grave, no? If re-created holograms, virtual tours, and couch-based online sessions determine the social practices of how humans, for their own safety, now interact with cultural property, including religious devotion, then whether the original physical cultural property is destroyed in a war becomes far less consequential or far less existential. For those who care about suddenly lonely "old-fashioned" cultural property that can be sat in, walked around, touched, and gazed upon, well, to some extent the anthropocentric approach developed by the ICC in *Al Mahdi* may indeed prove worrisome.