

The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC

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Abstract

The proceedings against Al Mahdi constitute a landmark precedent in the prosecution of crimes against cultural heritage, inside and outside the International Criminal Court. This article examines the Prosecution's overarching strategy at the confirmation of charges stage, where emphasis was placed on the consequences that the destruction of the shrines in Timbuktu had for the local population. It is suggested that this anthropocentric line of reasoning was historically inaccurate and strategically short-sighted. Using the example of the destruction of the Buddhas of Bamiyan, the article explains how, in the long run, this anthropocentric approach can restrict the capacity to prosecute crimes committed against cultural heritage *per se*, and undermine the conceptual foundation for the special protection given to cultural property.

French translation

La procédure contre Al Mahdi constitue un précédent historique dans la poursuite des crimes contre le patrimoine culturel, à l'intérieur et à l'extérieur de la Cour Pénale Internationale. Cet article examine la stratégie globale de l'Accusation au stade de la confirmation des charges, où l'accent a été mis sur les conséquences que la destruction des sanctuaires de Tombouctou a eu pour la population locale. L'article suggère que le raisonnement anthropocentrique était historiquement inexacte et une stratégie à court terme. À l'aide de l'exemple de la destruction des Bouddhas de Bamiyan, l'article explique comment, à long terme, cette approche anthropocentrique peut restreindre la capacité de poursuivre les crimes commis contre le patrimoine culturel en tant que tel et nuire à la base conceptuelle de la protection spéciale accordée aux biens culturels.

Spanish translation

El proceso contra Al Mahdi supone un precedente histórico en la persecución de los crímenes contra el patrimonio cultural, dentro y fuera de la Corte Penal Internacional. Este artículo examina la estrategia global de la fiscalía en la fase de confirmación de los cargos, en la que se puso énfasis en las consecuencias que la destrucción de los templos de Tombuctú tuvo para la población local. El artículo sugiere que este razonamiento antropocentrista fue inexacto históricamente y corto de miras desde un punto de vista estratégico. Tomando como ejemplo de la destrucción de los budas de Bamiyán, el artículo explica cómo, a largo plazo, este enfoque antropocéntrico puede restringir la capacidad de perseguir crímenes cometidos contra el patrimonio cultural *per se*, así como socavar las bases conceptuales de la protección especial que se debe dar al patrimonio cultural.

Introduction

Ahmad Al Faqi Al Mahdi, an ethnic Tuareg and Malian citizen in his thirties, is recognized as possessing a deep knowledge of Islam; indeed, he was a teacher of Islam prior to his membership in the militant Islamist group Ansar Dine (‘Defenders of the Faith’) and his involvement in the destruction of historic and religious sites in Timbuktu. He was arrested in Niger and surrendered to the International Criminal Court (ICC) in September 2015, the first suspect to be transferred to The Hague in connection with the armed conflict in Mali. More significantly, he was also the first person to be charged solely with the crime of directing attacks against cultural heritage. Some previous cases involving the damage and destruction of cultural or historic sites had been dealt with by the International Criminal Tribunal for the Former Yugoslavia,¹ but never before had a person been brought to international justice on these grounds alone. Hence, the Al Mahdi case is bound to become a reference for future prosecutions of attacks against cultural heritage and, more broadly, for cases that centre on crimes not against persons but against property. As such, its legacy should be closely scrutinized.

Precisely because the charges against Al Mahdi centred solely on attacks against cultural heritage, the decision of the Office of the Prosecutor to devote attention and resources to this case provoked controversy, with some labelling it a “victimless crime”.² This is not an accurate description as the destruction and damage of historical and religious buildings can lead to personal and material harm. In fact, the ICC Trial Chamber approved nine applications from persons wishing to participate as victims in the proceedings.³ However, as this article argues, the Prosecution’s focus at the confirmation of charges hearing on the “intangible” side of the events – the extent to which the population has been affected by the destruction – was not concurrent with the history of this crime and was strategically short-sighted.

An anthropocentric reading, that is, one that focuses on the impact it has on persons, of the crime sets limits on the prosecution’s range of action. This is something of which to be mindful because, as the sole precedent for the prosecution of crimes against cultural heritage and not persons, the Al Mahdi case will have consequences for the future internal functioning of the ICC when dealing with crimes against cultural heritage, other types of property or the environment. This is particularly important as the Office of the Prosecutor has recently indicated that it wishes to focus on acts that harm the environment.⁴ The case is also bound to set an example for the potential prosecution of international crimes in Syria and Iraq, where the extent of destruction and looting of cultural heritage is unprecedented.⁵ Lastly, given that fundamentalist groups have now incorporated the destruction of

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¹ For example, Jokić and Strugar were prosecuted at the International Criminal Tribunal for the former Yugoslavia (ICTY) for the shelling of the Old Town of Dubrovnik during the Balkan war. See: *The Prosecutor v Miodrag Jokić*, IT-01-42/1, Sentencing Judgment (18 March 2004) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>; *The Prosecutor v Pavle Strugar*, IT-01-42, Judgment (31 Jan 2005) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

² See, for example, Jonathan Jones, “Destroying priceless art is vile and offensive – but it is not a war crime”, *The Guardian* (22 August 2016), online: <www.guardian.co.uk>; and Marie Forestier, “ICC War Criminals: Destroying Shrines is Worse than Rape”, *Foreign Policy* (22 August 2016), online: <www.foreignpolicy.com>.

³ One of them withdrew its application at the beginning of the trial. See, for example, *Prosecutor v Ahmad al Faqi al Mahdi*, ICC-01/12-01/15, Decision on Victim Participation at Trial and on Common Legal Representation of Victims (8 June 2016) (International Criminal Court, Trial Chamber), online: ICC <www.icc-cpi.int>; and *Prosecutor v Ahmad al Faqi al Mahdi*, ICC-01/12-01/15, Second Report on Applications to Participate in the Proceedings (25 July 2016) (International Criminal Court, Trial Chamber), online: ICC <www.icc-cpi.int>. See also *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 art 68(3) (entered into force 1 July 2002) [ICC Statute].

⁴ International Criminal Court, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 Sept 2016 at para 7.

⁵ See, for example, Alexander A Bauer, “Editorial: The Destruction of Heritage in Syria and Iraq and Its Implications” (2015) 22:1 Intl J Cultural Property 1 at 1–6.

cultural heritage into their rhetoric and *modus operandi*, as seen in Libya, Egypt and Yemen,⁶ the Al Mahdi case will also serve as a point of reference in potential domestic proceedings against perpetrators.⁷

The first section of this article explains the background of the conflict in Mali and Al Mahdi's role in the destruction of cultural heritage in Timbuktu. The second explores the significance of Mali's cultural heritage to its population and the way this intangible side of cultural heritage has been increasingly acknowledged in international law. The third one turns to an analysis of how, at the confirmation of charges hearing, the Office of the Prosecutor rested its submissions on an anthropocentric reading of the crime, and contends that this line of reasoning is not in conformity with either the legal history of the prohibition of attacks against cultural heritage or all its goals. Consequently, the Prosecution's reading should be regarded as a legal innovation. Using the example of the destruction of the Buddhas of Bamiyan, the section concludes by arguing that such legal innovation is not particularly helpful since, in the long run, it can restrict the capacity to prosecute crimes committed against cultural heritage that has no obvious significance for the local population.

The conflict in Mali and Al Mahdi's role in the destruction of cultural heritage

In April 2012, Ansar Dine, Al-Qaeda in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (known by its French acronym, MUJAO) overran Kidal, Gao and Timbuktu, the three northern regions of Mali,⁸ amidst what at the time was a non-international armed conflict. All these groups wished to impose a radical interpretation of *Sharia* law, which not only included amputations and beheadings for what they considered as serious crimes,⁹ but also the destruction of certain religious and historic sites due to their impious nature.¹⁰

Al Mahdi was appointed head of the *Hisbah*, a morality police whose function was, in his words:

[t]o ensure the promotion of virtue and the prevention of vice ... reforming the apparent evils in the streets, such as the failure [of women] to wear the veil, revealing their feminine charms, social mix[ing], smoking, photos, and posters displaying, for example, banned slogans.¹¹

The mandate of the *Hisbah* also included deciding on whether or not to destroy the shrines, mosques and antiquities of Timbuktu. This was significant, given that Timbuktu is an emblematic city.

⁶ See, for example, "UNESCO Director-General deplures destruction of parts of ancient city of Baraqish, calls for protection of Yemen's heritage", *UNESCO News* (13 Sept 2015), online: <www.unesco.org>; "UNESCO Director-General Condemns Destruction to the Museum of Islamic Art in Cairo, Egypt", *UNESCO News* (24 Jan 2015), online: <www.unesco.org>.

⁷ Article 28 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict directs State Parties to "take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention" (*Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 240 art 28 (entered into force 7 Aug 1956)). The provisions on domestic criminal prosecutions and individual criminal responsibility were further elaborated upon in Chapter 4 of the 1999 Second Protocol to the 1954 Hague Convention. See *Second Protocol to The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict*, 26 March 1999, UNESCO Doc. HC/1999/7 (entered into force 9 March 2004).

⁸ Isaline Bergamaschi, "French Military Intervention in Mali: Inevitable, Consensual yet Insufficient" (2013) 2(2):20 *Intl J Sec & Dev* 1 at 2; Maryne Rondot, "The ICC's Investigation into Alleged War Crimes in Mali" (2013) Institute for the Study of Human Rights, University of Columbia, New York: American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC) at 2-3.

⁹ Human Rights Watch, "Collapse, Conflict and Atrocity in Mali: Human Rights Watch Reporting on the 2012-2013 Armed Conflict and its Aftermath" (2014) at 51.

¹⁰ Anna K. Zajac, "Between Sufism and Salafism: The Rise of Salafi Tendencies after the Arab Spring and Its Implications" (2014) 29:2 *Hemispheres* 9 at 97-98.

¹¹ ICC, "Collection of footage presented by the OTP during the Confirmation of Charges hearing" (1 March 2015), online: <https://www.icc-cpi.int/mali/al-mahdi>; see also, ICC, *Prosecutor v. Al Mahdi*, Judgment and Sentence (27 September 2016).

Historically, it “played a crucial role in the expansion of Islam in the region”,¹² and it is a part of UNESCO’s World Heritage List of sites deemed of outstanding universal value for the whole of humanity.¹³

From the outset, Al Mahdi admitted his guilt.¹⁴ As his trial began, he sought the pardon of the people of Timbuktu with the following words:

It is with deep regret and with great pain I have to enter a guilty plea and all the charges brought against me are accurate and correct. I am really sorry, I am really remorseful and I regret all the damage that my actions have caused.¹⁵

As this was the first time that an accused person had pleaded guilty at the ICC, the Trial Chamber dedicated some time to clarifying the parameters of this line of action in the Court. The ICC Statute does not allow plea bargaining – that is, reaching an agreement with the prosecution whereby the defendant pleads guilty to some or all of the charges in exchange (for example) for a reduced sentence. While Article 65(5) of the ICC Statute permits negotiations between the prosecution and the defence, the results of these discussions are not binding on the Court. In this case, the Prosecution recommended a sentence of between nine and eleven years’ imprisonment.¹⁶ Although the Trial Chamber could have imposed up to thirty years, Al Mahdi was finally sentenced to nine. In reaching this decision, the Trial Chamber considered the admission of guilt to be a mitigating circumstance¹⁷ and gave it substantial weight, although it also noted that the admission was “made against a backdrop of overwhelming evidence”.¹⁸

The legal basis for the crime committed by Al Mahdi lies in Article 8(2)(e)(iv) of the ICC Statute, which gives the following definition of the war crime of attacks against property:

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.¹⁹

The Trial Chamber decided that no re-characterization of the charges was necessary under Article 8(2)(e)(xii), which punishes instead “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict”, since this article refers to the more general crime against civilian property.²⁰ Albeit *lex specialis*, the reader should note

12 Prosecutor v Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgement and Sentence (public), (27 September 2016) at para 78 (International Criminal Court, Trial Chamber VIII), online: ICC <www.icc-cpi.int>.

13 See Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 Nov 1972, 1037 UNTS 151 at preamble and art 1 (entered into force 17 Dec 1975) [World Heritage Convention].

14 See *Prosecutor v Ahmad al Faqi al Mahdi*, ICC-01/12-01/15, Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi (19 Aug 2016) (International Criminal Court, Preliminary Chamber), online: ICC <www.icc-cpi.int> [Accord sur l'aveu].

15 *Prosecutor v. Ahmad al Faqi al Mahdi*, ICC-01/12-01/15, “Al Mahdi Case: accused makes an admission of guilt at trial opening” (22 August 2016), online: <<https://www.youtube.com/watch?v=Regsy114ovI&feature=youtu.be>>.

16 Accord sur l'aveu, *supra* note 14, at 19; see also, *Prosecutor v Ahmad al Faqi al Mahdi*, ICC-01/12-01/15, Public redacted version of “Prosecution’s submissions on sentencing” in the Al Mahdi case (22 July 2016), at para 65 (International Criminal Court, Trial Chamber VIII), online: ICC <www.icc-cpi.int> [Prosecution’s submissions on sentencing].

17 The Trial Chamber found four other mitigating circumstances: his cooperation with the Prosecution; the remorse and empathy expressed for the victims; his initial reluctance to carry out the destruction; and his good behaviour in detention. *Supra* note 11 at para 109.

18 *Ibid* at para 100.

19 The ICC Statute contains an identical provision applicable in international armed conflicts in Article 8(2)(b)(ix) (See ICC Statute, *supra* note 3 at Article 8(2)(b)(ix)).

20 *Supra* note 11 at para 12.

that the war crime concerning attacks against cultural heritage in the ICC Statute suffers from a far-from-negligible blind spot: the lack of reference to movable objects.²¹ Cultural property may also take the form of objects such as paintings, figurines, relics or, as in the case of Timbuktu, ancient manuscripts. Indeed, UNESCO reports that “4,203 manuscripts from the Ahmed Baba research centre were lost”²² during the conflict and around 300,000 were in urgent need of conservation. Nevertheless, this loss of Malian cultural heritage was not taken into account at the ICC proceedings.

The Trial Chamber found that Al Mahdi had been involved in the destruction of ten historical and religious sites,²³ and all but the Sheikh Mohamed Mahmoud Al Arawani Mausoleum were world heritage sites. At first, Al Mahdi advised against destroying the mausoleums “so as to maintain [good] relations between the population and the occupying groups.”²⁴ However, after receiving instructions from Ag Ghaly (the leader of Ansar Dine) and Abou Zeid (the governor of Timbuktu during its occupation by the armed groups), he agreed to proceed with the destruction and was present at each incident. He decided on the order in which the destruction was carried out, and he even drafted a sermon justifying the attacks that was read out at Friday prayers.²⁵

More specifically, Al Mahdi admitted to having been involved in the destruction of nine mausoleums and the door of the mosque of Sidi Yahia.²⁶ The buildings were often surrounded by security cordons of armed men to ensure that the destruction took place without disruption. Although Al Mahdi’s degree of involvement varied, he directly participated in the destruction of the Alpha Moya Mausoleum, the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum and the two mausoleums adjoining the Djingareyber Mosque, the Ahmed Fulane Mausoleum and the Bahaber Babadié Mausoleum²⁷ – he even recommended the use of a bulldozer on the latter. As for the Sidi Yahia Mosque, it was later established that only its door had been destroyed. Nevertheless, this door carried particular meaning for the local population: it had been sealed since time immemorial because it was thought to protect against the evil eye. Indeed, “some witnesses started crying when they saw the damage”;²⁸ they believed that “opening the door [would] herald misfortune”.²⁹ In light of this, the Pre-Trial Chamber of the ICC took the view that “[t]hese buildings were cherished by the community, were used for religious practices [...] and embodied the identity of the city”.³⁰ Al Mahdi personally purchased the pickaxes used at the site with *Hisbah* funds, and he justified the destruction of the door to the media as a way of “eradicating superstition, heresy and all things or subterfuge which can lead to idolatry.”³¹

²¹ Micaela Frulli, “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency” (2001) 22:1 EJIL 203 at 212.

²² “Damage to Timbuktu’s cultural heritage worse than first estimated reports UNESCO mission”, *UNESCO News* (7 June 2013), online: <<http://en.unesco.org/news/damage-timbuktu%E2%80%99s-cultural-heritage-worse-first-estimated-reports-unesco-mission>>.

²³ Namely: Sidi Mahmoud Ben Omar Mohamed Aquit; Cheick Mohamed Mahmoud Al Arawani; Cheikh Sidi Mokhtar Ben Sidi Mouhammad Ben Cheick Alkabir; Alpha Moya; Cheick Sidi Ahmed Ben Amar Arragadi; Cheick Mouhamad El Micky; Cheick Abdoul Kassim Attouaty; Ahamed Fulane and Bahaber Babadié; and the mosque of Sidi Yahia.

²⁴ *Supra* note 11 at para 36.

²⁵ *Ibid* at para 37.

²⁶ *Procureur c Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15 *Mandat d’arrêt* (publique expurgée), (18 September 2015) at 3 (Cour Pénale Internationale, Chambre Préliminaire I), online: ICC <<https://www.icc-cpi.int>>.

²⁷ *Supra* note 11 at para 38.

²⁸ “Timbuktu’s Sidi Yahia mosque ‘attacked by Mali militants’”, *BBC News* (2 July 2012), online: <<http://www.bbc.com/news/world-africa-18675539>>.

²⁹ *Ibid*.

³⁰ *Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, *Decision on the Confirmation of Charges against Al Faqi Al Mahdi* (public) (24 March 2016) at 23, para 11 (International Criminal Court, Pre-Trial Chamber I), online: ICC <www.icc-cpi.int> <www.icc-cpi.int>.

³¹ *Supra* note 11 at para 38(viii).

Al Mahdi is currently awaiting the reparation stage of the proceedings, where the Trial Chamber will decide on some form of compensation, rehabilitation or symbolic measures for the victims.

The intangible nature of the heritage destroyed in Mali

Timbuktu is sometimes referred to as the ‘City of the 333 (Sufi) Saints’; these saints are believed to lie buried in its sixteen mausoleums. It also houses thousands of sacred manuscripts, many dating back to the 13th century, and contains three ancient mosques – Djingrayber, Sidi Yahia (both affected by the conflict) and Sankoré.³² Sufism, one of the many different currents within Islam, is accused by followers of Salafism (the creed espoused by fundamentalist groups) of being polytheist.³³ It was the so-called ‘idolatrous’ nature of these mausoleums and mosques that led to the destruction of several of them between May and July 2012.³⁴

Al Mahdi was instructed to observe the behavior of the local population and pilgrims at these sites, and to warn against their practices in an attempt to stop the religious rites.³⁵ For example, the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum was a popular destination for pilgrims from across Mali and beyond; the Alpha Moya Mausoleum was regularly visited by Muslims in order “to pray and make offerings;”³⁶ the Sheikh Mouhamad El Mikki Mausoleum represented “a place of spiritual retreat and reflection;”³⁷ and the two mausoleums attached to the Djingareyber Mosque were used twice a week for religious purposes.³⁸ As the Trial Chamber acknowledged, these sites:

were of great importance to the people of Timbuktu, who admired them and were attached to them. They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu.³⁹

One unprecedented aspect of the Al Mahdi case that deserves scrutiny is the attention paid to the impact that the destruction of the shrines and mosques had on the population of Timbuktu. During the confirmation of charges hearing, a crucial stage in the proceedings,⁴⁰ the Prosecution highlighted the intangible nature of cultural heritage. The early instruments applicable to armed conflicts, such as the 1907 IV Hague Regulations on the Laws and Customs of War on Land (1907 IV Hague Regulations) and the landmark 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), had not really taken this aspect into account. As the discourse of human rights became mainstream, the approach to cultural objects changed. Whereas, previously, it was common to refer to such buildings and objects as ‘cultural property’, now it is more

³² Direction Nationale du Patrimoine Culture & Ministère de la Culture, *Rapport: Etat actuel de conservation du bien Tombouctou* (République du Mali : Direction Nationale du Patrimoine Culture et Ministère de la Culture, 2014) at 2.

³³ Anna K Zajac, “Between Sufism and Salafism: The Rise of Salafi Tendencies After the Arab Spring and its Implications ” (2014) 29:2 *Hemispheres* at 97-98.

³⁴ ICC, *Situation in Mali: Article 53(1) Report* (16 January 2013) at 11.

³⁵ *Supra* note 11 at para 35.

³⁶ *Ibid* at para 38(iv).

³⁷ *Ibid* at para 38(v).

³⁸ *Ibid* at para 38(ix).

³⁹ *Ibid* at para 78.

⁴⁰ Put roughly, at the confirmation of charges, the Pre-Trial Chamber acts as a gatekeeper pronouncing on whether the case is admissible. Its decision is based, *inter alia*, on the gravity of the crime – See s 17 and 61 of the Rome Statute of the International Criminal Court, 17 July 1998, UN Doc A/CONF 183/9 [ICC Statute].

appropriate to refer to ‘cultural heritage’, an expression that captures its immaterial dimension.⁴¹

It has since become a truism that the tangible and intangible nature of cultural heritage are often two sides of the same coin. According to the Committee for Economic, Social and Cultural Rights, the right of everyone to “take part in cultural life” enshrined in Article 15(1)(c) of the Covenant on Economic, Social and Cultural Rights is “associated with the use of cultural goods”.⁴² Former UN Special Rapporteur on Cultural Rights, Farida Shaheed, was of the view that “access to and enjoyment of cultural heritage as a human right is a necessary and complementary approach to the preservation/safeguard[ing] of cultural heritage”.⁴³ The present Special Rapporteur, Karima Bennouna, has given priority to the intentional destruction of cultural heritage as a violation of human rights and, in a related report, has acknowledged that “cultural heritage is to be understood as the resources enabling the cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations”.⁴⁴ In line with this reasoning, UNESCO adopted two treaties emphasizing the immaterial side of cultural heritage: the Convention for the Safeguarding of the Intangible Cultural Heritage in 2003⁴⁵ and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.⁴⁶

It is often useful to acknowledge the intimate connection that generally exists between the material and immaterial dimensions of cultural heritage. For example, recognition of the symbolic weight of cultural heritage can play a crucial role in devising peace processes and reconciliation strategies.⁴⁷ The impact of the destruction of cultural heritage on individuals and the community is also relevant for determining the form and amount of reparations owed to victims, and for assessing the gravity of the crime when passing sentence. In fact, the Trial Chamber noted at the Al Mahdi trial that the “symbolic and emotional value for the inhabitants of Timbuktu [was] relevant in assessing the gravity of the crime committed”⁴⁸ and, given its world heritage listing, the attack also affected “people throughout Mali and the international community”.⁴⁹

In contrast to this general trend, however, focusing on the intangible side of cultural heritage during the confirmation of charges phase, as happened in the Al Mahdi case, is not a particularly helpful long-term strategy for the prosecution of such crimes. This anthropocentric focus, as we shall see, constitutes a legal innovation that is not only historically inaccurate but, most importantly, may narrow the scope of the protection afforded to tangible cultural heritage.

The Prosecution’s strategy at the confirmation of charges: “What is at stake here is not just walls and stones”

⁴¹ See Lyndel V Prott & Patrick J O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property?’” (1992) 1:2 *International Journal of Cultural Property* 307.

⁴² UN Committee on Economic, Social and Cultural Rights, *General comment no 21*, ESC 43rd, UN Doc E/C12/GC/21 (2009) at s 15(b).

⁴³ Farida Shaheed, *Report of the independent expert in the field of cultural rights Farida Shaheed*, HRC, 2011, A/HRC/17/38 at para 2.

⁴⁴ Karima Bennouna, *Report of the Special Rapporteur in the field of cultural rights*, HRC, 2016, A/HRC/31/59 at para 47.

⁴⁵ *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 1 (entered into force 20 April 2006), online: <treaties.un.org >.

⁴⁶ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 online: <treaties.un.org>.

⁴⁷ See Dacia Viejo-Rose, “Reconstructing Heritage in the Aftermath of Civil War: Re-Visioning the Nation and the Implications of International Involvement” (2013) 7:2 *Journal of Intervention and Statebuilding* 125; Marina Lostal & Emma Cunliffe, “Cultural heritage that heals: factoring in cultural heritage discourses in the Syrian peacebuilding process” (2016) 7:2-3 *The Historic Environment: Policy & Practice* 248.

⁴⁸ *Supra* note 11 at para 79.

⁴⁹ *Ibid* at para 80.

The confirmation of charges at the ICC is an initial part of the proceedings in which the Pre-Trial Chamber must determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”⁵⁰ and, if so, to confirm those charges. At this stage, the Pre-Trial Chamber may also pronounce on whether the case at hand meets the ‘gravity threshold’, according to which, if the case is not of sufficient gravity to justify further action by the Court, it will be declared inadmissible.⁵¹ In a previous instance, the Pre-Trial Chamber conceded that “all crimes that fall within the subject-matter jurisdiction of the Court [such as the destruction of cultural heritage] are serious”,⁵² but that the gravity threshold requirement acted as an “additional safeguard which prevents the Court from investigating, prosecuting and trying peripheral cases”.⁵³

Given that the Al Mahdi case represents a historical first, in that it was solely centred on the damage and destruction of cultural heritage, and taking into account the ICC’s current crisis of legitimacy,⁵⁴ the gravity threshold must have been a particular concern for the Office of the Prosecutor – even more so in light of the ongoing criticisms it received for devoting attention to a crime against property. Amnesty International and the International Federation for Human Rights, for example, expressed “some public reservations that the ICC had advanced his case while other crimes [in Mali], such as the murder, rape, and torture of civilians, had not received the same degree of attention”.⁵⁵ Perhaps wary of the perception that crimes against property are too detached from human suffering, the Chief Prosecutor of the ICC, Fatou Bensouda – immediately after the transfer of Al Mahdi to The Hague – referred to the attacks against the mausoleums as a “callous assault on the dignity and identity of entire populations, their religious and historical roots”,⁵⁶ and further added that “[t]he inhabitants of Northern Mali [are] the main victims of these attacks”.⁵⁷ This political statement acquired a legal dimension when the Prosecution followed this anthropocentric line of reasoning at the confirmation of charges hearing. Bensouda submitted:

Let us be clear: What is at stake here is not just walls and stones. The destroyed mausoleums were important from a religious point of view, from an historical point of view and from an identity point of view.⁵⁸

The Prosecution went on to address a number of necessary technical concerns, such as the five elements of the war crime against cultural heritage in relation to the accused,⁵⁹ and the modes of liability applicable to Al Mahdi.⁶⁰ However, this was placed in a context where the impact on human

⁵⁰ *ICC Statute, supra* note 39 at s 61(7).

⁵¹ *Ibid*, s 17(1)(d), 19.

⁵² *Decision Pursuant to article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09 Pre-Trial Chamber (31 March 2010) at para 56. The gravity test for admissibility purposes must not be confused with the considerations that the Trial Chamber makes in order to determine the appropriate sentence; these are two different tests.

⁵³ *Ibid*. See also Margaret M. de Guzman, “The International Criminal Court’s Gravity Jurisprudence at Ten” (2013) 12:3 *Global Studies Law Review* 475.

⁵⁴ Iain Macleod & Shehzad Charania, “Three challenges for the International Criminal Court” (16 November 2015), *OUPblog* (blog), online: <<https://blog.oup.com/2015/11/three-challenges-international-criminal-court/>>.

⁵⁵ Brian I Daniels, “Is the destruction of cultural property a war crime?”, *Apollo* (28 November 2016) online: <<https://www.apollo-magazine.com/is-the-destruction-of-cultural-property-a-war-crime/>>.

⁵⁶ Fatou Bensouda, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the transfer of the first suspect in the Mali investigation: “Intentional attacks against historic monuments and buildings dedicated to religion are grave crimes”* (26 September 2015), online: <<https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-26-09-2015>> (emphases added).

⁵⁷ *Ibid*.

⁵⁸ ICC, Al Mahdi Transcript of the Confirmation of Charges Hearing (1 March 2016) at 13.

⁵⁹ See Transcript of the Confirmation of Charges, *supra* note 58 at 73-79.

⁶⁰ *Ibid* at 80-95.

lives and human suffering was emphasized as the driving force behind the prosecution of the crime:

Madam President, your Honours, the Rome Statute prohibits and punishes the most reprehensible criminal acts: Crimes of genocide, crimes against humanity and war crimes. These crimes can be perpetrated in various forms, but they all have one common denominator: They inflict irreparable damage to the human persons in his or her body, mind, soul and identity.

[...]

Such an attack against buildings dedicated to religion and historic monuments falls into the category of crimes that destroy the roots of an entire people and profoundly and irremediably affect its social practices and structures. This is precisely why such acts constitute a crime under Article 8(2)(e)(iv) of the Rome Statute.⁶¹

Albeit politically strategic, affording such prominence to the intangible dimension of the destruction of cultural heritage at the confirmation of charges was historically inaccurate and, most importantly, potentially counterproductive for future prosecutions.

The History of the Prohibition of Attacks Against Cultural Heritage

Notwithstanding the Chief Prosecutor's statement, concrete human suffering and victimization are not the rationale behind the crime against cultural heritage as enshrined in the ICC Statute. Historically, the existence of this crime has not been linked to questions of identity, the human right to take part in cultural life, or freedom of thought or religion. In fact, the existence of a prohibition of attacks against cultural heritage predates the human rights movement altogether.

Emerich de Vattel, an 18th-century Swiss jurist and diplomat, began codifying the laws of war in his major work, *Les Droits des Gens* (1758). In paragraph 168, 'What things are to be spared', he identified the emergence of a new norm prohibiting the pillage and wanton destruction of cultural property:

For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength — such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste; and in that light Belisarius represented the matter to Tittila, king of the Goths. We still detest those barbarians who destroyed so many wonders of art, when they overran the Roman Empire.⁶²

Nevertheless, he also contended that if it was "necessary to destroy edifices of that nature in order to carry on the operations of war, or to advance the works in a siege, we have an undoubted right to take such a step".⁶³ This is essentially the dual approach that international law follows today in respect to cultural property. The basic rule of the 1954 Hague Convention is that cultural property and its surroundings shall not be made the object of an attack or be used for military purposes unless it is

⁶¹ *Ibid* at 12–13 (emphasis added). The confirmation of charges decision reached by the Pre-Trial Chamber took note of this anthropocentric turn of the crime against cultural heritage, observing that "the Buildings/Structures played an important role in the life of the inhabitants of Timbuktu and that their destruction was considered as a serious matter and regarded by the local population as an aggression towards their faith"; see Confirmation of Charges, *supra* note 29 at 39.

⁶² Emerich de Vattel, *Les Droits des Gens* (London: 1758) at para 168, cited in Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law* (Leiden: Martinus Nijhoff, 2014) at 17.

⁶³ *Ibid*.

required by military necessity.⁶⁴

This prohibition became binding instructions for the Union Army during the American Civil War when Abraham Lincoln sanctioned the so-called ‘Lieber Code’ of 1863. Article 35 stated that “classical works of art, libraries, scientific collections, or precious instruments ... must be secured against all avoidable injury”.⁶⁵ Later, in 1899, Tsar Nicholas II convened the First Hague Peace Conference whose goal was to revise the laws and customs of war laid down in the 1874 Brussels Declaration, an instrument that had never entered into force. The 1899 Annex to The Hague Convention (II) with Respect to the Laws and Customs of War on Land contained provisions demanding respect for institutions dedicated to religion, charity and education, the arts and sciences.⁶⁶ In 1907 a Second International Peace Conference revisited the laws and customs of war. These were adopted in the IV Hague Regulations, which now represent customary international law.⁶⁷ Article 27 of the 1907 IV Hague Regulations states:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.⁶⁸

There have been later instruments dedicated to the protection of cultural property in armed conflict, such as the 1954 Hague Convention and its 1999 Second Protocol, that are more comprehensive, but Article 27 of the 1907 IV Hague Regulations is the provision that inspired the definition of the war crime of directing attacks against cultural heritage that is enshrined in the ICC Statute. In 1907, however, a general acceptance of the concept of international human rights was decades away (i.e. 1948), and discourses on the intrinsic connection between the tangible and intangible aspects of cultural heritage only appeared around a century later (i.e. the adoption of the UNESCO Convention on Intangible Cultural Heritage took place in 2003). In fact, cultural heritage was not even a topic in and of itself. As such, the Chief Prosecutor’s affirmation in the Al Mahdi case that the profound effect wrought on a people’s social practices and structures “is precisely why such acts [of destruction] constitute a crime under Article 8(2)(e)(iv) of the Rome Statute” is a legal invention.⁶⁹

The ICC’s set of five conditions that need to be proven in order to establish whether a crime against cultural heritage has been committed present a tangible definition, and are thus more consistent with the legal past of this prohibition:

1. The perpetrator directed an attack;
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives;
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and

⁶⁴ 1954 Hague Convention on Cultural Property, 14 May 1954, 249 UNTS 240 art 4.

⁶⁵ General Orders No. 100 : The Lieber Code, *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 art 35.

⁶⁶ Laws and Customs of War on Land (Hague II); July 29, 1899, arts. 27 and 56.

⁶⁷ See UN Security Council, *Report of the Secretary-General (S/25704)*.

⁶⁸ International Conferences (The Hague), *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*, 18 October 1907.

⁶⁹ Transcript of the Confirmation of Charges, *supra* note 58 at 12.

wounded are collected, which were not military objectives, to be the object of the attack;

4. The conduct took place in the context of and was associated with an armed conflict not of an international character;

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁷⁰

It follows that inflicting harm or suffering on the population is immaterial to the existence of the crime of attacks against cultural heritage. Human suffering should not be put forward as a requirement to prove that the crime meets the gravity threshold for admissibility purposes as this would amount to revisiting the definition of the crime.

Moreover, if the anthropocentric reading espoused by the Office of the Prosecution took hold, the ICC (and all courts that follow its example) would potentially be turning a blind eye to episodes of damage and destruction that do not affect the social or cultural practices of a specific population. This is not an improbable scenario: it actually took place in 2001, when the Buddhas of Bamiyan in Afghanistan were destroyed.

The Buddhas of Bamiyan: The Destruction of Buddhist 'Idols' in a Muslim Country

The Buddhas of Bamiyan were two monumental statues – situated in the Bamiyan valley in Afghanistan – which had been placed on the Afghan Tentative List of World Heritage in expectation of entry in the renowned World Heritage List. It is estimated that they were built around the 5th century,⁷¹ and one may have been “the largest [standing] Buddha ... in the world”.⁷² At the feet of these gigantic statues lay a community of Buddhist monasteries, which welcomed worshippers and sightseers from around the world.⁷³ These monuments represented a historic cultural landmark for Buddhists and non-Buddhists alike for around 1,500 years, particularly during the golden era of the Silk Road.

In 2001, the Taliban had gained control over 90 percent of Afghanistan, and the situation had changed dramatically.⁷⁴ Taliban rule was noted for its “absolute lack of freedom of expression and [its] total ban on pictures”,⁷⁵ which it regarded as the products of infidel religions. Mullah Omar, leader of the Taliban at the time, encouraged the removal of all traces of non-Islamic cultural heritage from Afghan territory.⁷⁶ This policy was reinforced by the publication of a decree by the Afghan Supreme Court ordering the destruction of the Buddhas,⁷⁷ and the statues were consequently dynamited over a period of ten days in March 2001.

The international community reacted with shock and outrage. In 2003, UNESCO adopted the Declaration Concerning the Intentional Destruction of Cultural Heritage as an explicit reaction to the

⁷⁰ Elements of Crimes, Article 8(2)(e)(iv) “War crime of attacking protected objects” in Official Records of the Assembly of States\Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 .

⁷¹ Xinri Liu, *The Silk Road in World History* (New York: Oxford University Press, 2010) at 63.

⁷² Ilona Bartsch, *Bamiyan Buddhas* in *Encyclopedia of Global Archaeology*, ed by Claire Smith (New York: Springer, 2014) at 744.

⁷³ *Ibid.*

⁷⁴ Stephen Tanner, *Afghanistan: A Military History of Afghanistan from Alexander the Great to the War against the Taliban* (Boston: Da Capo Press, 2009) at 219.

⁷⁵ Francesco Francioni & Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law” (2003)14:4 *Eur J Intl L* 619 at 624.

⁷⁶ Pierre Centlivres, “The Controversy over the Buddhas of Bamiyan” (2008) 2 *South Asia Multidisciplinary Academic J* at 2.

⁷⁷ Francioni & Lenzerini, *supra* note 75 at 626.

“tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole”.⁷⁸

One statement in particular deserves attention here. The destruction of the Buddhas led the then-UNESCO Director-General, Koïchiro Matsuura, to speak of “crimes against culture”.⁷⁹ This was pure rhetoric. Firstly, the destruction of the Buddhas happened during peacetime and there is no crime against cultural heritage enforceable outside armed conflict, at least at the international level. Secondly, Afghanistan deposited its instrument of accession to the ICC Statute on 10 February 2003 and, in principle, the Court could only start exercising jurisdiction over crimes committed on its territory or by its nationals after 1 May 2003.

But what would happen if the destruction of the Buddhas occurred during an armed conflict today? In such a case, the ICC’s Office of the Prosecutor could launch an investigation, and if it did so, it would find that the destruction of the shrines in Mali and the Buddhas of Bamiyan share some relevant similarities. Both events represented acts of sheer iconoclasm and both followed a policy decreeing the removal of all ‘infidel’ traces. In relation to the Buddhas, the text of the Afghan Supreme Court decree clearly stated:

[T]hese idols have been gods of the infidels, and these are respected even now and perhaps maybe turned into gods again. The real God is only Allah, and all other false gods should be removed.⁸⁰

In a similar vein, a spokesperson for Ansar Dine reportedly declared in the aftermath of the destruction of the shrines in Mali: “There is no world heritage. It does not exist. Infidels must not get involved in our business.”⁸¹

While Timbuktu was added to the World Heritage List in 1988, the Buddhas of Bamiyan were part of the Afghan Tentative List of World Heritage⁸² and were missing a formal requirement for their definitive inscription on the World Heritage List at the time they were destroyed. However, technically speaking, the fact that a property constituting cultural heritage has not been included on the World Heritage List “shall in no way be construed to mean that it does not have an outstanding universal value”.⁸³ Thus, both sites represented cultural heritage of outstanding universal value and, as a consequence, its deterioration or disappearance equally constitute “a harmful impoverishment of the heritage of all the nations of the world”.⁸⁴

There is, however, a major difference between the two episodes: whereas the affected shrines in Timbuktu were used by the local population in their religious practices,⁸⁵ there are no records indicating the presence of Buddhism in Afghanistan after 1336.⁸⁶ The intangible dimension of the crime as understood by the Chief Prosecutor would therefore be missing in the case of the Buddhas: their

78 Declaration concerning the Intentional Destruction of Cultural Heritage, 32C/Res. 33, UNESCOR, 32nd Sess, (2003) preamble.

79 Francesco Bandarin, “Editorial” World Heritage Newsletter n. 30 (May-June 2001) at 1.

80 Cited in Francioni & Lenzerini, *supra* note 75 at 626.

81 Cited in Irina Bokova, “Culture in the Cross Hairs”, *The New York Times* (2 December 2012).

82 Tentative lists are inventories of properties that each State Party to the World Heritage Convention intend to present for nomination for the World Heritage List. The current Afghan tentative list can be accessed at <http://whc.unesco.org/en/statesparties/af> (last visited on 25 May 2017).

83 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, art 12.

84 *Ibid* at preamble.

85 *Supra* note 29 at para 36.

86 Hamid Wahed Alikuzai, *A Concise History of Afghanistan in 25 Volumes* (Bloomington, Indiana: Trafford Publishing, 2013) vol 14 at 123.

destruction could not affect the social practices and structures or the cultural roots of the local people. 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 in his or her body, mind, soul and identity”.⁸⁷ According to this reasoning, unlike the shrines of Timbuktu, the destruction of the Buddhas would not warrant prosecution as a war crime before the ICC.

Turning consequences for the local population into ingredients for the gravity threshold of the crime against cultural heritage may have the adverse effect of rendering instances of the destruction of sites protected under international law (due to their importance for the whole of humanity) inadmissible. For example, given the disappearance of the Mayan civilization, the (hypothetical) obliteration in armed conflict of the Mayan site of Chichen Itza in Mexico would not square with the reading proposed for this crime. The same would happen in the case of the destruction of the so-called ‘forgotten cities’ in Syria, a group of “40 villages grouped in eight parks situated in north-western Syria [which provide a] remarkable testimony to rural life in late Antiquity and during the Byzantine period”,⁸⁸ which, as their name suggests, were abandoned many centuries ago. What is more, if damage to social practices and structures was “precisely why such acts constitute a crime under Article 8(2)(e) (iv) of the Rome Statute”,⁸⁹ would it stop being a war crime if all the population agreed through a referendum to the defacing of statues or demolition of historical places of worship? Likewise, would it stop being a crime if the defence was able to prove that the population did not feel any attachment to the cultural properties? It is in no one’s interest to exclude such episodes from the definition of the crime and, for this reason, the Office of the Prosecution should avoid re-defining its boundaries.

In the judgment and sentence of Al Mahdi, Trial Chamber VII was relatively faithful to the history and legal contours of the crime.⁹⁰ It considered the symbolic and emotional value of the destroyed buildings for the inhabitants of Timbuktu as relevant in assessing the gravity of the crime and thus in determining the appropriate sentence.⁹¹ However, in so doing, the Chamber acknowledged that “even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons”.⁹²

Conclusion

The conflict in Mali is part of a larger pattern of conflicts taking place across the Sahel and the Middle East, including in Syria, Iraq and Libya. Despite their initially secular motivations (in the case of Mali, a Tuareg-led rebellion against the central administration in Bamako), these conflicts have been hijacked by fundamentalist groups with different names (Ansar Dine, AQIM, MUJAO, ISIS) but a similar purpose: that of imposing a new reading of society, order and religion on the populations of these regions. This necessitates the eradication and denial of their past and their identity, and entails the destruction (and looting) of cultural heritage.

In a context where the arsenal of war now includes the destruction of historical and religious sites, the Al Mahdi case has put the crime of directing attacks against cultural heritage back on the map and sent a clear warning of the legal consequences. It has provided a unique legal precedent, and legitimized the inclusion and treatment of such acts of destruction in other conflicts around the world as war crimes.

⁸⁷ Transcript of the Confirmation of Charges, *supra* note 57 at 12–13.

⁸⁸ UNESCO, *Ancient Villages of Northern Syria: Description*, online: <whc.unesco.org/en/list/1348>.

⁸⁹ Transcript of the Confirmation of Charges, *supra* note 57 at 12–13.

⁹⁰ *Supra* note 11 at paras 13–20.

⁹¹ *Ibid* at para 79.

⁹² *Ibid* at para 77.

Nevertheless, while the Prosecution was right to contend that the “intentional destruction of cultural property is by nature a serious crime”,⁹³ this destruction – contrary to the Prosecution’s submission – is not always “aimed at erasing the cultural identity and heritage of a population”.⁹⁴ Although it is a less widely known scenario, destruction of cultural property may also happen for reasons unrelated to a population’s identity and the wish to re-write history. For example, the Syrian armed forces bombarded the medieval fortress of Crac des Chevaliers (a Syrian world heritage site) in July 2013, but it did so in pursuit of its quest to reconquer the city of Homs.

Local peoples, more often than not, feel victimised by the looting, damage or disappearance of what they consider to be ‘their’ heritage. This is something that should not be neglected, and there are mechanisms within the ICC to ensure that the views of victims are heard throughout the proceedings and, if appropriate, that they are compensated for their loss. However, as this article argues, the anthropocentric reading of the Al Mahdi proceedings at the confirmation of charges stage merely paid lip service to the history behind this crime and compromised future prosecutions by limiting the ambit of its application.

⁹³ Prosecution’s submissions on sentencing, *supra* note 15 at 18.

⁹⁴ *Ibid.*