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# (In)tangible Ownership in the International Sphere

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## Cover

The cover image was taken by Arian Zwegers at Yogyakarta, a city on the island of Java in Indonesia. It depicts Wayang Kulit, which is a traditional form of theatre originated in Java and spread to other parts of Southeast Asia. This cultural art form was inscribed in 2008 on UNESCO's Representative List of the Intangible Cultural Heritage of Humanity (originally proclaimed in 2003). UNESCO reports that this art form, which uses flat shadow puppets made of leather, is believed to have survived in part because of its significance in criticizing social and political issues in addition to telling stories. We hope that this thematic issue contributes to encouraging dialogue on tangible and intangible ownership that has impacted people worldwide such as this one.

L'image de couverture a été prise par Arian Zwegers à Yogyakarta, une ville sur l'île de Java en Indonésie. Il dépeint Wayang Kulit, qui est une forme traditionnelle de théâtre originaire de Java et se propage aux d'autres parties de l'Asie du Sud-Est. Cette forme d'art culturel a été inscrite en 2008 sur la Liste représentative de l'UNESCO du patrimoine culturel immatériel de l'humanité (proclamée à l'origine en 2003). L'UNESCO rapporte que cette forme d'art, qui utilise des marionnettes à l'ombre plate en cuir, aurait survécu en partie en raison de sa signification en critiquant les problèmes sociaux et politiques en plus de raconter des histoires. Nous espérons que cette édition thématique contribue à encourager le dialogue sur la propriété matérielle et immatérielle qui a touché les gens du monde entier comme celui-ci.

La fotografía de la portada fue tomada por Arian Zwegers en Yogyakarta, una ciudad en la isla de Java en Indonesia. Representa el Wayang Kulit, que es una forma tradicional de teatro que se originó en Java y se extendió a otras partes del sudeste asiático. Esta forma de arte cultural fue inscrita en 2008 en la Lista Representativa de la UNESCO del Patrimonio Cultural Inmaterial de la Humanidad (proclamada originalmente en 2003). La UNESCO informa que se cree que esta forma de arte, que utiliza títeres de sombras planas hechas de cuero, ha sobrevivido en parte debido a su importancia en la crítica a cuestiones sociales y políticas, además de contar historias. Esperamos que esta edición temática contribuya a fomentar el diálogo sobre la propiedad tangible e intangible, el cual, al igual que esta, ha impactado a personas a través del mundo.

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# When Cultural Property Becomes a Tool of Warfare: Law, Politics, and International Security

*Helga Turku\**

## Abstract

Cultural property has increasingly become a target and a means of war used by extremists. The persistent cultural destruction and looting in the Middle East by ISIS is a new feature in the pathology of a radical group's behaviour toward cultural property. ISIS has both profited from the sale of antiquities and has used the destruction of cultural property as a means to dismantle the existence of nations and states. Prosecuting those who seek to sell antiquities to help finance terrorism should be part of the short-term security agenda. At the same time, future efforts for national reconciliation and peace-building will have to include narratives of a proud and rich past. As such, protection of cultural property is an important element for the long-term security in the region and beyond.

## *French translation*

Les biens culturels sont devenus de plus en plus un objectif et un moyen de guerre utilisé par les extrémistes. La destruction et le pillage culturels persistants au Moyen-Orient par ISIS est une nouvelle caractéristique de la pathologie du comportement d'un groupe radical envers les biens culturels. ISIS a profité de la vente des antiquités et a utilisé la destruction des biens culturels comme un moyen de démanteler l'existence des nations et des États. La poursuite de ceux qui cherchent à vendre des antiquités pour aider à financer le terrorisme devrait faire partie du programme de sécurité à court terme. En même temps, les efforts futurs pour la réconciliation nationale et la consolidation de la paix devront inclure des récits d'un passé fier et riche. En tant que telle, la protection des biens culturels est un élément important pour la sécurité à long terme dans la région et dans le monde.

## *Spanish translation*

Los extremistas han convertido el patrimonio cultural en un objetivo cada vez más frecuente de sus ataques y en un arma de guerra. La continuada destrucción y expoliación del patrimonio cultural en Oriente Próximo por parte del Estado Islámico es una novedad en la patología del comportamiento de los grupos extremistas con respecto al patrimonio cultural. En este artículo se postula que los ataques al patrimonio cultural deberían formar parte del orden del día de los planes seguridad tanto a corto como a largo plazo. El Estado Islámico se ha enriquecido con la venta de antigüedades y ha utilizado la destrucción del patrimonio cultural como un medio para acabar con la existencia de naciones y estados, por eso, la persecución de aquellos que quieren utilizar la venta de antigüedades para financiar el terrorismo debería formar parte de los planes de seguridad a corto plazo. Al mismo tiempo, los futuros esfuerzos de reconciliación nacional y consolidación de la paz deberían tener en

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consideración el rico y orgulloso pasado de los países afectados. Además, la protección del patrimonio cultural en sí mismo es un elemento importante para la seguridad a largo plazo dentro y fuera de la región.

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## 1. Introduction

Cultural property has increasingly become a target and a means of war used by extremists. The persistent cultural destruction and looting in the Middle East by the so-called Islamic State of Iraq and Syria (also known as ISIS, ISIL, the Islamic State, and Da'esh) has prompted wide condemnation and outrage throughout the world. Yet the destruction and theft of cultural property during war is not new, for civilizations have been the victims of cultural theft and destruction throughout history. However, ISIS' re-invented use of cultural property as part of their warfare is a new feature in the pathology of a radical group's behavior toward cultural property.

While other actors in the region have actively looted historical sites to finance their battles, ISIS is the most notorious because it has institutionalized such plunder and destruction. This article analyzes the theft and destruction of cultural property in conflict zones as a form of warfare, and argues that protection of cultural property should be part of the short-term and long-term international security agenda. First, this article discusses theoretical conceptualizations of cultural property. Second, it highlights the link between the destruction of cultural property and its use as a weapon of war and a means to finance it. Finally, it highlights existing international law provisions to protect cultural property and proposes new measures to safeguard it.

## 2. Framing cultural property in the scholarship

The idea that cultural property deserves a special treatment in property law is well established in the scholarship.<sup>1</sup> However, there are differences on how scholars view cultural heritage and cultural property, such as whether it belongs to a person, a group/nation, or humanity as a whole, or whether it should be freely traded or strictly regulated.

### *a. Cultural heritage or cultural property?*

There is little consensus as to the boundaries between “cultural property” and “cultural heritage”, and many scholars use these two terms interchangeably.<sup>2</sup> In theory, cultural heritage embodies a form of community in its manifestation and usage, while the term cultural property lends itself to a more formal ownership discourse. “Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors.”<sup>3</sup> Similarly, cultural heritage is inherited to safeguard and pass on to future generations.<sup>4</sup> Indeed, “[t]he real sense of heritage [...] is not so much in the possession of [an object], but in the act of passing on and receiving memories and knowledge.”<sup>5</sup> The real

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<sup>1</sup> See Eric A Posner, “The International Protection of Cultural Property: Some Skeptical Observations” (2006) Chicago Public Law & Leg Theory Working Paper No 141 1 at 11, online: <<http://www.law.uchicago.edu/academics/publiclaw/index.html>>.

<sup>2</sup> See Roger O’Keefe, “The Meaning of ‘Cultural Property’ Under the 1954 Hague Convention” (1999) 46 Netherlands Intl L Rev 26; Janet Blake notes that “[t]here exists a difficulty of interpretation of the core concepts of ‘Cultural heritage’ (or ‘cultural property’) and ‘cultural heritage of mankind’ and as yet no generally agreed definition of the content of these terms appears to exist.” Janet Blake, “On Defining the Cultural Heritage” (2000) 49 Intl & Comp L Q 61 at 62–63; Tatiana Flessas, “Cultural Property Defined, and Redefined as Nietzschean Aphorism” (2003) 24:3 Cardozo L Rev 1067 at 1070–73; Manlio Frigo, “Cultural Property v. Cultural Heritage: A ‘Battle of Concepts’ in International Law?” (2004) 86:854 Intl Rev Red Cross 367 at 369.

<sup>3</sup> Lyndel Prott & Patrick J O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property?’” (1992) 1 Intl J Cultural Prop 307 at 311; see also Derek Fincham, “The Distinctiveness of Property and Heritage” (2011) 115 Penn St L Rev 641 at 654.

<sup>4</sup> Blake, *supra* note 2, at 83.

<sup>5</sup> Laurajane Smith, *Uses of Heritage* (New York: Routledge, 2006) at 2.



grief of losing one's heritage comes from "the loss of the opportunity to pass it on, and the role it plays as both prop and prompt in the stories" about one's heritage.<sup>6</sup>

Cultural property, on the other hand, has a more narrow definition and can be described as a "sub-group"<sup>7</sup> to cultural heritage which is "capable of encompassing this [within its] much broader range of possible elements, including the intangibles."<sup>8</sup> Indeed, cultural property may be limited in scope, as it can prove "inadequate and inappropriate for the range of matters covered by the concept of [...] 'cultural heritage'."<sup>9</sup> However, the notion of "tangible" versus "intangible" heritage can be questioned because "[h]eritage only becomes 'heritage' when it becomes recognizable within a particular set of cultural or social values, which are themselves 'intangible'."<sup>10</sup> Any object, building, or place becomes tangible heritage when constituents, law, and polity assign a value to it.<sup>11</sup> The object itself possesses no inherent value that makes it cultural heritage; its purported value is a social construction. Indeed, tangible cultural heritage "can only be understood and interpreted through the intangible."<sup>12</sup> Some claim that all heritage can be conceptualized as intangible,<sup>13</sup> not only because it is a social construction, but also because of its impact on society's memory and knowledge.

Different international instruments use both the term cultural property and cultural heritage. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was the first international instrument to use the term "cultural property."<sup>14</sup> The 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>15</sup> also used this term and highlighted the fact that cultural property is important to a state, because it expresses the "collective genius of nationals of the State concerned."<sup>16</sup> While the International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects notably highlights the use of the term "cultural objects" over "cultural property,"<sup>17</sup> the latter remains widely used in the scholarship.<sup>18</sup>

The term "cultural heritage" is also used in various international agreements. The best known instrument that used this term is the 1972 Convention concerning the

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<sup>6</sup> *Ibid.*

<sup>7</sup> Frigo, *supra* note 2, at 369.

<sup>8</sup> Blake, *supra* note 2, at 67.

<sup>9</sup> Prott & O'Keefe, *supra* note 3, at 319.

<sup>10</sup> Laurajane Smith & Natsuko Akagawa, *Intangible Heritage* (New York: Routledge, 2009) at 6.

<sup>11</sup> *Ibid.*

<sup>12</sup> Dawson Munjeri, "Tangible and intangible heritage: from difference to convergence" (2004) 56:1–2 *Museum International* at 13.

<sup>13</sup> Smith, *supra* note 5.

<sup>14</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, 249 UNTS 240 (entered into force 13 March 1956) [1954 *Hague Convention*].

<sup>15</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 UNTS 231, 10 ILM 289 (entered into force 9 May 1972) [1970 *UNESCO Convention*].

<sup>16</sup> *Ibid.*, art 4(a).

<sup>17</sup> *Convention on the International Return of Stolen or Illegally Exported Cultural Objects*, UNIDROIT, 24 June 1995, 34 ILM 1322 [1995 *UNIDROIT Convention*].

<sup>18</sup> Frigo, *supra* note 2 at 368.



Protection of the World Cultural and Natural Heritage,<sup>19</sup> which followed the 1970 UNESCO Convention.<sup>20</sup> This Convention established the World Heritage Committee<sup>21</sup> which manages the World Heritage List.<sup>22</sup> Some critical observers of this List note that UNESCO is a project of cultural legitimization, thus recognizing, authorizing, validating, and universalizing certain cultural expressions as “heritage.”<sup>23</sup> By producing a list of world heritage, “[e]verything on the list, whatever its previous context, is now placed in a relationship with other masterpieces.”<sup>24</sup> Thus the list becomes a new context for all masterpieces in it. Two other examples of the use of heritage include, the 1992 European Convention on the Protection of the Archaeological Heritage,<sup>25</sup> and the 1985 Convention for the Protection of the Architectural Heritage of Europe.<sup>26</sup>

*b. Cultural property: national or cosmopolitan good?*

The terms “cultural property” and “cultural heritage” are not always compatible because “[i]n the same breath we commend national patrimony, regional and ethnic legacies, and a global heritage shared and sheltered in common.”<sup>27</sup> Indeed, “[a]ided and abetted by multiculturalism and the recognition of difference, cultural property has popularized a logic that tends to forcefully align ‘cultures’ with particular groups.”<sup>28</sup> John Henry Merryman, who strongly supports the idea of cultural property as a cosmopolitan good able to be shared by the international community, lamented the fact that during the 1970s and 1980s, “the dialogue about cultural property [...] bec[a]me one-sided. Retentive nationalism [was] strongly and confidently represented and supportively received wherever international cultural property policy [was] made.”<sup>29</sup> Indeed he clearly argues in favor of cultural internationalism, which he equates with “preservation, integrity and distribution/access.”<sup>30</sup>

Scholars have debated the idea of cultural property and whether it belongs to society as a whole or a particular group. The 1954 Hague Convention has some overlapping

<sup>19</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, UST 37 art 1 (entered into force 17 December, 1975) [1972 UNESCO Convention]; other recent, international instruments that use the term “heritage” include the *Convention for the Protection of Underwater Cultural Heritage*, Gen Con Res 2001, UNESCO, 31st Sess, 31 C./Res 15 (2001) at 50; *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 Oct 2003, 2368 UNTS 3 (entered into force 20 April 2006, UNESCO); *Declaration Concerning the Intentional Destruction of Cultural Heritage*, Gen Con 2003, UNESCO, 32nd Sess, 32 C./Res 15 (2003).

<sup>20</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, Nov. 14, 1970, 823 U.N.T.S. 231 [Preventing Illicit Import, Export and Transfer of Ownership].

<sup>21</sup> 1972 UNESCO Convention, *supra* note 19, art 8.

<sup>22</sup> *Ibid*, art 11(2).

<sup>23</sup> Smith, *supra* note 5 at 111.

<sup>24</sup> Barbera Kirshenblatt-Gimblett, “Intangible heritage as metacultural production” (2004) 56 *Museum International* at 57.

<sup>25</sup> *European Convention on the Protection of the Archaeological Heritage (Revised)*, 16 Jan 1992, 1966 UNTS 305 at art 1 (entered into force 25 May 1995).

<sup>26</sup> *Convention for the Protection of the Architectural Heritage of Europe*, 3 Oct 1985, 1496 UNTS 147, 25 ILM 380 at art 1 (entered into force 14 March 1988).

<sup>27</sup> David Lowenthal, *The Heritage Crusade and the Spoils of History* (Cambridge: Cambridge University Press, 1998) at 227.

<sup>28</sup> Naomi Mezey, “The Paradoxes of Cultural Property” (2007) 107 *Colum L Rev* 2004 at 2005.

<sup>29</sup> John Henry Merryman, “Two Ways of Thinking About Cultural Property” (1986) 80:4 *Am J Intl L* 831 at 850. In discussing the Hague 1954 and UNESCO 1970 conventions, Merryman distinguishes the meaning of the term ‘protect’ in each of them. He interprets the Hague 1954 to state that cultural property transcends national borders, meaning that humanity, not nations, is the party in interest. By contrast, the UNESCO 1970 is about national retention of cultural property and protection against removal. Thus, the latter was instrumental in the move for “repatriation”, that is, the return of cultural objects to the country of origin. These different emphases characterize two ways of thinking about cultural property, which he distinguishes as “cultural internationalism” and “cultural nationalism.”

<sup>30</sup> *Ibid* at 853.

tones on whether culture belongs to humanity as a whole or to a particular group of people. Specifically, it states 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.”<sup>31</sup> Indeed, some argue that the idea of cultural property has conflicting elements, namely “culture” and “property.”<sup>32</sup> The first element, “culture”, is a product of a group of people<sup>33</sup> and it signifies their values, history, and worldview. More importantly, culture can be potentially conceptualized as an intangible good. The idea of “property”, on the other hand, has material value attached to an individual rights-based legal principle.<sup>34</sup> The idea of a specific group of people owning cultural property indefinitely has been challenged by those who argue that property can be possessed, alienated, controlled and fixed by its owner, while culture cannot.<sup>35</sup> Moreover, “cultural property claims tend to fix culture, which if anything is unfixed, dynamic, and unstable.”<sup>36</sup> For some, this rigid conceptualization of cultural property in theory and practice “has so colonized the idea of culture that there is not much culture left in cultural property.”<sup>37</sup> Therefore, they advocate for a dynamic conceptualization of cultural property which “requires asking about the power, appropriation, and negotiation between groups” thus moving “away from fixing and preserving cultures and peoples and toward an interesting set of questions that flow from cultural change and contact.”<sup>38</sup> Other scholars also support the idea of a “living culture” and the need to safeguard a mutable heritage, without freezing or fossilizing it.<sup>39</sup>

Within the spectrum of cultural property and property rights debate, some scholars, such as Eric Posner, believe that cultural property would be better served if we strip it of any significance and deregulate the market. He advocates that most cultural property should be viewed/treated like regular property, which would in turn decrease its trade in the black market.<sup>40</sup> Yet objects embody culture<sup>41</sup> and do carry a significant meaning. By stripping cultural property of its cultural significance, the object “would be merely property, more or less beautiful or rare and more or less valuable on the basis of that beauty or rarity only.”<sup>42</sup> In conceptualizing cultural property as simply property the scholarship runs the danger of stripping it from context and impeding upon larger issues of group identity.<sup>43</sup> The two are not mutually exclusive and the concept of cultural property should integrate both its

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<sup>31</sup> *Supra* note 14.

<sup>32</sup> Patty Gerstenblith, “Identity and Cultural Property: The Protection of Cultural Property in the United States” (1995) 75 B U L Rev 559 at 567.

<sup>33</sup> *Ibid* at 561–62, 566.

<sup>34</sup> *Ibid* at 567.

<sup>35</sup> *Supra* note 28.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* at 2006.

<sup>39</sup> See Peter JM Nas, “Masterpieces of Oral and Intangible Culture: Reflections on the UNESCO World Heritage List” (2002) 43:1 Current Anthropology 139 at 140; Jean-Loup Amselle, “Intangible Heritage and Contemporary African Art” (2004) 56:1-2 Museum International 84 at 89; Lourdes Arizpe “Intangible Cultural Heritage, Diversity and Coherence” (2004) 56:1-2 Museum International 130 at 131.

<sup>40</sup> Posner, *supra* note 1 at 11.

<sup>41</sup> See John Henry Merryman, “‘Protection’ of the Cultural ‘Heritage’?” (1990) 38:1 Am J Comp L 513.

<sup>42</sup> Roger W Mastalir, “A Proposal for Protecting the ‘Cultural’ and ‘Property’ Aspects of Cultural Property under International Law” (1992) 16 Fordham Intl LJ 1033 at 1039.

<sup>43</sup> See Kristen A Carpenter, Sonia K Katyal & Angela R Riley, “In Defense of Property” (2008) 118 Yale LJ 1022 at 1046.

“humanness and its thingness”<sup>44</sup> because this concept reflects “intellectual and social forces.”<sup>45</sup>

Cultural property often is used to legitimize or delegitimize interests. The idea that history is necessary for national identity is well established in the international relations literature.<sup>46</sup> However, there are questions on whether such historical pasts are real or invented. For example, Eric Hobsbawm coined the phrase “invented traditions” to allude to the fact that stories used to build nations may be fabricated.<sup>47</sup> Yet it is imperative to understand that whether or not the past is factually true or has added fabrications, once a particular group of people subscribes to it and accepts it as true, it has profound significance and meaning.<sup>48</sup> More importantly, when historical sites, objects, sculptures, buildings, paintings, and symbols corroborate with such historical accounts, cultural property has heightened significance. The very idea of identity is a narrative/discourse that is spatially and temporally articulated through collective understanding of what unites a group of people. The study of a society’s art, history, and culture facilitates this process.<sup>49</sup>

### 3. Cultural property looted and destroyed as a component of warfare

Whether we take the classic view of property law focusing on the predictability and certainty of protecting the individual owner’s rights of exclusion and alienation primarily for wealth-maximization purposes or the more fluid approach to cultural ownership, scholars/policymakers across the spectrum would condemn its theft and destruction. The recent strategic destruction and theft of cultural property in Iraq and Syria further validates the fact that cultural property is important to the survival of a nation, and it is precisely why it is being attacked. In an attempt to destroy the state, the people, and their history, ISIS has systemically attacked religious (Christian, Shia, and Sunni significance) and other pre-Islamic sites, looted these sites to finance its reign of terror and destroyed them for propaganda value and attention.<sup>50</sup>

<sup>44</sup> Craig Anthony Arnold, “The Reconstitution of Property: Property as a Web of Interests” (2002) 266 Harv Envtl L Rev 281 at 284.

<sup>45</sup> *Ibid* at 289.

<sup>46</sup> See Anthony D Smith, *Myths and Memories of the Nation* (Oxford: Oxford University Press, 1999); Benedict R O’G Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 3rd. 2006).

<sup>47</sup> Eric Hobsbawm, “Introduction: Inventing Traditions” in Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (New York: Cambridge University Press, 1992) 1 at 13–14.

<sup>48</sup> For example, the Albanians are the descendants of the ancient Illyrians. See Miranda Vickers, *The Albanians: a Modern History* (London: I.B. Tauris, 1995); Miranda Vickers, *Between Serb and Albanian: A History of Kosovo* (New York: Columbia University Press, 1998); Neritan Ceka, *The Illyrians to the Albanians*, 2nd ed (Tirana: Migjeni, 2013) (all providing archeological and historical evidence supporting this claim); Serbian scholars question this assertion, acknowledging that such inquiry is irrelevant to the cohesion of contemporary Albanian identity and its acceptance of the Illyrian theory. The same can be said for the Serbian claim that Kosovo is the cradle of their civilization, dating back to the 13<sup>th</sup> century. See Dušan T Bataković, *Serbia’s Kosovo Drama: A Historical Perspective* (Belgrade: Čigoja Štampa, 2012) at 21, 17.

<sup>49</sup> Paul M Bator, “An Essay on the International Trade in Art” (1981) 34:2 Stan L Rev 275 at 295.

<sup>50</sup> Sarah Almukhtar, “The Strategy Behind the Islamic State’s Destruction of Ancient Sites”, *New York Times* (28 March 2016), online: <[www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html](http://www.nytimes.com/interactive/2015/06/29/world/middleeast/isis-historic-sites-control.html)>.

Indeed, extremist groups that are looting and destroying cultural property/heritage in war zones are exercising what they see as their divine right to destroy other cultures.<sup>51</sup> They are using both the tangible (title, exclusion, alienability, commodification, and commensurability) and intangible (national/ethnic identity, heritage, religion, and tradition) aspects of cultural property to both finance and disseminate their worldview. The theft and destruction of cultural property during war is not new, but ISIS' organized and institutionalized attacks on cultural property deserve a critical observation.

*a. Theft of cultural property to finance terrorism*

Historical sites are not only being destroyed for ideological purposes but also to raise money for terrorist activities. Despite the fact that other groups are also involved, ISIS is the most notorious actor in this activity because it has institutionalized the process. An investigative article by The Wall Street Journal reports that trafficking in antiquities was ISIS' "second-largest source of finance after oil" in 2015.<sup>52</sup> The estimates on the value of this enterprise are said to be between a few million<sup>53</sup> to hundreds of millions<sup>54</sup> of dollars.

Regional reports support the claim that ISIS has profited from trafficking of antiquities. In 2014, Iraq officials claimed that ISIS had taken millions from the al-Nabuk region.<sup>55</sup> The United Nation Security Council's (UNSC) Al Qaeda Analytical Support and Sanctions Monitoring Team also stated that ISIS' involvement in trafficking of antiquities "has become more systematic and organized."<sup>56</sup>

Specifically, ISIS began issuing licenses for plundering sometime in 2014-2015. Its Natural Resources department (*Diwan al-Rikaz*) had an Antiquities Division Unit designed to search known archeological sites, explore new sites and sell looted antiquities. When the United States (US) Special Forces raided Abu Sayyaf's compound (ISIS' chief financial

<sup>51</sup> In September 2015, Ahmad Al Faqi Al Mahdi (a member of Ansar Dine, a branch of Al Qaeda in Mali) was arrested pursuant to an ICC warrant for destroying cultural and religious sites in Mali. See *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Decision on the Confirmation of Charges (24 March 2016) at para 18 (International Criminal Court), online: <www.icc-cpi.int>; see also Mark Kersten, "Prosecuting the Destruction of Shrines at the ICC—A Clash of Civilizations?" (4 March 2016), *Justice in Conflict* (blog), online: <justiceinconflict.org/2016/03/04/> (one of his defense attorneys argues that "[f]undamentalism is a political plan or project and . . . a political project that is not a crime . . . [Al Mahdi was] seeking the means to allow his conception of good over evil to prevail . . . We're talking about two visions of the world that are in contradiction"); see also Geoffrey York, "ICC trial on destruction of Timbuktu shrines debates meaning of Islam", *The Globe and Mail* (1 March 2016), online: <www.theglobeandmail.com/news/world/icc-trial-on-destruction-of-timbuktu-shrines-debatesmeaning-of-islam/article28989152/>.

<sup>52</sup> Joe Parkinson, Ayla Albayrak & Duncan Mavin, "Syrian 'Monuments Men' Race to Protect Antiquities as Looting Bankrolls Terror", *The Wall Street Journal* (10 February 2015) online: <www.wsj.com/articles/syrian-monuments-men-race-to-protect-antiquities-as-looting-bankrolls-terror-1423615241>; See also "Terrorist Financing and the Islamic State," testimony of Matthew Levitt, Director, Stein Program on Counterterrorism and Intelligence, Washington Institute for Near East Policy, to the House Committee on Financial Services, November 13, 2014, online: <https://www.washingtoninstitute.org/uploads/Documents/testimony/LevittTestimony20141113.pdf>.

<sup>53</sup> Andrew Keller, "Documenting ISIL's Antiquities Trafficking: The Looting and Destruction of Iraqi and Syrian Cultural Heritage: What We Know and What Can Be Done" (2015 Economic and Business Affairs Remarks delivered at the Metropolitan Museum of Art, New York, 29 September 2015), online: <www.state.gov/e/eb/rls/rm/2015/247610.htm> [*Documenting ISIL*]. ("The U.S. government assesses that ISIL has probably earned several million dollars from antiquities sales since mid-2014, but the precise amount is unknown.")

<sup>54</sup> UNSC, V Churkin, *Letter dated 31 March 2016 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council: Smuggling of antiquities by the international terrorist organization Islamic State in Iraq and the Levant*, UN Doc S/2016/298, 31 March 2016 at 2 [*Russian Letter to the UN*]. ("The profit derived by the Islamists from the illicit trade in antiquities and archaeological treasures is estimated at US\$150-200 million per year.")

<sup>55</sup> Martin Chulov, "How an Arrest in Iraq Revealed Isis's \$2bn Jihadist Network", *The Guardian* (15 June 2014), online: <http://www.theguardian.com/world/2014/jun/15/iraq-isis-arrest-jihadists-wealth-power>. It should be noted that archaeologists familiar with this region dispute the accuracy of this claim.

<sup>56</sup> Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities, *The Islamic State in Iraq and the Levant and the Al-Nusra Front for the People of the Levant: Report and Recommendations Submitted Pursuant to Resolution 2170*, UNSCOR, 69th Sess, UN Doc S/2014/815 (2014).

officer), they found actual artifacts in his possession. Given that the artifacts were intact and had been carefully photographed, the US Department of State believes they were for sale.<sup>57</sup> The Russian authorities also agree with this claim, stating that antiquities are “offered to collectors from various countries, generally through Internet auction sites such as eBay and specialized online stores... [ISIS is] exploiting the potential of social media more and more frequently so as to cut out the middleman and sell artefacts directly to buyers.”<sup>58</sup> Officials involved in counterterrorism state that “[ISIS] is now selling looted antiquities worth millions of pounds directly to western collectors.”<sup>59</sup>

Moreover, ISIS did not only collect a 20% tariff on looted antiquities,<sup>60</sup> but it also exercised control over the trade by providing authorizations to ensure maximum profit.<sup>61</sup> Only certain individuals were allowed to excavate or supervise the excavation of historical sites. ISIS also detained and punished anyone searching for antiquities without the proper Diwan of Natural Resources stamped permit. If someone attempted to remove artifacts without a proper stamped permit, ISIS is known to have confiscated and destroyed such contraband antiquities.<sup>62</sup> For example, in July 2015, ISIS released images of its militants destroying statutes looted from Palmyra without proper ISIS authorization. The alleged smuggler was publicly whipped in order to warn others of the consequences of operating without ISIS approval.<sup>63</sup>

#### *b. Cultural property and propaganda warfare*

ISIS’ visual representations of their ideology, atrocities and destruction have portrayed their worldview and highlighted the relationship between terror and cultural cleansing. Images have been a critical element of propaganda, recruiting, advertising, and other purported objectives. Doctored with the right visual effects, sounds, and lighting, these videos and images were packaged to create an emotional impact. This ideological frame of reality has served as a medium to facilitate/enable a controlled/structured form of transmitting ISIS’ worldview. Such cognitive frames appear to encumber categories of meaning about life and death, god, state, and nation. Their function and utility are calibrated to portray a measured amount of horror, pain, and suffering blended with their ideological message and utopia. “Photographs really are experience captured, and the camera is the ideal arm of consciousness in its acquisitive mood. ...[They create] a [...] relation to the world that feels like knowledge—and, therefore, like power.”<sup>64</sup> Therefore, armed with the enough social media savviness, ISIS is promulgating its ideology by exercising power over the image captured.

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<sup>57</sup> *Documenting ISIL*, *supra* note 53.

<sup>58</sup> *Russian Letter to the UN*, *supra* note 54 at 2.

<sup>59</sup> Oliver Moody, “ISIS Fills War Chest by Selling Looted Antiquities to the West”, *The Times* (17 December 2014), online: <<http://www.thetimes.co.uk/tto/news/world/middleeast/article4299572.ece>>.

<sup>60</sup> *United States of America v. One Gold Ring with Carved Gemstone, An Asset of ISIL Discovered on Electronic Media of Abu Sayyaf, President of ISIL Antiquities Department et al.* (16-cv-02442-TFH) at para 15.

<sup>61</sup> *Ibid* at paras 12–13.

<sup>62</sup> *Ibid* at para 13; “Islamic State militants ‘destroy Palmyra statues’”, *BBC* (2 July 2015), online: <<http://www.bbc.com/news/world-middle-east-33369701>>; US, Terrorist Financing: Kidnapping, Antiquities Trafficking, and Private Donations: Hearing Before the House of Foreign Relations Subcommittee on Terrorism, Non-proliferation and Trade, 114 Cong (Washington DC: US Government Printing Office, 2015) (Michael D Danti).

<sup>63</sup> Gianluca Mezzofiore, “ISIS: Islamic State Militants Publicly Destroy Smuggled Palmyran Statues”, *International Business Times* (2 July 2015), online: <<http://www.ibtimes.co.uk/isis-islamic-state-militants-publicly-destroy-smuggled-palmyran-statues-1509038>>.

<sup>64</sup> Susan Sontag, *On Photography*, 4th ed (New York: Farrar, Strauss and Giroux, 1973) at 3–4.

Due to the fact that there is no inside/outside demarcation of identity – as ISIS soldiers are a blend of local/foreign fighters and the local population are mostly fellow Muslims – the quest to create an identity within their realm of operation foments a need to find enemy targets within the local population and its culture/heritage. Interestingly, the large majority of ISIS’ cultural attacks have been against Islamic sites.<sup>65</sup> Elements that epitomize diversity represent a way to introduce that much needed delineation between us/ them in order to create cohesiveness within ISIS’ domain. In defining themselves by what they fight against, extremists make possible the otherwise paradoxical deployment of death and destruction within their controlled areas.

*c. Attacks on cultural property as an intent to annihilate religious diversity*

The violent acts toward cultural diversity and cultural property show new features in the pathology of a radical group’s behavior toward them. The demolition of cultural property is not linked to a military objective but rather inspired by sheer will to eradicate historical manifestations of religious or spiritual expression that do not correspond to the extreme religious views of the Taliban, ISIS, Al-Qaeda, or others. Unlike traditional warfare, where damage to cultural heritage affects the enemy’s property, here these cultural terrorist acts are partly conducted by locals themselves.<sup>66</sup> More importantly, the destruction of cultural heritage by these radical groups is not a collateral effect of armed conflict, but rather a carefully planned and documented process of destruction, often timed for the greatest propaganda value.<sup>67</sup>

In recent history, one of the first terrorist groups that destroyed cultural property for religious propaganda purposes was the Taliban. In March 2001, the international community watched in dismay as the Taliban in Afghanistan destroyed the Buddhas of Bamiyan, built in 507-554 CE, in an attempt to crack down on “un-Islamic” segments of Afghan society.<sup>68</sup> Mullah Mohammad Omar, a Taliban militia leader, explained the destruction as follows: “Based on the verdict of the clergymen and the decision of the supreme court of the Islamic emirate all the statues around Afghanistan must be destroyed [...] Because God is one God and these statues are there to be worshipped and that is wrong. They should be destroyed so that they are not worshipped now or in the future.” Sadly, Mullah Omar’s order was only one amongst a long line of such decrees implemented by the Taliban at the time.<sup>69</sup> According to the Online Center of Afghan Studies, the destruction of the two Buddhas was not an isolated incident, but a carefully planned

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<sup>65</sup> Kristin Romey, “ISIS Destruction of Ancient Sites Hits Mostly Muslim Targets”, *National Geographic* (2 July 2015) online: <<http://news.nationalgeographic.com/2015/07/150702-ISIS-Palmyra-destruction-salafism-sunni-shiite-sufi-Islamic-State/>>.

<sup>66</sup> Extremist uprisings in this region unfortunately have found a somewhat sympathetic audience in some areas. Visiting the front lines between the Iraqi military and the Islamic State (IS), Elliot Ackerman notes that ISIS is effective in regions with a Sunni Arab majority because “[i]n these places...the population rises up with the militants, fighting alongside them.” See Elliot Ackerman, “Eight Men, and One Gun, on the Iraqi Front”, *The New Yorker* (17 November 2014), online: <<http://www.newyorker.com/news/news-desk/eight-men-one-gun-front>>. Other groups involved in the trafficking and/or looting of antiquities in various capacities and degrees are: Al-Nusrah Front for the People of the Levant (an Al Qaeda affiliate in Syria), the Bashar Al-Assad regime, Hesbollah, and most non-state actors involved in the Syrian conflict. See US House of Representatives Committee on Financial Services, Preventing Cultural Genocide: Countering the Plunder and Sale of Priceless Cultural Antiquities by ISIS (19 April 2016) online: <[http://financialservices.house.gov/uploadedfiles/041916\\_tf\\_supplemental\\_hearing\\_memo.pdf](http://financialservices.house.gov/uploadedfiles/041916_tf_supplemental_hearing_memo.pdf)>.

<sup>67</sup> See Francesco Francioni & Federico Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law” (2003) 14:4 EJIL 619 at 621 (explaining Taliban’s orchestrated destruction of the Buddhas of Bamiyan as a form of defiance against the international community and their morals). [Francioni & Lenzerini, “The Destruction of the Buddhas”]

<sup>68</sup> “Bamiyan destroyed by Taliban”, *BBC News* (12 November 2001), online: <[http://news.bbc.co.uk/2/hi/south\\_asia/1654085.stm](http://news.bbc.co.uk/2/hi/south_asia/1654085.stm)>.

<sup>69</sup> Rory McCarthy, “Taliban Orders All Statues Destroyed”, *The Guardian* (27 February 2011), online: <<http://www.theguardian.com/world/2001/feb/27/afghanistan.rorymccarthy>>.

systematic move to eradicate ancient Afghan cultural heritage in its entirety.<sup>70</sup> Interestingly, the Taliban has not only destroyed cultural property but might have profited from it. In 2010, the Counter Terrorism Center at West Point also noted that United Arab Emirates-based businessmen “who smuggle precious stone, sculptures, and other historic artifacts” contributed to Haqqani Network and paid dues to the Taliban “to avoid trouble on the road.”<sup>71</sup>

Similar to the Taliban’s destruction of pre-Islamic heritage in Afghanistan, ISIS also systematically destroyed and looted historical sites within their self-styled caliphate, which spanned across Iraq-Syria border.<sup>72</sup> In 2014, ISIS militants demolished a revered Muslim/Christian/Jewish shrine, which is thought to be the burial place of the prophet Younis, or Jonah in Mosul, Iraq.<sup>73</sup> This site is mentioned in the Hebrew and Christian Bible and Qur’an, and the mosque itself was built on an archaeological site dating back to the 8<sup>th</sup> century BCE.<sup>74</sup> ISIS militants destroyed the mosque because, to them, it “had become a place for apostasy, not prayer.”<sup>75</sup> Unfortunately, the Tomb of Jonah was not just a sacred place for people of different faiths, but also a symbol of tolerance and shared traditions.<sup>76</sup> In their perverse reality, extremists perceived this symbol of tolerance as a threat to their “new world order.”

In trying to establish its ultraconservative faith, ISIS has destroyed cultural artifacts including Sunni, Shia and Sufi sites. Although ISIS claims to adhere to the Sunni branch of Islam, they have destroyed multiple Sunni shrines, targeting any place they deem “un-Islamic.”<sup>77</sup> Indeed, Michael D Danti asserts that “[ISIS] primary target is [...] the ‘near enemy,’ [which is] anyone other than Salafist Sunni Muslims.”<sup>78</sup> This list of religious sites that have been destroyed since ISIS’ rise is long but these are a few highlights: Imam Dur Shrine in Salah-e-Din built in the 11<sup>th</sup> century CE and considered as one of the emblematic representations of Islamic architecture of its time;<sup>79</sup> Mosul’s 1,800-year-old church; the Green Church in Tikrit, one of the oldest Christian churches in the Middle East; and the

<sup>70</sup> Francesco Francioni & Federico Lenzerini, “The Obligation to Prevent and Avoid Destruction of Cultural Heritage: From Bamiyan to Iraq”, in *Art and Cultural Heritage: Law, Policy and Practice*, Barbara T. Hoffman ed. (Cambridge: Cambridge University Press 2006) at 32; Francioni & Lenzerini, “The Destruction of the Buddhas”, *supra* note 67 at 619.

<sup>71</sup> Gretchen Peters, *Crime and Insurgency in Tribal Afghanistan and Pakistan*, ed. by Don Rassler (West Point: Harmony Program, 2010) at 36–37.

<sup>72</sup> Different military forces are engaging ISIS in the battlefield. The situation is very fluid, and it is difficult to estimate what ISIS controls at this given time. However, during 2014–2015, ISIS did control large territories in Iraq and Syria, including UNESCO World Heritage and other registered archeological sites. See “IS ‘loses more than a quarter of its territory’ in Syria and Iraq”, *BBC* (9 October 2016) online: <http://www.bbc.com/news/world-middle-east-37588882>; “6 out of 6: ALL of Syria’s UNESCO Heritage Sites damaged or destroyed during civil war”, *Reuters* (15 March 2015) online: <<https://www.rt.com/news/335619-syria-unesco-heritage-damage/>>.

<sup>73</sup> Dana Ford and Mohammed Tawfeeq, “Extremists destroy Jonah’s tomb, officials say”, *CNN* (25 July 2014) <http://www.cnn.com/2014/07/24/world/iraq-violence/>; “Isis blows up shrine in Iraqi city of Mosul”, *BBC* (25 July 2014) online: <<http://www.bbc.com/news/world-middle-east-28485029>>.

<sup>74</sup> “ISIS Militants Blow Up Jonah’s Tomb”, *The Guardian* (14 July 2014), online: <<http://www.theguardian.com/world/2014/jul/24/isis-militants-blow-up-jonah-tomb>>.

<sup>75</sup> *Ibid.*

<sup>76</sup> Justin Moyer, “After Leveling Iraq’s Tomb of Jonah, the Islamic State Could Destroy ‘Anything in the Bible’”, *The Washington Post* (25 July 2014), online: <<https://www.washingtonpost.com/news/morning-mix/wp/2014/07/25/after-leveling-iraqs-tomb-of-jonah-the-islamic-state-could-destroy-anything-in-the-bible/>>.

<sup>77</sup> Yasmine Hafiz, “ISIS Destroys Jonah’s Tomb in Mosul, Iraq, as Militant Violence Continues”, *Huffington Post* (25 July 2014), online: <[http://www.huffingtonpost.com/2014/07/25/isis-jonah-tomb\\_n\\_5620520.html](http://www.huffingtonpost.com/2014/07/25/isis-jonah-tomb_n_5620520.html)>.

<sup>78</sup> Kristin Romey, “Why ISIS Hates Archaeology and Blew Up Ancient Iraqi Palace”, *National Geographic* (14 April 2015), online: <<http://news.nationalgeographic.com/2015/04/150414-why-islamic-state-destroyed-assyrian-palace-nimrud-iraq-video-isis-isis-archaeology/>>.

<sup>79</sup> “Iraq: condemning destruction of shrine, UNESCO urges end to ‘cultural cleansing’”, *UN News Centre* (28 October 2014) online: <<http://www.un.org/apps/news/story.asp?NewsID=49187#.WHsNDbYrjE4>>.



mosque of Al Arbain—a historic site for Iraq’s Shia Muslim minority.<sup>80</sup> They also replaced the crosses on Mosul’s Syrian Orthodox cathedral with black flags.<sup>81</sup>

*d. Attacks on cultural property as an intent to destroy national identity*

In its own magazine, *Dabiq*, ISIS publicized the destruction of historical/religious sites as part of their plan to destroy the “nationalist agenda” they deem that the cultural heritage signifies.<sup>82</sup> This magazine highlights ISIS’ view on culture and national pride, in that “[t]he kuffār [unbelievers] had unearthed these statues and ruins in recent generations and attempted to portray them as part of a cultural heritage and identity that the Muslims of Iraq should embrace and be proud of.”<sup>83</sup> While its propaganda may attempt to portray the destruction of antiquities as part of ISIS’ strict adherence to religious ideology, it may in fact be a simple tool to advertise, capture international headlines, show their dominance, thus appealing to young recruits, and create shock value.<sup>84</sup> Unfortunately, the region is considered the “center of the world for every great empire recorded in human history...[We are witnessing] successive generations of history all in one place, all being destroyed at once.”<sup>85</sup> Camouflaging its distorted worldview with religious scriptures, ISIS is not only destroying multiple layers of history; it is doing so with intent to erase these peoples’ identities. Indeed, just before destroying the Northwest Palace at Nimrud, constructed in the ninth century BCE by the Assyrian King Ashurnasirpal II, an ISIS militants said: “Whenever we take control of a piece of land, we remove the symbols of polytheism and spread monotheism in it.”<sup>86</sup>

Cultural objects are the basis of cultural memory, in that “the monument expresses the profound psychology of generations.”<sup>87</sup> By destroying history, culture, and memory, ISIS is attempting “to erase the identity”<sup>88</sup> of the people in the region. The extremist Sunni militant group is conducting a systemic “cultural cleansing”<sup>89</sup> through its destruction of churches, shrines, historical buildings, and ancient manuscripts in areas it controls, as well as plundering historical sites to sell artifacts abroad.

In trying to establish its ultraconservative faith and a new order that adheres blindly to such rule, ISIS has destroyed some of the historical jewels of the region. ISIS has destroyed temples, tombs, and statues in Nimrud, Hatra, and Palmyra, among many other

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<sup>80</sup> Madeleine Grant, “Head of UNESCO Accuses ISIS of Trying to ‘Delete’ Civilizations”, *Newsweek* (14 November 2014), online: <<http://www.newsweek.com/head-unesco-compares-isis-methods-nazis-brands-destruction-archeological-sites-284456>>.

<sup>81</sup> Lucy Westcott, “ISIS Destroys Mosques and Shrines in Iraq”, *Newsweek* (8 July 2014), online: <<http://www.newsweek.com/isis-destroys-shiite-mosques-and-shrines-iraq-257683>>.

<sup>82</sup> David Roberts, “Why IS Militants Destroy Ancient Sites”, *BBC News* (1 September 2015), online: <<http://www.bbc.com/news/world-middle-east-34112593>>.

<sup>83</sup> Romey, *supra* note 78.

<sup>84</sup> Roberts, *supra* note 82.

<sup>85</sup> Graham Bowley, “Antiquities Lost, Casualties of War; In Syria and Iraq, Trying to Protect a Heritage at Risk”, *The New York Times* (3 October 2014), online: <<http://www.nytimes.com>> (quoting Candida Moss, professor of New Testament and early Christianity at the University of Notre Dame).

<sup>86</sup> Romey, *supra* note 78,

<sup>87</sup> Pierre de Lagarde, *La mémoire des Pierres* (Paris: Albin Michel, 1979) at 11.

<sup>88</sup> Grant, *supra* note 80.

<sup>89</sup> “Director-General of UNESCO Irina Bokova condemns the destruction of the Imam Dur Shrine in Iraq”, *UNESCO* (27 October 2014), online: <<http://en.unesco.org/news>>.

sites.<sup>90</sup> One could argue that extremists are employing “a kind of cultural cleansing that undermines the morale of the communities they invade,”<sup>91</sup> attempting to instill fear and obedience, thus breaking the will to resist.

Questions can be raised as to whether the pre-Islamic Roman Era ruins of Palmyra<sup>92</sup> or the Assyrian city of Nimrud have anything in common with the predominantly Arab population that inhabits the region today.<sup>93</sup> Similarly, do the great Buddhas of Bamiyan represent the Afghani heritage as a whole or in part? Or do these historical sites partly represent the heritage of some people who lived there once in the past? There may be questions as to the degree to which “other people’s heritage”<sup>94</sup> is also part of the heritage of inhabitants today. One example from Syria may shed some light as to the connection between locals and these historical sites. Khalid Al-Asaad, a Syrian bespectacled octogenarian,<sup>95</sup> and a retired chief of antiquities for Palmyra was tortured for weeks by ISIS to reveal the city’s hidden treasures. When he refused to reveal information that could damage the ancient site he had dedicated his life to studying and exploring, he was gruesomely murdered and hung in a public place.<sup>96</sup> He had named his daughter Zenobia after Palmyra’s ancient queen.<sup>97</sup> Al-Asaad may or may not have been a direct descendent of the Assyrians, but he spent his life studying the history of Palmyra, and gave his life to protect it. These sites are part of the cultural landscape<sup>98</sup> of the Syrians today.

#### 4. Legal framing of the intentional destruction of cultural property during armed conflict

What is happening in Syria and Iraq is often referred to as a “cultural cleansing”<sup>99</sup>—but can it also be considered cultural genocide? US Secretary of State, John Kerry, remarked

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<sup>90</sup> Andrew Curry, “Here Are the Ancient Sites ISIS Has Damaged and Destroyed”, *National Geographic* (1 September 2015), online: <<http://news.nationalgeographic.com>>.

<sup>91</sup> Moody, *supra* note 59.

<sup>92</sup> Department of Ancient Near Eastern Art. “Palmyra,” in *Heilbrunn Timeline of Art History* (New York: The Metropolitan Museum of Art, October 2000) online: <[http://www.metmuseum.org/toah/hd/palm/hd\\_palm.htm](http://www.metmuseum.org/toah/hd/palm/hd_palm.htm)>; see also Michael D Danti et al, *Special Report on the Importance of Palmyra* (ASOR Cultural Heritage Initiatives, 2005) online: <<http://www.asor-syrianheritage.org>>.

<sup>93</sup> See Hannibal Travis, “The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq” (2009) 15 *Tex Wesleyan L Rev* 601; Eyal Zisser, “Who’s Afraid of Syrian Nationalism? National and State Identity in Syria” (2006) 42:2 *Middle Eastern Studies* 179 at 184 (claiming that governments attempted to legitimize the Syrian state based on pre-Islamic past, but this “was ineffective, as it lacked relevance for most of the population, which had adopted an Arab identity”).

<sup>94</sup> Derek Gillman, *The Idea of Cultural Heritage*, revised ed (New York: Cambridge University Press, 2010) at 12.

<sup>95</sup> One of the reasons why Al-Asaad is described this way in the media is because he was gruesomely beheaded and his glasses were still on his face after the fact.

<sup>96</sup> Ben Hubbard, “Syrian Expert Who Shielded Palmyra Antiquities Meets a Grisly Death at ISIS’ Hands”, *New York Times* (19 August 2015), online: <<http://www.nytimes.com>>.

<sup>97</sup> His daughter Zenobia Al-Asaad said: “When I was a little girl, I remember sitting in the car with him, driving from our home in the modern part of Palmyra over to the ancient sites. ... [T]he way he talked about Palmyra made me love the city even more, because I know he loved it. He would explain what some of these things once were - this was a temple, this was a tomb, this city was the place where Zenobia was from, who I’m named after... Palmyra the ancient city will always be a part of me.” Kanishk Tharoor and Maryam Maruf “Museum of Lost Objects: The Temple of Bel”, *BBC* (1 March 2016), online: <<http://www.bbc.com>>.

<sup>98</sup> *Ibid.* Syrian archeologist Salam al-Kuntar explains that Palmyra is not a remote place of the past but deeply ingrained in Syrian human history. The cultural landscape of the city is part of the narrative of who Palmyrians are today. The archeologist explains: “I have a special love for Palmyra because the Temple of Bel is where my mother was born... I hear many stories about the building, how people used the space, how children played around, including my mum. So that’s what it means to me. This is the meaning of heritage – it’s not only architecture or artefacts that are representing history, it’s these memories and ancestral connection to the place.”

<sup>99</sup> See “Director-General Irina Bokova firmly condemns the destruction of Palmyra’s ancient Baalshamin, Syria”, *UNESCO* (24 August 2015), online: <<http://en.unesco.org/news>>; “UNESCO calls for mobilization to stop ‘cultural cleansing’ in Iraq”, *UNESCO* (27 February 2015), online: <<http://whc.unesco.org>>.

on whether acts committed by ISIS amount to genocide. He noted: “Daesh is responsible for genocide against groups in areas under its control, including Yazidis, Christians, and Shia Muslims... Daesh has made a systematic effort to destroy the cultural heritage of ancient communities – destroying Armenian, Syrian Orthodox, and Roman Catholic churches; blowing up monasteries and the tombs of prophets; desecrating cemeteries... [the] United States recognizes and confirms the despicable nature of the crimes that have been committed against them.”<sup>100</sup> Similarly, comparing ISIS to the Nazis, the Secretary General of UNESCO noted: “This is a way to destroy identity. You deprive [people] of their culture, you deprive them of their history, their heritage, and that is why it goes hand in hand with genocide.”<sup>101</sup>

*a. Cultural genocide or cultural cleansing?*

In order to examine the question of “cultural cleansing” versus “cultural genocide”, it is important to review the literature and legal documents. Raphael Lemkin noted that genocide is “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, [...] and the destruction of [...] dignity”.<sup>102</sup>

David Nersessian builds on this definition and claims that “[c]ultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions [...] Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.”<sup>103</sup> He notes that when cultural genocide is accompanied by physical and biological genocide, “historical records of the group’s self-definition [are] also destroyed.”<sup>104</sup>

Although the term “cultural genocide” is used both in the media and academia, the existing international body of law does not recognize this term when referring to acts of hostility against and plunder of cultural property.<sup>105</sup> The United Nations (UN) recognized genocide as a crime under general international law in the General Assembly Resolution 96 (I) of 11 December 1946.<sup>106</sup> Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide* adopted in 1948, also recognizes that genocide is a crime under international law “whether committed in time of peace or in time of war”.<sup>107</sup> The

<sup>100</sup> Secretary of State, Media Release, “Secretary of State John Kerry: Remarks on Daesh” (17 March 2016), online: US Department of State <<http://www.state.gov>>.

<sup>101</sup> Grant, *supra* note 80.

<sup>102</sup> Raphaël Lemkin, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress* (Washington: Carnegie Endowment for International Peace Vision of International Law, 1944) at 79.

<sup>103</sup> David Nersessian, “Rethinking Cultural Genocide Under International Law” 2:12 Human Rights Dialogue: Cultural Rights (Spring 2005), online: <<http://www.carnegiecouncil.org>>.

<sup>104</sup> David Nersessian, *Genocide and Political Groups* (Oxford: Oxford University Press, 2010) at 30.

<sup>105</sup> For a substantive discussion of relevant international criminal law, protection of cultural property during armed conflict, and historical background of different conventions see Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (New York: Cambridge University Press, 2006) ; Roger O’Keefe, “Protection of Cultural Property Under International Criminal Law” (2010) 11 Melbourne J of Intl L 339.

<sup>106</sup> *The Crime of Genocide*, GA Res 96 (I), UNGAOR, 1st sess, UN Doc A/RES/96(I) (1946).

<sup>107</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, art I (entered into force 12 January 1951).

Convention prohibits physical and biological genocide, but makes no mention of cultural genocide. Specifically, article II of the *Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide Convention*) defines the crime as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”<sup>108</sup>

Interestingly, draft versions of the *Genocide Convention* had encompassed the concept of “cultural genocide”. The earliest draft included a provision for “[s]ystematic destruction of historical or religious monuments or their diversion to alien uses’ and ‘destruction or dispers[ion] of documents and objects of historical, artistic, or religious value and of objects used in religious worship”.<sup>109</sup> Another version mentioned “[d]estroying ... libraries, museums, schools, historical monuments, places of worship and other cultural institutions and objects of the group’ with the intent to destroy the culture of that group.”<sup>110</sup> However the Sixth Committee of the General Assembly omitted the term “cultural genocide” from the final text.<sup>111</sup> The parties viewed cultural and biological genocide as conceptually different. Notably, the representatives of Denmark remarked that it was disproportionate and illogical to include “in the same convention both mass murders in gas chambers and the closing of libraries.”<sup>112</sup>

This idea of cultural genocide was again discussed and rejected during the in the *Draft Code of Crimes against the Peace and Security of Mankind*.<sup>113</sup> Specifically:

As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of the word 'destruction', which must be taken only in its material sense, its physical or biological sense. It is true that the 1947 draft Convention prepared by the Secretary-General and the 1948 draft prepared by the *Ad Hoc* Committee on Genocide contained provisions on 'cultural genocide' ... However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of 'cultural genocide' contained in the two drafts and simply listed acts which come within the category of 'physical' or 'biological' genocide. The first three subparagraphs of the present article list

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<sup>108</sup> *Ibid*, art 2.

<sup>109</sup> *Draft Convention on the Crime of Genocide*, OHCHR, UN Doc E/447 (1947) at art I(II)(3)(c) [*Draft Genocide Convention*].

<sup>110</sup> Ad Hoc Committee on Genocide, *Report of the Committee and draft Convention Drawn Up by the Committee*, UNESCO, 1948, UN Doc E/794 at art III (2) [*Report on the Draft Genocide Convention*].

<sup>111</sup> UNGAOR, 3rd Sess, 83rd Mtg, A/C6/SR 83 (1948) at 206.

<sup>112</sup> *Ibid* at 198–99.

<sup>113</sup> International Law Commission, *Report on the Forty-Eighth Session*, UNGAOR, 51st Sess, Supp No. 10, UN Doc A/51/10 (1996) at 46-7.

acts of 'physical genocide', while the last two list acts of 'biological genocide'.<sup>114</sup>

The text adopted by the International Law Commission at its forty-eighth session in 1996,<sup>115</sup> article 4(2) of the *International Criminal Tribunal for the former Yugoslavia (ICTY) Statute*, and article 6 of the *Rome Statute* all adopted the same definition as article II of the *Genocide Convention*. The question of cultural genocide was again discussed and rejected by the ICTY. In *Prosecutor v Krstić*, the Trial Chamber held that “customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group”.<sup>116</sup> Meaning that acts aimed to destroy the cultural aspects of a particular group in order to annihilate their identifying elements (religion, language, literature, works of art, historical monuments etc.) do not fall under the definition of genocide.<sup>117</sup>

Yet the Tribunal noted that: “[W]here there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.”<sup>118</sup>

The Appeals Chamber affirmed the Trial Chambers’ decision noting that it had “correctly identified the governing legal principle”.<sup>119</sup> Yet, Judge Shahabuddeen, wrote in his partial dissenting opinion that there is a need to be cautious when it comes to culture and intent to destroy a group. Specifically: “It is established that the mere destruction of the culture of a group is not genocide: none of the methods listed in article 4(2) of the Statute need be employed. But there is also need for care. The destruction of culture may serve evidentially to confirm an intent, to be gathered from other circumstances, to destroy the group as such. In this case, the razing of the principal mosque confirms an intent to destroy the Srebrenica part of the Bosnian Muslim group.”<sup>120</sup>

The term cultural genocide was rejected by the International Court of Justice (ICJ) in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*:

The Court takes note of the submission of the Applicant that the destruction of such [cultural] heritage was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims. However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Prosecutor v Krstić*, IT-98-33-T, Judgment (2 August 2001) at para 580 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> *Prosecutor v Krstić*, IT-98-33-A, Judgment (19 August 2005) at para 26 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <www.icty.org>.

<sup>120</sup> *Ibid* at Part VII, para 53.

about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention [...] The ICTY took a similar view in the *Krstić* case, finding that even in customary law, 'despite recent developments', the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group. The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.<sup>121</sup>

Yet the ICJ endorsed the observation in *Krstić*, in that, when simultaneous physical or biological destructions are combined with attacks on cultural property of the targeted group, such acts could be construed as evidence of an intent to physically destroy the group.<sup>122</sup>

Despite the fact that attacking a group in effigy is most likely intended to attack the group itself and its existence, the law establishes a clear demarcation between biological and physical genocide and cultural genocide. Surreptitiously, the terms “cultural cleansing” and “cultural genocide” may have become intertwined in the media, but such terms do not have an equivalent in the law. In light of the linear trajectory of the discussion on whether or not acts against cultural heritage constitute genocide, it seems that the principle that they do not is set for the time being.

However, these crimes against cultural property that are specifically committed to destroy group identity can be tried as a crime against humanity—persecution.<sup>123</sup> In *Blaškić*, the Trial Chamber argued that the crime of persecution as defined in Article 5(h) of the ICTY Statute “encompasses not only bodily and mental harm and infringements upon individual freedom but also acts which appear less serious, such as those targeting property, so long as the victimized persons were specially selected on grounds linked to their belonging to a particular community.”<sup>124</sup> Deliberate attacks on cultural property “when perpetrated with the requisite discriminatory intent, amounts to an attack on the very [...] identity of a people. As such, it manifests a nearly pure expression of the notion of ‘crimes against humanity’, for all of humanity is indeed injured by the destruction of a unique ... culture and its concomitant cultural objects [...] which] may amount to an act of persecution.”<sup>125</sup>

The idea that discriminatory destruction of, or extensive damage to cultural property can amount to a crime against humanity was re-affirmed more recently in

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<sup>121</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at 185.

<sup>122</sup> *Ibid* at 186.

<sup>123</sup> *Prosecutor v Tadić*, IT-94-1-T, Judgment (7 May 1997) at para 713 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>; Note that most of ISIS’ acts against cultural property are also war crimes; Rome Statute of the International Criminal Court, UN Doc. No. A/CONF. 183/9, at art 5 (h) (July 17, 1998).

<sup>124</sup> *Prosecutor v Blaškić*, IT-95-14-T, Judgment (3 March 2000) at para 233 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

<sup>125</sup> *Prosecutor v Kordić*, IT-95-14/2-T, Judgment (26 February 2001) at para 207 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

*Karadžić*.<sup>126</sup> The Trial Chamber held that destruction of property can constitute a crime against humanity, depending “on the nature and the extent of the destruction and if committed with discriminatory intent.”<sup>127</sup> Acts against cultural property “can be of equal gravity to other crimes”<sup>128</sup> listed under Article 5 of the ICTY Statute, which include: murder; extermination; enslavement; deportation; imprisonment; torture; rape; and other inhumane acts. Due to the discriminatory intent of ISIS’ acts in Syria and Iraq, such attacks should be tried as crimes against humanity and not simply as war crimes.

*b. New resolutions and case law targeting the destruction and theft of cultural property and the security agenda*

Although the destruction of cultural property in Iraq and Syria may not be recognized as cultural genocide under the current international law, other legal provisions indicate that ISIS has committed war crimes. The destruction of cultural heritage in these war zones is not accidental, but rather a deliberate act of war. In May 2015, the UN General Assembly unanimously adopted a resolution *Saving the Cultural Heritage of Iraq*, which “affirms that attacks intentionally directed against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, may amount to war crimes.”<sup>129</sup> Furthermore, the resolution “stresses the importance of holding accountable perpetrators” who directly attack cultural property.<sup>130</sup>

The eradication of cultural property has also been framed as a security concern by the UN Security Council Resolution 2249 (2015) which noted that such an act “constitutes a global and unprecedented threat to international peace and security.”<sup>131</sup> Moreover, the UN Security Council adopted Resolution 2199, condemning trade with terrorist groups and calling on “all Member States [to] take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011”<sup>132</sup> Similarly, the UN Security Resolution 2347, lists preventive steps and calls on Member states to take measures to “prevent and counter the illicit trade and trafficking in cultural property.”<sup>133</sup>

These resolutions aimed at stopping the looting and destruction of cultural property in conflict zones, help create a basis for a stronger policing and possible prosecution of the perpetrators. Other recent progress in the fight against those who attack cultural property includes the International Criminal Court’s (ICC) prosecution of Ahmad Al Mahdi Al Faqi for war crimes allegedly committed in Timbaktu, Mali in the summer of 2012. He was accused of “intentionally directing attacks against buildings dedicated to religion and

<sup>126</sup> *Prosecutor v Karadžić*, IT-95-5/18-T, Public redacted Judgment (24 March 2016) at para 207 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: ICTY <www.icty.org>.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Saving the Cultural Heritage of Iraq*, GA Res 69/281, UNGAOR, 69th Sess, UN Doc A/RES/69/281, (2015) at art 5 [*UNGA Res 69/281*].

<sup>130</sup> *Ibid* at art 6.

<sup>131</sup> United Nations, Press Release, SC/12132, “Security Council ‘Unequivocally’ condemns ISIL terrorist attacks, unanimously adopting text that determines extremist group poses ‘unprecedented’ threat” (20 November 2015), online: UN Meetings Coverage and Press Releases <www.un.org/press>.

<sup>132</sup> United Nations, Press Release, SC/11775, “Unanimously adopting resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens further targeted sanctions” (12 February 2015), online: UN Meetings Coverage and Press Releases <www.un.org/press>.

<sup>133</sup> *Maintenance of International Peace and Security*, S/Res/2347, UNSC, 2017 at para 8.



historical monuments.”<sup>134</sup> At the time Al Mahdi was a member of an al-Qaeda-affiliated group, Ansar Eddine that took over northern Mali in 2012. Soon thereafter, the so-called Islamic Court of Timbuktu ordered the destruction of various cultural property sites and objects. Al Mahdi was accused of directing the attacks against nine mausoleums and a mosque.<sup>135</sup> Given that these attacks were part of a religious ideology, the Prosecutor explained that: “this case is not about determining who was right or wrong from a religious point of view. The bottom line is that the attacked monuments had a religious use and had an historic nature. To intentionally direct an attack against such monument is a war crime under the Rome Statute, regardless of the judgment by other people on the religious practices by the inhabitants of Timbuktu.”<sup>136</sup>

On March 24, 2015, the Prosecutor issued a statement following admission of guilt by Al Mahdi. In an unprecedented speedy and efficient manner, the ICC was able to bring to justice the perpetrator of such wanton destruction of cultural property. The Prosecutor noted that Al Mahdi’s case “represents a further step towards the realisation of tangible justice for atrocity crimes in Mali. In addition to the ends of justice [...] this judicial development will contribute to peace, stability and reconciliation in Mali.”<sup>137</sup> In September 2016, he was convicted “of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute [and sentenced] to nine years of imprisonment.”<sup>138</sup>

The case against Al Mahdi highlights the gravity of acts against cultural property. In fact this is the first case before the ICC where the acts against cultural property constitute the only charges, thus highlighting the fact that such acts are grave enough to deserve the full attention of the ICC. As discussed earlier, the academia and ICTY’s observation in *Krstić* support the idea that cultural heritage embodies a people’s identity. Ultimately an attack on cultural property when combined with other systemic biological attacks on the population itself, can be construed as intent to annihilate that specific group of people. By successfully prosecuting Al Mahdi’s case, the ICC is showing to other extremists that orchestrated attacks on cultural property do not go unpunished.

The theft and destruction of cultural property has been rightly framed as a security issue by both the international and national institutions. In addition, to the UN Security Council Resolution 2249 (2015), framing the issue as part of the global agenda for peace and security, the US has identified the trafficking of cultural property from war zones as a terrorist offense. Specifically, in August 2015, the FBI warned Americans that trafficking in cultural property from Iraq and Syria can be prosecuted under 18 USC §2339A which prohibits material support to terrorism.<sup>139</sup> The European Council has also condemned ISIS’ deliberate destruction of cultural property and has adopted the European Union regional

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<sup>134</sup> International Criminal Court, Press Release, ICC-CPI-20150926-PR1154, “Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu” (25 September 2015), online: ICC-CPI <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>135</sup> *Ibid.*

<sup>136</sup> Fatou Bensouda, Address (Statement delivered at the Opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi, 1 March 2016), online: ICC-CPI <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>137</sup> Fatou Bensouda, Address (Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following admission of guilt by the accused in Mali war crime case: “An important step for the victims, and another first for the ICC”, 24 March 2016), online: ICC-CPI <[www.icc-cpi.int](http://www.icc-cpi.int)>.

<sup>138</sup> Al Mahdi (Judgment and Sentence) ICC-01/12-01/15 (27 September 2016).

<sup>139</sup> Federal Bureau of Investigation, Press Release, “ISIL and Antiquities Trafficking; FBI Warns Dealers, Collectors About Terrorist Loot” (26 August 2015), online: FBI <[www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking](http://www.fbi.gov/news/stories/2015/august/isil-and-antiquities-trafficking)>.

strategy for Syria and Iraq and ISIL/Da'esh threat.<sup>140</sup> These efforts show that the international community is working to combat its negative effects.

## 5. Conclusion

Framing the attacks on cultural property as part of the security agenda may be a relatively new approach, but perhaps efficient and expeditious in the fight against such acts. The fact that ISIS has profited from the sale of antiquities makes it imperative that national and international institutions create a framework for tackling this issue and prosecuting those who buy and sell looted antiquities from war zones. Prosecuting those who facilitate such trade, and implicitly/explicitly help finance terrorism should be part of the short-term security agenda. Whether ISIS has earned a few millions or hundreds of millions from the sale of Iraq and Syria's cultural property, the exact sum may not be of existential importance. Terrorist attacks on civilian population are inexpensive to execute; for example, the November 2015, Paris attacks cost less than \$10,000.<sup>141</sup> Any amount of money, no matter how small or large, can be used to harm humanity. Framing the issue of antiquities trafficking as part of the agenda for peace and security may catalyze the more efficient response in the domestic realm, as it was the case of the US.

The protection of cultural property is important for the long-term security agenda because history and culture are important ingredients in nation building. Future efforts for national reconciliation will have to include narratives of a proud and rich past. Such ideas have already been discussed in official international forums. For example, the UN General Assembly resolution *Saving the Cultural Heritage of Iraq* affirmed that protecting "cultural diversity and pluralism as well as freedom of religion and belief [is essential] for achieving peace, stability, reconciliation and social cohesion."<sup>142</sup> The Prosecutor in the Mali case also acknowledged that prosecuting crimes against property might help foster peace, stability, and reconciliation. The US Assistant Secretary of State Ann Richard expressed a similar idea, noting that preservation of cultural heritage in conflict zones is critical to reconstruction, reconciliation, and re-building of civil society because it is "a source of pride and self-definition for their present and future."<sup>143</sup> Moreover, she highlighted the fact that protecting cultural objects serves to "support a nation's efforts to restore its national identity. Citizens of all ethnicities, faiths, backgrounds, and economic stations can feel the pride and sense of national unity that comes with that."<sup>144</sup>

The preservation of national identity is important to any future efforts to bring together the divided people of Iraq and Syria. ISIS is using the tangibles and intangibles of cultural property in their overall strategy for war. It is profiting from the sale of antiquities and it is using it for ideological purposes both to destroy the other and to build itself. Protecting cultural property in these war zones should be part of the platform for peace and security in the region and beyond. Culture is essential to the survival of a society and integral to its renewal.

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<sup>140</sup> Council of the European Union, Press Release, ST 7267 2015 INIT "Council conclusions on the EU Regional Strategy for Syria and Iraq as well as the ISIL/Da'esh threat" (16 March 2015), online: European Council of the European Union <<http://www.consilium.europa.eu/en/press/>>.

<sup>141</sup> Robert Windrem, "Terror on a Shoestring: Paris Attacks Likely Cost \$10,000 or Less", *NBC News* (18 November 2005), online: NBC News <[www.nbcnews.com](http://www.nbcnews.com)>.

<sup>142</sup> UNGA Res 69/281, *supra* note 129.

<sup>143</sup> Anne C Richard, Address (Remarks delivered at the Launch of the International Council of Museums' *Emergency Red List of Syrian Cultural Objects at Risk*, 25 September 2013), online: USDS <[www.state.gov/j/prm/releases/remarks](http://www.state.gov/j/prm/releases/remarks)>.

<sup>144</sup> *Ibid.*

# The Safeguarding of the Intangible Cultural Heritage According to the 2003 UNESCO Convention: The Case of First Nations of Canada\*

*Tullio Scovazzi and Laura Westra*

## Abstract

The paper aims at providing an overview of the rules of international law applicable to the protection of the intangible cultural heritage, as defined in the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in 2003 within the framework of the UNESCO and today in force for 174 States. The paper elaborates on the definition of the intangible cultural heritage and its main components — an element of intangible cultural heritage, a community of people and a cultural space — and makes some remarks on two questions that were deliberately left aside from the scope of the Convention, namely the rights of indigenous peoples and the relationship between the intangible cultural heritage and intellectual property rights. Consideration is finally given to the special case of the First Nations of Canada, who are the bearers of an important intangible cultural heritage.

## *French translation*

L'article vise à donner un aperçu des règles du droit international applicables à la protection du patrimoine culturel immatériel, tel que défini dans la Convention pour la Sauvegarde du Patrimoine Culturel Immatériel, adoptée en 2003 dans le cadre de l'UNESCO et aujourd'hui en vigueur pour 174 États. L'article élabore la définition du patrimoine culturel immatériel et ses composantes principales - un élément du patrimoine culturel immatériel, une communauté de personnes et un espace culturel - et fait quelques remarques sur deux questions qui ont été délibérément écartées du champ d'application de la Convention, à savoir les droits des peuples autochtones et la relation entre le patrimoine culturel immatériel et les droits de propriété intellectuelle. Enfin, l'article terminera par traiter du cas spécial des Premières Nations du Canada, qui sont les porteurs d'un important patrimoine culturel immatériel.

## *Spanish translation*

En este artículo se pretende ofrecer un panorama general de las normas del derecho internacional aplicables a la protección del patrimonio cultural inmaterial, tal y como está definido en la Convención para la Salvaguardia del Patrimonio Cultural Inmaterial, aprobada en 2003 por la Unesco y actualmente en vigor en 174 estados. Asimismo, se trata más en profundidad la definición de patrimonio cultural inmaterial y sus principales componentes —un elemento del patrimonio cultural inmaterial, una comunidad de personas y un espacio cultural— y se formulan algunas observaciones sobre dos cuestiones deliberadamente excluidas del marco de la Convención y que son los derechos de los pueblos indígenas y la relación entre el patrimonio cultural inmaterial y los derechos de propiedad intelectual. Por

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\* T. Scovazzi has written paras. 1 to 4 and L. Westra para. 5.

último, se considera el caso especial de las Primeras Naciones de Canadá, que son portadoras de un importante patrimonio cultural inmaterial.

1. A heritage in need of safeguarding;
2. The obligations and mechanisms established by the Convention;
3. The definition of intangible cultural heritage:
  - 3.A. The element of intangible cultural heritage;
  - 3.B. The community of people;
  - 3.C. The cultural space;
  - 3.D. Compatibility with human rights and other requirements;
4. Two issues left aside by the Convention:
  - 4.A. The rights of indigenous peoples;
  - 4.B. Intellectual property rights on intangible cultural heritage;
5. The UNESCO 2003 Convention on the safeguarding of the intangible cultural heritage and the First Nations of Canada:
  - 5.A Aspects of the First Nations' Intangible Cultural Heritage;
  - 5.B Oral History and Tradition: Its Role in Proving Aboriginal Rights or Title.

## Introduction

This paper aims at providing an overview of the rules of international law applicable to the protection of the intangible cultural heritage, as defined in the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted in 2003 within the framework of the UNESCO and today in force for many States. The paper elaborates on the definition of the intangible cultural heritage and its main components—a subject of particular interest for anthropologists—and makes some remarks on two questions that were deliberately left aside from the scope of the Convention, namely the rights of indigenous peoples and the relationship between the intangible cultural heritage and intellectual property rights. Consideration is finally given to the special case of the First Nations of Canada, who are the bearers of an important intangible cultural heritage.

### 1. A Heritage in Need of Safeguarding

In the first years of this century, new instruments were negotiated and adopted at the international level within the framework of United Nations Educational, Scientific and Cultural Organization (UNESCO) and have enlarged the scope of international treaty law relating to the protection of all components of the cultural heritage. One of these instruments is the Convention for the Safeguarding of the Intangible Cultural Heritage, which was adopted in Paris on 17 October 2003, entered into force on 20 April 2006 and is now (June 2017) binding on the notable number of 174 States Parties.<sup>1</sup> The Convention was negotiated to fill a gap within the UNESCO legal instruments and to put due emphasis on an aspect of cultural heritage that, although not as “tangible” as monuments, buildings or natural sites,<sup>2</sup> is equally important “as a mainspring of cultural diversity and a guarantee of sustainable development” (preamble of the Convention).<sup>3</sup>

For many countries, especially developing countries, traditional culture represents the principal form of cultural expression and is an important contribution to economic and social progress. However, it is a heritage in danger. The present trend of globalization threatens the continuation of traditional practices, also because people, in particular young people, are attracted to a unified culture, mostly based on Anglo-American models. The loss of the intangible heritage is aggravated by phenomena of neglect and intolerance, as it is recalled in the preamble of the Convention, where the Parties recognize that:

[T]he processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural

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<sup>1</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006) [The Convention]; see Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*, (Leicester: Institute of Art & Law, 2006); Toshiyuki Kono, “UNESCO and Intangible Cultural Heritage from the Viewpoint of Sustainable Development” in Abdulqawi A Yusuf, ed, *Standard-Setting in UNESCO, Vol I: Normative Action in Education, Science and Culture: Essays in Commemoration of the Sixtieth Anniversary of UNESCO*, (Leiden: Martinus Nijhoff Publishers, 2007) 237; Burra Srinivas, “The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage” in James A R Nafziger & Tullio Scovazzi, eds, *Le patrimoine culturel de l’humanité – The Cultural Heritage of Mankind*, (Leiden: Martinus Nijhoff Publishers, 2008) 529; Toshiyuki Kono, ed, *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21<sup>st</sup> Century* (Leiden: Martinus Nijhoff Publishers, 2010); Tullio Scovazzi, “The Definition of Intangible Cultural Heritage” in Silvia Borelli and Federico Lenzerini, eds, *Cultural Heritage, Cultural Rights, Cultural Diversity* (Leiden: Martinus Nijhoff Publishers, 2012) 179; Lucas Lixinski, *Intangible Cultural Heritage in International Law*, (Oxford: Oxford University Press, 2013).

<sup>2</sup> The “tangible” heritage is the subject of UNESCO’s well-known 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972.

<sup>3</sup> The *Convention*, *supra* note 1, Preamble.

heritage, in particular owing to a lack of resources for safeguarding such heritage.<sup>4</sup>

The intangible cultural heritage is viewed today as a common interest of humanity that, besides its national dimension, deserves to be protected also under principles and rules of international law, as seen in Art. 19, para. 2 of the Convention:

[W]ithout prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels.<sup>5</sup>

Apart from its cultural dimension, the intangible cultural heritage also involves other fundamental values, such as the preservation of the natural environment and the respect of human rights, especially those of indigenous peoples and minority groups.

## **2. The Obligations and Mechanisms Established by the Convention**

The purposes of the Convention are stated in Art. 1:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.<sup>6</sup>

The first three purposes are linked, as the intangible cultural heritage cannot be safeguarded without appreciating the communities, groups and individuals who are its performers and custodians, and without raising general awareness of its importance.

The main obligations of States Parties relate to the identification and definition of the various elements of the intangible cultural heritage present in their territory, with the participation of communities, groups and relevant non-governmental organizations;<sup>7</sup> the drawing up and updating, in a manner geared to their own situation, of one or more inventories of the intangible cultural heritage present in their territory;<sup>8</sup> the adoption of training, educational, awareness-raising and informational programmes, as well as the promotion of capacity-building activities for the safeguarding of the intangible cultural heritage.<sup>9</sup> The States Parties are bound to submit reports on the legislative, regulatory and other measures taken for the implementation of the Convention.<sup>10</sup>

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, art 19(2).

<sup>6</sup> *Ibid.*, art 1.

<sup>7</sup> *Ibid.*, art 11.

<sup>8</sup> *Ibid.*, art 12.

<sup>9</sup> *Ibid.*, art 14.

<sup>10</sup> *Ibid.*, art 29.



At the international level, the Convention provides for the establishment of a Representative List of the Intangible Cultural Heritage of Humanity, “in order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity”,<sup>11</sup> and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding.<sup>12</sup> A third list is also drawn up to include the national, sub-regional and regional programmes, projects and activities for the safeguarding of the heritage which best reflect the principles and objectives of the Convention (so-called “best practices”), taking into account the special needs of developing countries.<sup>13</sup> Besides other functions, the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (hereinafter, the Committee), which has been established by the Convention,<sup>14</sup> is in charge of examining the proposals submitted by States Parties for inscription on the lists of elements of intangible cultural heritage and best practices. In its eight years of activity (from 2008 to 2016), the Committee has inscribed 365 elements in the Representative List, 47 in the Urgent List and 17 in the Best Practices List.<sup>15</sup>

The Convention includes provisions for international co-operation and assistance and sets up a Fund for the Safeguarding of the Intangible Cultural Heritage.<sup>16</sup>

### 3. The Definition of Intangible Cultural Heritage

The definition of intangible heritage is particularly interesting, as addressed in Art. 2, para. 1, of the Convention:

The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

Accordingly, the essential components of the concept of intangible cultural heritage seem to be: A) an element of such heritage (objective component); B) a community of people (subjective or social component); and C) a cultural space (spatial component).<sup>17</sup>

#### 3.A. The Element of Intangible Cultural Heritage

Art. 2, para. 2, of the Convention provides several concrete examples of domains in which the intangible cultural heritage can be manifested:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;

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<sup>11</sup> *Ibid*, art 16.

<sup>12</sup> *Ibid*, art 17.

<sup>13</sup> *Ibid*, art 18(1).

<sup>14</sup> *Ibid*, arts 5–8.

<sup>15</sup> *Ibid*, arts 16–18.

<sup>16</sup> *Ibid*, art 25.

<sup>17</sup> The *Convention*, *supra* note 1, art 2(1).

(e) traditional craftsmanship.<sup>18</sup>

The same element can belong to two or more different domains. For example, in vocal music, storytelling or sung poetry, the distinction between performing arts and oral expression becomes blurred; food practices can be listed in all the last three domains.

The negotiators of the Convention discussed whether languages could be included among the manifestations of the intangible cultural heritage. At the end, languages were included only insofar as they can be considered as “a vehicle of the intangible cultural heritage”.<sup>19</sup> The consequence seems to be that a language, such as English or Chinese, cannot be considered in itself a manifestation of the intangible cultural heritage. However, a language could qualify as such if it becomes a means for the expression of what already belongs to the domain of the intangible cultural heritage.<sup>20</sup>

The domain of social practices can include elements belonging to, *inter alia*, sports,<sup>21</sup> law,<sup>22</sup> medicine<sup>23</sup> or food.<sup>24</sup> With regard to “rituals”, during the negotiations it was generally agreed that religions were excluded from the notion of intangible cultural heritage, as far as their theological and moral aspects are concerned. Nevertheless, the rituals associated with a religion, such as processions and sacred dances,<sup>25</sup> do qualify as the heritage.

Concerning the relationship with nature, intangible cultural heritage is not limited to manifestations of human creativity that reinterpret or recreate nature.<sup>26</sup> It also includes

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18 Ibid, art 2(2); the external manifestation does not necessarily mean that access to the intangible cultural heritage should be open to everyone, considering that the States Parties to the Convention are, *inter alia*, bound to respect “customary practices governing access to specific aspects of such heritage,” The Convention, art 13(d)(ii).

19 The *Convention*, *supra* note 1, art 2(2)(a).

20 For example, within the element “Oral Heritage and Cultural Manifestations of the Zápara People” (Ecuador, Peru), the language expresses the extremely rich understanding of nature by the Zápara people, online: <<http://www.unesco.org/culture/ich/en/RL/oral-heritage-and-cultural-manifestations-of-the-zapara-people-00007>>; the element “Whistled Language of the Island of La Gomera (Canary Islands), the Silbo Gomero” (Spain) shows that although in itself the Spanish language does not qualify for the definition of intangible cultural heritage, the situation completely changes if Spanish is not spoken, but whistled, online: <<http://www.unesco.org/culture/ich/en/RL/whistled-language-of-the-island-of-la-gomera-canary-islands-the-silbo-gomero-00172>>.

21 For example, “Kırkpınar Oil Wrestling Festival” (Turkey), online: <<http://www.unesco.org/culture/ich/en/RL/krkpınar-oil-wrestling-festival-00386>>

22 For example, “Irrigator’s Tribunals of the Spanish Mediterranean Coast: The Council of Wise Men of the Plain of Murcia and the Water Tribunal of the Plain of Valencia” (Spain), online: <<http://www.unesco.org/culture/ich/en/RL/irrigators-tribunals-of-the-spanish-mediterranean-coast-the-council-of-wise-men-of-the-plain-of-murcia-and-the-water-tribunal-of-the-plain-of-valencia-00171>> and “Wayuu Normative System, applied by the Pütchipü’üi (Palabrero)” (Colombia), online: <<http://www.unesco.org/culture/ich/en/RL/wayuu-normative-system-applied-by-the-putchipui-palabrero-00435>>.

23 For example, UNESCO, “Acupuncture and Moxibustion of Traditional Chinese Medicine” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/acupuncture-and-moxibustion-of-traditional-chinese-medicine-00425>>.

24 For example, UNESCO, “Gastronomic Meal of the French” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/gastronomic-meal-of-the-french-00437>>; UNESCO, “Traditional Mexican Cuisine – Ancestral, Ongoing Community Culture, the Michoacán Paradigm” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/traditional-mexican-cuisine-ancestral-ongoing-community-culture-the-michoacan-paradigm-00400>>; and UNESCO, “Mediterranean Diet” (2013) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/mediterranean-diet-00884>>.

25 See e.g. UNESCO, “The Procession of the Holy Blood in Bruges” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/procession-of-the-holy-blood-in-bruges-00263>>; UNESCO, “Yeongsanjae” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/yeongsanjae-00186>>; UNESCO, “Mystery Play of Elche: Spain” (2008) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/mystery-play-of-elche-00018>>.

26 See e.g. UNESCO, “Dragon Boat festival: China” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online <<https://ich.unesco.org/en/RL/dragon-boat-festival-00225>>; UNESCO, “Ritual ceremony of the Voladores: Mexico” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/ritual-ceremony-of-the-voladores-00175>>. The dragon is not an existing animal, but is created by human imagination. The *voladores* cannot fly, but they behave as if they could.

manifestations of human creativity that are based on a deep knowledge of nature and are aimed at exploiting nature for the satisfaction of concrete human needs, such as the healing arts<sup>27</sup> or wood-crafting.<sup>28</sup>

The manifestations of intangible cultural heritage also include the instruments, objects and artifacts associated therewith. These items can be either the product of a practice<sup>29</sup> or the means through which it is performed.<sup>30</sup> It is difficult to find any manifestation of intangible cultural heritage that is not associated with any objects.<sup>31</sup>

### 3.B. The Community of People

According to Art. 2, para. 1, of the Convention:

This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.<sup>32</sup>

Because intangible cultural heritage is shared among a plurality of people, this type of heritage provides “a sense of identity and continuity” to a specific community of bearers or practitioners (the custodian community), who by this aspect distinguish themselves from the rest of the world.<sup>33</sup> Practices or objects that are diffused worldwide, such as the wheel, the football, the Olympic Games, hamburgers or blue jeans, are not associated with any specific community and cannot belong to the intangible cultural heritage.

Simple connoisseurs and appraisers of the heritage, including spectators at performances or buyers of products, cannot be considered as members of the custodian community. However, the great popularity of an element<sup>34</sup> does not prevent it from belonging to the intangible cultural heritage, provided that a custodian community can be identified.

<sup>27</sup> See e.g. UNESCO, “Andean cosmovision of the Kallawayas: Bolivia (Plurinational State of)” (2008) *Representative List of the Intangible Cultural Heritage of Humanity*, online: < <https://ich.unesco.org/en/RL/andean-cosmovision-of-the-kallawayas-00048>>.

<sup>28</sup> See e.g. UNESCO, “Woodcrafting knowledge of the Zafimaniry: Madagascar” (2008) *Representative List of the Intangible Cultural Heritage of Humanity*, online: < <https://ich.unesco.org/en/RL/woodcrafting-knowledge-of-the-zafimaniry-00080>>.

<sup>29</sup> See e.g. UNESCO, “Traditional Art of Azerbaijani carpet weaving in the Republic of Azerbaijan: Azerbaijan” (2010) *Representative List of the Intangible Cultural Heritage of Humanity*, online: < <https://ich.unesco.org/en/RL/traditional-art-of-azerbaijani-carpet-weaving-in-the-republic-of-azerbaijan-00389>>; “Traditional Skills of Carpet Weaving in Fars” (Iran), online: < <https://ich.unesco.org/en/RL/traditional-skills-of-carpet-weaving-in-fars-00382>> and “Indonesian Kris” (Indonesia), online: < <https://ich.unesco.org/en/RL/indonesian-kris-00112>>.

<sup>30</sup> For example, the puppets in “Opera dei Pupi, Sicilian Puppet Theatre” (Italy), online: < <https://ich.unesco.org/en/RL/opera-dei-pupi-sicilian-puppet-theatre-00011>>; the “Wayang Puppet Theatre” (Indonesia), online: < <https://ich.unesco.org/en/RL/wayang-puppet-theatre-00063>>, and the masks and drums in the “Mask Dance of the Drums from Drametse” (Bhutan), online: < <https://ich.unesco.org/en/RL/mask-dance-of-the-drums-from-drametse-00161>>.

<sup>31</sup> Instances could perhaps be the “Canto a Tenore, Sardinian Pastoral Songs” (Italy), online: < <https://ich.unesco.org/en/RL/canto-a-tenore-sardinian-pastoral-songs-00165>>; and the already quoted “Whistled Language of the Island of La Gomera (Canary Islands), the Silbo Gomero” (Spain), *supra* note 20.

<sup>32</sup> The *Convention*, *supra* note 1, art 2(1).

<sup>33</sup> *Ibid.*

<sup>34</sup> For example, “Tango” (Argentina, Uruguay); see UNESCO, “Tango” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: < <https://ich.unesco.org/en/RL/tango-00258>>.

A delicate question is the commercialization of the heritage. As remarked in the 2009 report of the Subsidiary Body for the Examination of Nominations to the Representative List of the Intangible Cultural Heritage of Humanity:

[T]he members of the Subsidiary Body were of the view that commercialization was not *a priori* a disqualifying factor, highlighting the vital role of the intangible cultural heritage as a factor of economic development in some communities. They did, however, point out that excessive commercialization could distort traditional cultural customs or expressions. It was therefore necessary to ensure that such processes remained under the control of the communities concerned and not of private companies.<sup>35</sup>

The intangible cultural heritage is also voluntarily transmitted from bearers to recipients. A mere exhibition of a certain skill, without any desire to transmit it, cannot qualify for intangible cultural heritage. Transmission can take place in several forms: in families from parents to sons, at work from masters to apprentices, at school from teachers to pupils. Transmission also implies the consequent recreation or reinterpretation of the heritage, which is inevitable because of its social and living character. Changes also reflect the passing of time, as it is shown by the elements in “The Traditional Manufacturing of Children’s Wooden Toys in Hrvatsko Zagorje” (Croatia), where horses and carts have been joined by cars, trucks, airplanes and trains,<sup>36</sup> and “Gule Wamkulu” in Malawi, Mozambique, Zambia, where, in a rather unexpected manner, the “dancers wear costumes and masks [...] representing [...] wild animals, spirits of the dead, slave traders, as well the honda (motorcycle) or the helicopters.”<sup>37</sup>

The concepts of recreation and reinterpretation evoke the difficult question of determining the extent to which changes in the substance of the heritage are acceptable. Natural transformation does not mean artificial alteration, even though many variations can be found between one extreme and the other. With regard to modernization, the already mentioned Subsidiary Body, referring to the ever-changing nature of intangible cultural heritage, remarked that:

[T]he **modernization** of production methods, mechanization and electrification would not be regarded as *a priori* disqualifying an element of intangible cultural heritage, particularly as regards craft practices, as long as the requirements were met that emphasis remained on the human factor of the element and that mechanization duly respected the aspirations of the communities concerned. The Subsidiary Body considered, however, that the degree of mechanization in the production of the element must be appraised case by case when the files were being examined.<sup>38</sup>

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<sup>35</sup> Subsidiary Body for the Examination of Nominations to the Representative List of the Intangible Cultural Heritage of Humanity, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, *Report by the Rapporteur*, UNESCO, 4th Sess, UN Doc ITH/09/4.COM/CONF>209/INF.6 (2009) at para 28 [2009 Report].

<sup>36</sup> See UNESCO, “Traditional manufacturing of children’s wooden toys in Hrvatsko Zagorje” (2009) *Representative List of the Intangible Cultural Heritage of Humanity*, online: <<https://ich.unesco.org/en/RL/traditional-manufacturing-of-childrens-wooden-toys-in-hrvatsko-zagorje-00233>>.

<sup>37</sup> UNESCO, “Gule Wamkulu: Malawi, Mozambique and Zambia” (2008), *UNESCO: Representative List of the Intangible Cultural Heritage*, online: <<http://www.unesco.org/culture/ich/en/RL/gule-wamkulu-00142>>.

<sup>38</sup> 2009 Report, *supra* note 35 at para 27.

Another difficult question is the “revitalization” of intangible cultural heritage, intended as the reinvention or reactivation of social practices and representations, which are no longer in use or are falling into disuse. In fact, the intangible cultural heritage is subject not only to transformation but also to death, like every social manifestation. The definitive loss of the heritage can be the consequence of a wide variety of events, having either a natural (for example, deforestation or drought) or a social (for example, conflicts or urbanization) character. The loss may also be the consequence of the simple indifference shown by the younger generations towards the traditions of their parents and grandparents.

In Art. 2, para. 3, of the Convention, the “revitalization” of the heritage is included among the “safeguarding measures” aimed at ensuring its viability.<sup>39</sup> The very inclusion of the word “revitalization” was one of the most discussed issues during the Convention negotiations. Does this mean that a manifestation of heritage that has died can be resuscitated? Should the State provide incentives to encourage indifferent people to engage in a fading practice or should it limit itself to documenting the last manifestations of the practice for the records and the archives? Is it in conformity with the spirit of the Convention that someone takes the initiative to restore a practice that is no longer in use because there is a commercial interest in performing it for tourists? Can a tournament from the Middle Ages be revitalized through a parade of *majorettes*?

On the thorny issue of revitalization, the Subsidiary Body was unable to take a clear-cut position:

The issue of **revitalization** was also discussed. The Subsidiary Body spoke out in favour of elements that, despite being threatened, played a key role in a community’s collective memory. Even if they were not in regular use, they could be revitalized and could once more fulfil socio-cultural functions. A lapsed element that had subsequently been revitalized could also be included in that category. Nevertheless, some members of the Body pointed out that the main purpose of the Convention was to safeguard living intangible cultural heritage, and emphasized the need to avoid trying to revive historical practices that no longer had a social function in contemporary society.<sup>40</sup>

The social component of the intangible cultural heritage explains why the elements included in the lists established by the Convention are seen as “representative of the intangible cultural heritage of humanity” and do not need to present an “outstanding universal value,” as required for inscription on the lists drawn up under the 1972 World Heritage Convention.<sup>41</sup> In the case of intangible cultural heritage, the lists are inclusive rather than exclusive. They are drawn up “to ensure better visibility of the intangible cultural heritage and awareness of its significance,”<sup>42</sup> as opposed to establishing a hierarchy between different manifestations. Such a hierarchy would be contrary to the objectives of encouraging “dialogue which respects cultural diversity”<sup>43</sup> and of “bringing human beings closer together and ensuring exchange and understanding among them.”<sup>44</sup>

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<sup>39</sup> The *Convention*, *supra* note 1 at art 2(3).

<sup>40</sup> *Supra* note 35 at para 29.

<sup>41</sup> *Ibid* at para 1; *supra* note 2 at art 11(2).

<sup>42</sup> *Supra* note 1 at art 16(1).

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid* at Preamble.

### 3.C. The Cultural Space

The intangible cultural heritage is associated with a “cultural space” and is constantly recreated by communities and groups “in response to their environment” and to “their interaction with nature and their history”.<sup>45</sup> The heritage is strictly linked to the natural and historical context in which it is created and transmitted. A cultural space cannot be identified by lines drawn on maps, as instead it is measured in the case of the properties inscribed on the lists established under the 1972 World Heritage Convention. A cultural space must be intended more for social practices than for its geographical character, as “a physical or symbolic space in which people meet to enact, share or exchange social practices or ideas.”<sup>46</sup>

A non-Mediterranean coastal State such as Portugal can thus share the element “Mediterranean Diet”, submitted by Greece, Italy, Morocco and Spain, later joined by Croatia, Cyprus and Portugal. Even a square, such as “Cultural Space of Jemaa el-Fna Square” (Morocco), is no longer just a space delimited on the topographical map of the city of Marrakesh.<sup>47</sup> It becomes a major place of cultural exchange and a unique concentration of popular culture, where it is possible to find storytellers, poets, snake-charmers, musicians, dancers, players, bards, where a variety of services are offered, such as dental care, traditional medicine, fortune-telling, preaching, and henna tattooing, and where fruit and local food may be bought and eaten.<sup>48</sup>

It is also true that a cultural space is not an immovable location, but can be transferred elsewhere, if the custodian community of the heritage or some members of it move to another location.<sup>49</sup>

The cultural concept of space has little to do with the legal concept of territory over which a State exercises its sovereignty. As a number of elements inscribed in the Representative List show, the same intangible cultural heritage can belong to the territory of two or more States, if it has a transboundary or even transcontinental character. To avoid the risk of fragmentation of the same heritage, State Parties to the Convention are encouraged to jointly submit multi-national nominations to the lists when an element is found on the territory of more than one country.

### 3.D. Compatibility with Human Rights and Other Requirements

Art. 2, para. 1, adds to the definition of intangible cultural heritage a condition that, if it is not met, prevents the application of the Convention to a given element, namely that:

For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual

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<sup>45</sup> Ibid, art 2, para 1.

<sup>46</sup> Van Zantern, Wim ed, *Glossary: Intangible Cultural Heritage* (The Hague: Netherlands National Commission for UNESCO, 2002) at 4.

<sup>47</sup> UNESCO, “Cultural space of Jemaa el-Fna Square: Morocco” (2008), *UNESCO: Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/cultural-space-of-jemaa-el-fna-square-00014](http://www.unesco.org/culture/ich/en/RL/cultural-space-of-jemaa-el-fna-square-00014)>.

<sup>48</sup> Ibid.

<sup>49</sup> The element “Cultural Space and Oral Culture of the Semeiskie” (Russian Federation) involves a “confessional community” originating in the seventeenth century that “[d]uring the reign of Catherine the Great [...] had to move to the Transbaikalian region in Siberia, where they still live today” (2008), *UNESCO: Representative List of the Intangible Cultural Heritage*, online: <<http://www.unesco.org/culture/ich/en/RL/cultural-space-and-oral-culture-of-the-semeiskie-00017>>.

respect among communities, groups and individuals, and of sustainable development.<sup>50</sup>

It goes without saying that practices, such as female genital mutilation, however traditional they might be, cannot be protected under the Convention.

In its 2010 meeting, the Committee discussed a question relating to compatibility with human rights. A letter was read in which a Spanish non-governmental organisation (*Grup d'Acció Valencianista*) took the position that the element “Human Towers” (Spain)<sup>51</sup> conflicted with the human rights of children, particularly their right to health, because sometimes accidents occur that can determine injuries or even loss of life for the children occupying the higher levels of the human towers. However, the letter did not prevent the inscription of the element in the Representative List.

The Committee also discussed the condition of mutual respect among communities, inviting States Parties to:

[E]nsure that, in case of proposals of elements containing references to war or conflict or specific historical events, the nomination file should be elaborated with utmost care, in order to avoid provoking misunderstanding among communities in any way, with a view to encouraging dialogue and mutual respect among communities, groups and individuals.<sup>52</sup>

War, violence and massacres are part of history of humanity and have inevitably left their traces on a number of elements of the intangible cultural heritage. For example, the stories told in the performances of the element “Opera dei Pupi, Sicilian Puppet Theatre” (Italy) go back to the Middle Ages and inevitably describe the events of the crusades in a typical Christian perspective. What is important is that this and other analogous elements are proposed today in a spirit of dialogue and respect among communities, irrespective of the passions and hatred that occurred in the past.

#### 4. Two Issues Left aside by the Convention

If the negotiations for the 2003 Convention were conducted without any serious differences of views, it was also because the two most thorny issues, namely the rights of indigenous peoples and intellectual property rights on intangible cultural heritage, were deliberately left aside.

##### 4.A. The Rights of Indigenous Peoples

Most likely as a consequence of the political sensitivity of the subject itself for certain States, the expression “indigenous communities”<sup>53</sup> appears only in the preamble of the Convention, where the General Conference of UNESCO recognizes:

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<sup>50</sup> The *Convention*, *supra* note 1, art 2(1).

<sup>51</sup> “The human towers are formed by *castellers* standing on the shoulders of one another in a succession of stages (between six and ten). Each level of the *trunc*, the name given to the second level upwards, generally comprises two to five heavier built men supporting younger, lighter-weight boys or girls. The *pom de dalt* – the three uppermost levels of the tower – is composed of young children” UNESCO ICSICH, 5th Sess, UN Doc ITH/10/5.COM/CONF202/6 (2010) at 51.

<sup>52</sup> *Ibid* at 11.

<sup>53</sup> An indigenous community has been defined as “a community whose members consider themselves to have originated in a certain territory. This does not exclude the existence of more than one indigenous community in the same territory”, *supra* note 46 at 5.



[T]hat communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.<sup>54</sup>

The lack of references to indigenous people in any substantive provision is regrettable. Other treaties follow a different approach. For example, Art. 3 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions clearly provides that “the protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of, and respect of, all cultures, including the cultures of people belonging to minorities and indigenous peoples.”<sup>55</sup> The Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010)<sup>56</sup> recognizes the relevance of traditional knowledge associated with genetic resources and the fair and equitable sharing of benefits arising from the utilization of such knowledge with the indigenous and local communities concerned.

However, there is no doubt that the Convention was also drafted with the aim of safeguarding the cultural heritage of indigenous peoples, who own a substantial part of the intangible cultural heritage of the world and face a number of threats affecting their heritage in different ways. Depending on the circumstances, these threats include globalization, deforestation, commercial exploitation by outsiders and armed conflicts. As it was also suggested during the *travaux préparatoires* for the Convention, indigenous communities can be easily included in the broader terms “communities” or “groups”, which are used in several provisions of the Convention. Indeed, a number of elements already appearing in the Representative List refer to indigenous communities.<sup>57</sup>

#### 4.B. Intellectual Property Rights on Intangible Cultural Heritage

During the negotiations for the Convention it was agreed that the elaboration of the legal tools for a better protection of intellectual property rights falls within the mandate of the World Intellectual Property Organization (WIPO). Art. 3, para. b, clearly provides that nothing in the Convention may be interpreted as:

[A]ffecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.<sup>58</sup>

In fact, the way in which the main intellectual property rights have been conceived and formulated in national legislation and international instruments seems to be in conflict with

<sup>54</sup> *Supra* note 1 at Preamble.

<sup>55</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, 2440 UNTS 311 art 3 at 348 (entered into force 18 March 2007).

<sup>56</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 5 June 1992 at Preamble (entered into force 29 December 1993).

<sup>57</sup> For example, UNESCO, “Andean Cosmovision of the Kallawayá: Bolivia” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/andean-cosmovision-of-the-kallawayá-00048](http://www.unesco.org/culture/ich/en/RL/andean-cosmovision-of-the-kallawayá-00048)>; UNESCO, “Oral and Graphic Expressions of the Wajapi: Brazil” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/oral-and-graphic-expressions-of-the-wajapi-00049](http://www.unesco.org/culture/ich/en/RL/oral-and-graphic-expressions-of-the-wajapi-00049)>; UNESCO, “Oral Heritage and Cultural Manifestations of the Zápara People: Ecuador and Peru” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/oral-heritage-and-cultural-manifestations-of-the-zápara-people-00007](http://www.unesco.org/culture/ich/en/RL/oral-heritage-and-cultural-manifestations-of-the-zápara-people-00007)>; UNESCO, “Rabinal Achi Dance Drama Tradition: Guatemala” (2008) *Representative List of the Intangible Cultural Heritage*, online: <[www.unesco.org/culture/ich/en/RL/rabinal-achi-dance-drama-tradition-00144](http://www.unesco.org/culture/ich/en/RL/rabinal-achi-dance-drama-tradition-00144)>.

<sup>58</sup> *Supra* note 1 at art 3(b).

many of the peculiarities of the intangible cultural heritage and with the needs of the communities which create and transmit such heritage, especially the indigenous communities.<sup>59</sup> For instance, the requirement of novelty cannot apply to most of the manifestations of intangible heritage that are based on the transmission of practices and knowledge from generation to generation. The granting of intellectual property rights to a specific person seems also inappropriate for cultural manifestations that are often expressed in a collective way and are considered by the practitioners themselves as belonging to a whole community. The temporary limits of the rights granted to the holder of a patent do not comply with the permanent character of a heritage that often has deep social or religious roots and is not intended to fall into the public domain after the expiration of a given time. The cost itself of obtaining a patent may discourage traditional holders of intangible cultural heritage from starting the relevant procedures.

Today the dangers to the preservation or integrity of the intangible cultural heritage are the result not only of disuse or abandonment by members of the communities concerned, but also of abuse or misuse by third parties. Intellectual property laws are mostly based on Western conceptions about protecting rights of individuals and their financial interests, rather than on the understanding of the needs of the communities concerned. Intellectual property rules put emphasis on products, rather than on practices and processes that create them. Wide scale copying for commercial gain of indigenous designs, motifs, symbols and artworks has often taken place without knowledge or permission by indigenous artists or communities. Commercialization may lead to the adaptation of traditional practices and products to fit the taste of potential consumers, be they tourists or the general public, and to the consequent alteration of such practices and products<sup>60</sup> Integrity of their creations is a major concern for indigenous artists.

As a result of granting a patent to a third party, the communities concerned with the heritage may become deprived of both their past history and present identity and can be even prevented from producing the same goods that they have been making for generations. For instance, the grant of patents to traditional medicines has caused great concern in many developing countries.<sup>61</sup> Before the granting of any intellectual property rights, prior informed consent should be acquired from the community concerned, according to procedures that are effective, culturally appropriate, transparent and flexible.<sup>62</sup> However, there is no consensus on the establishment of an obligation of disclosure which would bind the applicant for a patent or other intellectual property right to state from where he has taken the natural or genetic components of the invention he is asking to patent. This would be a strong tool to prevent the so-called bio-piracy in patenting pharmaceutical, cosmetic or other products and to ensure compliance with prior informed consent requirements.

Different remedies to the present unsatisfactory situation, such as collective trademarks granted to representative entities or specific clauses in contracts, have been

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<sup>59</sup> See Toshiyuki Kono ed, *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Antwerp: Intersentia Publishers, 2009).

<sup>60</sup> According to the *Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*, adopted in 1982 by UNESCO and WIPO, there is a need for protection against “(i) use without authorization; (ii) violation of the obligation to indicate the sources of folklore expressions; (iii) misleading the public by distributing counterfeit objects as folklore creations, and (iv) the public use of distorted or mutilated folklore creations in a manner prejudicial to the cultural interests of the community concerned.”

<sup>61</sup> The patent granted in the United States for the wound-healing properties of turmeric has been finally revoked for lack of novelty, as this natural element has been used for centuries in traditional healing practices in India.

<sup>62</sup> In some cases, the determination of the persons who have the authority to grant access to traditional knowledge is far from being an easy task, due to the lack of a clear leadership structure. Pedro Alberto De Miguel Asensio, “Transnational Contracts Concerning the Commercial Exploitation of Intangible Cultural Heritage” in Scovazzi, Ubertazzi & Zagato eds, *Il Patrimonio Culturale Intangibile nelle sue Diverse Dimensioni* (Milán: Giuffrè Editore, 2012) at 13.

envisaged.<sup>63</sup> A number of countries have already independently adopted in their legislation some form of protection against the misappropriation of traditional knowledge and cultural expressions. However, no uniform regime has been so far adopted at the international level to address the problem. It is understandable that the States negotiating a Convention within the framework of UNESCO, which is not the best equipped organization to deal with intellectual property rights, were not willing to enter into such complex and sensitive questions. It is less understandable that no adequate solutions at the international level have been so far been agreed in contexts different from UNESCO.

### 5. The UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage and the First Nations of Canada

After acknowledging the shortcomings of the Convention in regard to indigenous peoples, it might help to better understand the complex situation if we consider some aspects of the legal position of the First Nations of Canada. The Convention itself states:

Recognizing that communities, in particular indigenous communities, groups and in some cases individuals, play an important role in protection, safeguarding, maintenance and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity.<sup>64</sup>

In Art. 2 of the Convention, the definition of “intangible cultural heritage” includes “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and cultural spaces [...] that communities, groups [...] recognize as part of their cultural heritage.”<sup>65</sup> In fact, aside from ways to understand Indigenous communities embedded in a country like Canada, we can consider separate sovereignty over their lands, but, in addition, I have proposed the “cultural integrity model” as especially significant, given the most important characteristics of First Nations practices and traditions, most of which apply equally to other Indigenous groups. The “cultural integrity model” is also supported by the Organization of American States (OAS) Declaration that explicitly addresses the right to cultural integrity.<sup>66</sup>

The cultural integrity model emphasizes the value of traditional cultures in themselves, as well as for the rest of society. According to the 1992 Rio Declaration on Environment and Development, Principle 22, traditional cultures and the knowledge they possess, must be protected:

Cultural protection for indigenous peoples involves providing environmental guarantees that allow them to maintain the harmonious relationship to the earth that is central to their cultural survival.<sup>67</sup>

Hence, not only their biological integrity, but their cultural integrity as well, is entirely dependent on the protection of the ecological integrity of the areas they occupy. Any

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<sup>63</sup> See Anastasia Telesetsky, “Traditional Knowledge: Protecting Communal Rights through a Sui Generis System” in Nafziger & Scovazzi eds, *Le Patrimoine Culturel de l’Humanité* (Leiden: Martinus Nijhoff Publishers, 2008) at 310; *Ibid* at 13.

<sup>64</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 UNTS 3 at preamble (entered into force 20 April 2006).

<sup>65</sup> *Ibid* at art 2.

<sup>66</sup> S James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York: Oxford University Press, 2004).

<sup>67</sup> Cherie Metcalf, “Indigenous Rights and the Environment: Evolving International Law” (2004) 35 *Ottawa L Rev* 101 at 107.

consideration of the economic value of these areas and forests then is equally dependent on that protection.

The Biodiversity Convention, Art. 8(j),<sup>68</sup> and the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification Especially in Africa,<sup>69</sup> incorporate cultural integrity as one of the indigenous environmental rights that are protected, while the Arctic Council Declaration of 1996<sup>70</sup> ensures that “indigenous groups gained status as permanent participants in an international inter-governmental forum for addressing environmental concerns affecting them and their ancestral lands”.<sup>71</sup>

The cultural integrity model has two aspects: (1) one aspect emphasizes the environmental closeness between environment and the traditional lifestyle of indigenous peoples, that in fact defines and delimits their cultural presence as a people; and (2) the other aspect has their traditional knowledge as its focus, and especially the value of that knowledge to the global community.

Indigenous groups, hence FN’s, appear not to be valued for themselves in this aspect of the model, as much as for their instrumental value, as holders of specific, commercially valuable knowledge.<sup>72</sup> When traditional knowledge is viewed as “intellectual property”, then some may conclude with Dinah Shelton,<sup>73</sup> that the best way to protect the environmental rights of indigenous peoples is through intellectual property law. I believe that this emphasis is misplaced, as the traditional approach of indigenous peoples to the land, for instance, is one of deep kinship and respect, in which the land, the creatures it supports and all its processes are not viewed as a commodity.

Several articles of the Convention on the Rights of the Child<sup>74</sup> are far more appropriate for the protection of their cultural integrity, and the CRC is an instrument that has been ratified by almost all of the global community. Art. 30 states:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous, shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.<sup>75</sup>

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<sup>68</sup> *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 at art 8(j) (entered into force 29 December 1993) [*Biological Diversity Convention*].

<sup>69</sup> *Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 14 October 1994, 1954 UNTS 3 (entered into force 26 December 1996) [*Desertification Convention*].

<sup>70</sup> *Declaration on the Establishment of the Arctic Council*, Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden, and the United States, 19 September 1996, 35 ILM 1387 [Arctic Council Declaration].

<sup>71</sup> *Supra* note 67 at 104.

<sup>72</sup> Michael Halewood, “Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection” (1999) 44 McGill LJ 953.

<sup>73</sup> Dinah Shelton, “Fair Play, Fair Pay: Preserving Traditional Knowledge and Biological Resources” (1995) 5:1 Yearbook Intl Environmental L 77.

<sup>74</sup> *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [CRC].

<sup>75</sup> *Ibid* at art 30.

Here the respect for cultural integrity of children is easy to adapt to indigenous teachings, especially the Seven Generations Rule.

If indigenous peoples are to survive as peoples, rather than being simply assimilated to the larger society in which they are embedded, *both* their biological integrity and their cultural integrity must be treasured: the latter, not as a commodity, but as a living tradition of great value, necessary to guarantee their survival.

The cultural heritage of First Nations figures prominently in the case law that arises from conflicts between FNs and the Canadian Federal or Provincial governments. Their bond with the land and the waters in their areas is fundamental to their tradition, so that the protection of, and the respect for the integrity of the earth is basic to their culture. As well, their traditional food is at times part of their religious ceremonies, hence protected in Canada since the Proclamation of King George:

Nations or Tribes of Indians [...] should not be molested or disturbed in the possession of such Parts of our Dominions and Territories as not having been ceded to or purchased by Us, are reserved to them [...] as their Hunting Grounds [...] We do [...] strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any lands reserved to the said Indians [...]; but that if, at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be Purchased only by Us in our Name, at some public meeting or Assembly of the said Indians.<sup>76</sup>

After the Constitution Act of 1982, specifically, after the adoption of Section 35(1) of the Act, aboriginal rights or title could not be extinguished without the consent of Aboriginal peoples,<sup>77</sup> despite ongoing settlement treaties disputes.<sup>78</sup>

Prior to European occupation, and after the Treaty of Paris (1763), which ended the war between Britain and France regarding Canada, the Aboriginal peoples did not sign treaties giving the Europeans the power to decide their fate. In fact, as noted above, the Royal Proclamation of 1763 was intended to protect the land rights of Aboriginal people in the region.

However, before the Constitution Act of 1982 proclaimed that consent was needed before native rights could be extinguished, the situation was somewhat unclear. The Crown had a “fiduciary duty”,<sup>79</sup> that limited its power regarding indigenous peoples by its obligation to observe “the principles of recognition and reconciliation”.<sup>80</sup> The Crown has the obligation to ensure that there are limits to its sovereign power, in order to protect Aboriginal peoples.<sup>81</sup> The Aboriginal peoples once had sovereignty over the lands they occupied historically and the Crown did not avail itself of the categories of *terra nullius*,

<sup>76</sup> R George, *Royal Proclamation Under the Treaty of Paris, 1768*, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.

<sup>77</sup> Özlem Ülgen, “Aboriginal Title in Canada: Recognition and Reconciliation” (2000) 40 *Netherlands Intl L Rev* 146 at 150.

<sup>78</sup> Michael Asch & Norma Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations”, in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essay son Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 209-211.

<sup>79</sup> Reorganized in 1984 in *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321.

<sup>80</sup> Asch *supra* note 78 at 151.

<sup>81</sup> *R v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 38.

discovery or conquest, recognizing that these were organized native societies already present there.<sup>82</sup>

### 5.A Aspects of the First Nations' Intangible Cultural Heritage

In the case of Indigenous Peoples, the “creativity” that is foundational to their lifestyle has developed together with their culture, through their ceremonies, their traditional feasts and ritual meetings, all of which centre on the consumption of specific foods, such as salmon, as we saw. Because the younger generations tend toward embracing the globalized western culture of the nation within which they are embedded, or a generalized Anglo-American culture, their culture remains marginalized and depreciated, and hence is in peril, and risks disappearing altogether.

It is therefore particularly important that the international community should provide a form of protection specific to the cultural traditions of Indigenous Peoples. Elsewhere, I have argued that the protection of the “natural heritage” was central to an ecologically sound form of global governance.<sup>83</sup> Ecological integrity is also necessary (though not sufficient) for the protection of the lands from which such communities draw their nourishment, and on which they carry on their traditional ceremonies.

The Declaration of King George and its confirmation in the Canadian Constitution,<sup>84</sup> guarantee the FN's rights to “hunt and fish” in their areas. It guarantees the *size* of their reserves but, as can be expected, the Constitution says nothing about the *condition* of the area, that is, whether it is unpolluted enough to maintain wildlife within the borders. It is impossible to hunt and fish according to their tradition, if the pollution eliminates wild animals on land and fish in water.

This difficulty was not an issue at the time of King George, and it was not seriously considered at the time the Constitution was enacted. It is sad, however that it is not seriously considered even today. Hence it is particularly vital to introduce yet another legal instrument to protect not only the basic rights of Indigenous peoples, but also their culture and traditions, tied as these are to the land which they occupy. When a FN's salmon catch is protected, or when the moose they hunt is kept safe, it is more than just their food sources that are defended, it is—at the same time—their traditions, their unique cultures, hence, essentially, their survival as a people.

In the case of the FNs of Canada or the Indian tribes in North America, the “intangible cultural heritage” includes their “practices, representations, expressions, knowledge, skills” such as they pertain specifically to each group or community.<sup>85</sup> In Canada, the “intangible” is especially significant, given that there are no written histories of each group, and their culture and traditions live only in their oral history. Today oral history and oral traditions are also accepted to support aboriginal claims in a court of law,<sup>86</sup> and we will return to this topic in the next section.

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<sup>82</sup> Asch *supra* note 78 at 153.

<sup>83</sup> Laura Westra, *Ecological Integrity and Global Governance: Science, ethics and the law* (New York: Routledge, 2016) at 114-119.

<sup>84</sup> *Canada Act 1982* (UK), 1982, c 11 at art 35.

<sup>85</sup> The *Convention*, *supra* note 1 at art 2(1).

<sup>86</sup> Stuart Rush, *Aboriginal Practice Points: Oral History* (Continuing Legal Education Society of British Columbia, 2008) online: < <https://www.cle.bc.ca/PracticePoints/ABOR/Oral%20History%20FINAL.pdf> >.

In 2009, there was a meeting at Vitré, where experts in food practices met to discuss the fact that Art. 2, para. 2, explains why “food practices”, as they include several of the elements mentioned, represent also systems of social relations and express meanings shared by the collective:

Les experts ont estimé, que, dans le cadre de la Convention, les pratiques alimentaires ont une dimension transversal vis-à-vis des domaines explicités à l'article 2 alinéa 2 en tant qu'elles s'intègrent à des systèmes articulés de relations sociales et de significations collectivement partagées. Les pratiques alimentaires concernent donc aussi bien les traditions et expressions orales, les arts du spectacle, les pratiques concentrent la nature aussi que les savoir-faire liés à l'artisanat traditionnel.<sup>87</sup>

Essentially the social practices, the rites and feast occurrences include shared food, traditional music and dance.<sup>88</sup> In addition, in 2010, the List of representative examples of the intangible cultural heritage included non-Indigenous food practices: the “*pasto gastronomico dei francesi*” (the French gastronomic meal), and the well-known “Mediterranean diet” (Italy, Greece, Morocco and Spain).<sup>89</sup> These practices founded in tradition and culture are substantive examples of the intangible cultural heritage of specific peoples. Valentina Vadi argues that the 2003 UNESCO Convention on the Safeguard of the Intangible Cultural Heritage (CSICH) represents a significant way:

[To] counter the perceived commodification of culture, i.e. its reduction to the good or merchandise to be bartered or traded. Rather, the CSICH proposes an alternative view perceiving oral traditions and express knowledge and practices concerning food, as forms of intangible cultural heritage.<sup>90</sup>

Vadi emphasizes the importance of CSICH, despite its legal importance against the WTO, which, she adds, is a “legally binding and highly effective regime which demands states to promote and facilitate free trade”.<sup>91</sup> The WTO’s rules and decisions are entirely oriented to trade, with no respect for “food, culture, or farming techniques”.<sup>92</sup>

At any rate, our discussion reaches even beyond the basic conflict between cultural heritage, traditional activities on one hand, and trade on the other, because Canadian Courts allow the confirmation of land title, using these same traditions as decisive.

However it is important to distinguish those traditional activities from the recognition that the same Indigenous communities do not have written histories or laws, although only recently their oral testimonies have been accepted as equal to written documents in Canadian courts, as we shall see below.

<sup>87</sup> *Compte rendu des journées de Vitré sur les Pratiques Alimentaires*, 3 April 2009; see also Scovazzi, *supra* note 1 at 156.

<sup>88</sup> *Ibid* at 159.

<sup>89</sup> *Ibid* at 162.

<sup>90</sup> Valentina Vadi, “Food wars: Food, intangible cultural heritage and international trade” in Laura Westra, Janice Gray & Antonio D’Aloia, eds, *The Common Good and Ecological Integrity: Human Rights and the Support of Life* (Abingdon, GB: Routledge, 2016) 49 at 52.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid* at 56-57, see also Fiona Smith, “Indigenous Farmers’ Rights, International Agriculture Trade and the WTO” (2011) 2:2 J HR & Env 157.

### 5.B. Oral History and Tradition: Its Role in Proving Aboriginal Rights or Title

Judicial skepticism about the use of oral history has taken a turn for the better as a result of the judgment of Vickers J. in *Tsilhqot'in Nation v. British Columbia*, 2007 BC SC 1700. By this case the law on the use of oral history evidence has evolved significantly and its important role in aboriginal title litigation has been properly recognized. The decision represents the first considered and systematic application of oral history and oral tradition evidence by a trial judge in determining long-standing occupation of a definite tract of land. Relying on principles set out in a number of Supreme Court of Canada Decisions.<sup>93</sup>

The judges who supported this move toward the acceptance of oral history and testimony in general, gave “greater prominence to the function of history and the role of historians”: they emphasized the fact that even written historical records are not self-evident but require interpretation instead.<sup>94</sup> A further distinction is useful to achieve a clearer understanding of the difference between oral history and oral tradition and, most of all, to acknowledge the fact that oral history differs from one aboriginal nation to another, as there is not one format for all.<sup>95</sup>

Oral accounts given at trial also show the distinction between oral history and oral traditional evidence.<sup>96</sup> The latter is the history of a specific group, and how they came to occupy their land, how they procured their food, such as fishing stations or hunting areas, although some oral histories might be close to mythology as they describe the feasts and other events of the history of a people.<sup>97</sup> At any rate:

Aboriginal rights arise from pre-contact occupation and are reflected in the use of land or resources based on practice, custom or tradition.<sup>98</sup>

Although we have been studying primarily food and the use of natural resources, what we consider at this time is far more than simply the Indigenous ways of satisfying hunger. What is at stake may be the very “proof of Aboriginal rights”, as the Supreme Court of Canada demonstrates the vital importance of traditional practices and traditional ceremonies involving food:

The elements of proof of aboriginal rights were set out by the Supreme Court of Canada in *R. v. van der Peet* [1996] 2 S.C.R. 307, and the tests were summarized by the court in *Mitchell v. Canada* (M.N.R.), 2001, SCC 33 at para. 12: Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact.<sup>99</sup>

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<sup>93</sup> *Delgamuukw v BC* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; *Mitchell v MNR*, 2001 SCC 33, 199 DLR (4th) 385; *R v Marshall*; *R v Bernard*, 2005 SCC 43, 255 DLR (4th) 1; Vicker J. adopted a constructive approach to determining admissibility (*Rush*, *supra* note 86 at 4).

<sup>94</sup> *Ibid* at 5.

<sup>95</sup> *Ibid* at 6.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Delgamuukw*, *supra* note 92 at para 96-97.

<sup>98</sup> *R v Sappier*; *R v Gray*, 2006 SCC 54 at para 45, 274 DLR (4th) 75; *Rush*, *supra* note 86 at 9.

<sup>99</sup> *Rush*, *supra* note 86.



Thus, a specific intangible cultural practice may be believed to have been initiated before contact with white people had been established. If that traditional feast, event or other cultural practice can be established to have existed prior to contact, perhaps in a somewhat different form, it may be sufficient to convince the Superior Court that the area where it occurred belonged legitimately to the FN presently occupying the same location. Thus, at least in Canada, the oral recollection of a cultural practice, traditionally transmitted orally, may well be sufficient to decide a case involving the limited sovereignty present in today's Canadian law. The Convention for the Intangible Cultural Heritage, I believe, could and should support the many facets of Indigenous traditional culture that are not protected under major international law instruments.

At the same time, there is a reciprocal relation between this Convention and the rights of Indigenous Peoples, as it emerges in the discussion of the FNs of Canada. Thus, the latter's rights and values in turn emphasize the importance of the 2003 Convention, while they also demonstrate the need for further development and expansion of that document. Given the close relation between the principles and goals of the Convention and those of the traditions of the First Nations, it is unfortunate that Canada is not yet a party to the 2003 Convention. This is particularly regrettable because the Convention could grant a better protection for the cultural rights of the First Nations.

### **Conclusion**

It appears that the Convention for the Safeguarding of the Intangible Cultural Heritage has many merits and deserves to be ratified by the broadest number of States, including Canada. However, despite its expressed aim to safeguard the cultural heritage of humanity, the Convention does not address adequately the culture of indigenous peoples. Neither the preservation of the natural systems upon which most indigenous peoples depend, nor their specific traditions and culture are sufficiently stressed in the Convention. Yet oral history and traditions, at least in Canada, have a strong role in proving aboriginal title of First Nations. This explains why Canada not only should become a party to the Convention, but should take the Convention as an opportunity to do more than the Convention would strictly require in order to enhance the protection of the rights and traditions of its First Nations.

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

*Marina Lostal\**

## 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,<sup>1</sup> 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”.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Lastly, given that fundamentalist groups have now incorporated the destruction of

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<sup>1</sup> 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](http://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](http://www.icty.org)>.

<sup>2</sup> 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](http://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](http://www.foreignpolicy.com)>.

<sup>3</sup> 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](http://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](http://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].

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

<sup>5</sup> 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,<sup>6</sup> the Al Mahdi case will also serve as a point of reference in potential domestic proceedings against perpetrators.<sup>7</sup>

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,<sup>8</sup> 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,<sup>9</sup> but also the destruction of certain religious and historic sites due to their impious nature.<sup>10</sup>

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.<sup>11</sup>

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.

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<sup>6</sup> See, for example, "UNESCO Director-General deplores destruction of parts of ancient city of Baraqish, calls for protection of Yemen's heritage", *UNESCO News* (13 Sept 2015), online: <[www.unesco.org](http://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](http://www.unesco.org)>.

<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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”,<sup>12</sup> and it is a part of UNESCO’s World Heritage List of sites deemed of outstanding universal value for the whole of humanity.<sup>13</sup>

From the outset, Al Mahdi admitted his guilt.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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 circumstance<sup>17</sup> and gave it substantial weight, although it also noted that the admission was “made against a backdrop of overwhelming evidence”.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> Albeit *lex specialis*, the reader should note

<sup>12</sup> 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](http://www.icc-cpi.int)>.

<sup>13</sup> 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].

<sup>14</sup> 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](http://www.icc-cpi.int)> [Accord sur l’aveu].

<sup>15</sup> *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>>.

<sup>16</sup> 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](http://www.icc-cpi.int)> [Prosecution’s submissions on sentencing].

<sup>17</sup> 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.

<sup>18</sup> *Ibid* at para 100.

<sup>19</sup> 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)).

<sup>20</sup> *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.<sup>21</sup> 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”<sup>22</sup> 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,<sup>23</sup> 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.”<sup>24</sup> 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.<sup>25</sup>

More specifically, Al Mahdi admitted to having been involved in the destruction of nine mausoleums and the door of the mosque of Sidi Yahia.<sup>26</sup> 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 Mausoleum<sup>27</sup> – 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”;<sup>28</sup> they believed that “opening the door [would] herald misfortune”.<sup>29</sup> 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”.<sup>30</sup> 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.”<sup>31</sup>

<sup>21</sup> 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.

<sup>22</sup> “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>>.

<sup>23</sup> Namely: Sidi Mahmoud Ben Omar Mohamed Aquit; Cheick Mohamed Mahmoud Al Arawani; Cheikh Sidi Mokhtar Ben Sidi Mouhammad Ben Cheick Alkabar; 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.

<sup>24</sup> *Supra* note 11 at para 36.

<sup>25</sup> *Ibid* at para 37.

<sup>26</sup> *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>>.

<sup>27</sup> *Supra* note 11 at para 38.

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

<sup>29</sup> *Ibid*.

<sup>30</sup> *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](http://www.icc-cpi.int)>.

<sup>31</sup> *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.<sup>32</sup> Sufism, one of the many different currents within Islam, is accused by followers of Salafism (the creed espoused by fundamentalist groups) of being polytheist.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> 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;”<sup>36</sup> the Sheikh Mouhamad El Mikki Mausoleum represented “a place of spiritual retreat and reflection;”<sup>37</sup> and the two mausoleums attached to the Djingareyber Mosque were used twice a week for religious purposes.<sup>38</sup> 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.<sup>39</sup>

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,<sup>40</sup> 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

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<sup>32</sup> 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.

<sup>33</sup> 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.

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

<sup>35</sup> *Supra* note 11 at para 35.

<sup>36</sup> *Ibid* at para 38(iv).

<sup>37</sup> *Ibid* at para 38(v).

<sup>38</sup> *Ibid* at para 38(ix).

<sup>39</sup> *Ibid* at para 78.

<sup>40</sup> 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.<sup>41</sup>

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”.<sup>42</sup> 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”.<sup>43</sup> 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”.<sup>44</sup> 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 2003<sup>45</sup> and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.<sup>46</sup>

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.<sup>47</sup> 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”<sup>48</sup> and, given its world heritage listing, the attack also affected “people throughout Mali and the international community”.<sup>49</sup>

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”**

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

<sup>42</sup> 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).

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

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

<sup>45</sup> *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>.

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

<sup>47</sup> 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.

<sup>48</sup> *Supra* note 11 at para 79.

<sup>49</sup> *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”<sup>50</sup> 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.<sup>51</sup> 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”,<sup>52</sup> but that the gravity threshold requirement acted as an “additional safeguard which prevents the Court from investigating, prosecuting and trying peripheral cases”.<sup>53</sup>

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,<sup>54</sup> 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”.<sup>55</sup> 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”,<sup>56</sup> and further added that “[t]he inhabitants of Northern Mali [are] the main victims of these attacks”.<sup>57</sup> 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.<sup>58</sup>

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,<sup>59</sup> and the modes of liability applicable to Al Mahdi.<sup>60</sup> However, this was placed in a context where the impact on human

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<sup>50</sup> *ICC Statute*, *supra* note 39 at s 61(7).

<sup>51</sup> *Ibid.*, s 17(1)(d), 19.

<sup>52</sup> *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.

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

<sup>54</sup> 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/>>.

<sup>55</sup> 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/>>.

<sup>56</sup> 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).

<sup>57</sup> *Ibid.*

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

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

<sup>60</sup> *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.<sup>61</sup>

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.<sup>62</sup>

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".<sup>63</sup> 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

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<sup>61</sup> *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.

<sup>62</sup> 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.

<sup>63</sup> *Ibid*.

required by military necessity.<sup>64</sup>

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”.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup>

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

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

<sup>65</sup> 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.

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

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

<sup>68</sup> 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.

<sup>69</sup> 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.<sup>70</sup>

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,<sup>71</sup> and one may have been “the largest [standing] Buddha ... in the world”.<sup>72</sup> At the feet of these gigantic statues lay a community of Buddhist monasteries, which welcomed worshippers and sightseers from around the world.<sup>73</sup> 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.<sup>74</sup> Taliban rule was noted for its “absolute lack of freedom of expression and [its] total ban on pictures”,<sup>75</sup> 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.<sup>76</sup> This policy was reinforced by the publication of a decree by the Afghan Supreme Court ordering the destruction of the Buddhas,<sup>77</sup> 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

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<sup>70</sup> 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 .

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

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

<sup>73</sup> Ibid.

<sup>74</sup> 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.

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

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

<sup>77</sup> Francioni & Lenzerini, *supra* note 75 at 626.

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

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”.<sup>79</sup> 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.<sup>80</sup>

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.”<sup>81</sup>

While Timbuktu was added to the World Heritage List in 1988, the Buddhas of Bamiyan were part of the Afghan Tentative List of World Heritage<sup>82</sup> 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”.<sup>83</sup> 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”.<sup>84</sup>

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,<sup>85</sup> there are no records indicating the presence of Buddhism in Afghanistan after 1336.<sup>86</sup> The intangible dimension of the crime as understood by the Chief Prosecutor would therefore be missing in the case of the Buddhas: their

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

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

<sup>80</sup> Cited in Francioni & Lenzerini, *supra* note 75 at 626.

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

<sup>82</sup> 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).

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

<sup>84</sup> *Ibid* at preamble.

<sup>85</sup> *Supra* note 29 at para 36.

<sup>86</sup> 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”.<sup>87</sup> 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”,<sup>88</sup> 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”,<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> However, in so doing, the Chamber acknowledged that “even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons”.<sup>92</sup>

## 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.

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

<sup>88</sup> UNESCO, *Ancient Villages of Northern Syria: Description*, online: <[whc.unesco.org/en/list/1348](http://whc.unesco.org/en/list/1348)>.

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

<sup>90</sup> *Supra* note 11 at paras 13–20.

<sup>91</sup> *Ibid* at para 79.

<sup>92</sup> *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”,<sup>93</sup> this destruction – contrary to the Prosecution’s submission – is not always “aimed at erasing the cultural identity and heritage of a population”.<sup>94</sup> 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.

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<sup>93</sup> Prosecution’s submissions on sentencing, *supra* note 15 at 18.

<sup>94</sup> *Ibid.*