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# From Timbuktu to The Hague and Beyond

## The War Crime of Intentionally Attacking Cultural Property

Mark A. Drumbl\*

### Abstract

*This essay refracts the criminal conviction and reparations order of the International Criminal Court (ICC) in the Al Mahdi case into the much broader frame of increasingly heated public debates over the protection, removal, defacement, relocation, display and destruction of cultural heritage in all forms: monuments, artefacts, language instruction, art and literature. What might the work product of the ICC in the Al Mahdi proceedings — and international criminal law more generally — add, contribute or excise from these debates? This essay speculatively explores connections between the turn to penal law to protect cultural property and the transformative impulses that undergird transitional justice which, in turn, often insist upon cultural change, including to cultures of oppression and impunity. Along the way, this essay also unpacks thorny questions as to how to value cultural property; how to determine what, exactly, constitutes the kind of property whose destruction should be criminalized; and which 'cultures' should be protected by 'whom' and in 'whose' interests.*

'Culture is who we are.'<sup>1</sup>

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1 Fatou Bensouda, Prosecutor of the International Criminal Court (ICC), in her opening statement in the ICC proceedings against Ahmed al Faqi Al Mahdi.

# 1. Introduction

On 27 September 2016, Trial Chamber VIII of the International Criminal Court (ICC or ‘the Court’) unanimously sentenced Ahmad al-Faqi Al Mahdi to nine years’ imprisonment after convicting him of the war crime of intentionally attacking cultural property in Timbuktu, Mali.<sup>2</sup> Al Mahdi pled guilty as a co-perpetrator. His is the lowest sentence the ICC has thus far issued. On 17 August 2017, the Trial Chamber issued its reparations order in the same case. It found Al Mahdi liable for 2.7 million euros for individual and collective reparations.<sup>3</sup>

In 2012, Al Mahdi jointly organized the destruction of structures (including mausoleums) of a religious and historical character in Timbuktu. An emblematic city, Timbuktu served as a trading *entrepôt* in the fifteenth and sixteenth centuries. It constituted a focal point for the spread of Islam in the region, housing libraries and manuscripts of great intellectual and spiritual renown. Acting in the name of fundamentalist Salafism, Al Mahdi destroyed shrines to Sufi saints situated above tombs.<sup>4</sup> Many were made of mud and brick. The United Nations Educational, Scientific, and Cultural Organization (UNESCO) had recognized all but one of these structures as world heritage sites. Timbuktu indeed was inscribed on the World Heritage List in 1998.<sup>5</sup> Al Mahdi was charged solely in relation to his role in demolishing these shrines, and additionally the door of a renowned mosque (Sidi Yahia) and adjacent buildings, all of which constituted conduct falling under the auspices of Article 8(2)(e)(iv) of the ICC Statute. The devotional sites he attacked have since been rebuilt with the help of foreign financial assistance.<sup>6</sup>

The *Al Mahdi* case represents the first time that charges have been brought before the ICC for the war crime of intentional attacks on cultural property. Although such attacks are ‘in no sense a modern

2 Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 27 September 2016 (hereinafter ‘*Al Mahdi* judgment and sentence’); see also M. Simons, ‘Prison Sentence Over Smashing of Shrines in Timbuktu: 9 Years’, *New York Times*, 27 September 2016.

3 Reparations Order, *Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 17 August 2017 (hereinafter ‘*Al Mahdi* reparations order’). For further discussion, see F. Capone, ‘An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes Against Cultural Heritage’, 16 *Journal of International Criminal Justice* (JICJ) (2018) 645–661.

4 M. Lostal, ‘The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the *Al Mahdi* Case at the ICC’, 1 *Inter Gentes* (2017) 45–58, at 50 (‘Timbuktu is sometimes referred to as the City of the 333 (Sufi) Saints ... It also houses thousands of sacred manuscripts, many dating back to the 13<sup>th</sup> century ... Sufism, one of the many different currents within Islam, is accused by followers of Salafism (the creed espoused by fundamentalist groups) of being polytheist.’).

5 Convention Concerning the Protection of the World Cultural and Natural Heritage, 23 November 1972, 1037 UNTS 151 (entered into force 15 December 1975). For discussion of selection criteria and processes for the World Heritage List, which is established by this Convention, see discussion *infra* notes 58–62.

6 *Al Mahdi* reparations order, *supra* note 3, §§ 63, 116 (‘Since the attacks, UNESCO — together with other stakeholders — has rebuilt or restored each of the Protected Buildings.’); see also <https://www.theguardian.com/world/2015/jul/20/timbuktus-historic-tombs-restored-in-show-of-confidence-for-war-ravaged-mali> (visited 29 November 2018).

phenomenon;<sup>7</sup> the deployment of international judicial institutions to prosecute offenders is a recent development. To be clear, the ICC is not the first judicial institution to turn to international criminal law to protect cultural property in armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) did so in the context of violence during the Balkans Wars;<sup>8</sup> the International Military Tribunal at Nuremberg indicted major war criminals for destruction of cultural monuments;<sup>9</sup> and in 1947, the French Permanent Military Tribunal found a civilian guilty of a war crime for destroying a statue of Joan of Arc and a monument commemorating the dead of World War I.<sup>10</sup> The reparations order in *Al Mahdi*, made possible by virtue of the ICC Statute's innovative nature, for its part presents as a breakthrough in terms of assisting populations afflicted by cultural property destruction.<sup>11</sup>

The judgment and reparations order in *Al Mahdi* coincide with a moment in which debates over cultural property have intensified in a broad array of disciplines and venues. In the two years since *Al Mahdi*'s criminal conviction, questions of protection and destruction and removal of cultural property — and the place of cultural heritage and memorialization in public life — continue to galvanize discussion and enflame heightened passions. To gesture towards but a few such controversies: acrimonious debates over Confederate memorials roil the United States; a statue of Canada's first Prime Minister, Sir John A. Macdonald, has been removed from the city hall of Victoria, British Columbia (two other iconic/ironic place-names) owing to his establishment of cruel anti-Aboriginal policies in the then newly independent country; legislation has been enacted in Serbia that requires any construction of war memorials to be 'in line with' the country's 'liberation wars' and permits removal of memorials that fail to 'correspond [to] historical or real facts' or 'offend state

7 M.S. Ellis, 'The ICC's Role in Combatting the Destruction of Cultural Heritage', 49 *Case Western Reserve Journal of International Law* (2017) 23–62, at 24.

8 Judgment, *Jokić* (IT-01-42/1-S), Trial Chamber, 18 March 2004 (Jokić was sentenced to seven years' imprisonment); Judgment, *Strugar* (IT-01-42-T), Trial Chamber, 31 January 2005 (Strugar was sentenced to eight years' imprisonment); S. Brammertz, K. Hughes, A. Kipp and W. Tomljanovich, 'Attacks Against Cultural Heritage as a Weapon of War', 14 *JICJ* (2016) 1143–1174. See, however, *Al Mahdi* judgment and sentence, *supra* note 2, § 16 (noting that ICTY jurisprudence is of 'limited guidance' in light of the fact that the crime in the ICTYST. does not govern 'attacks' against cultural objects but rather punishes their 'destruction or wilful damage').

9 Count Three (War Crimes), Part E (Plunder of Public and Private Property, Indictment, in Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, vol. 1 at 11–30. One scholar notes that '[t]he [International Military Tribunal] held that confiscation and destruction of religious and cultural institutions and objects of Jewish communities amounted to persecution that was a crime against humanity'. See A.E. Vrdoljak, 'The Criminalisation of the Intentional Destruction of Cultural Heritage' (2016), at 14, available online at <http://works.bepress.com/ana.filipa.vrdoljak/38/> (visited 29 November 2018).

10 Trial of Karl Lingenfelder (11 March 1947), in United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (London, 1949) Vol. 9, 67.

11 For exploration of preventative and other non-criminal law ways to protect cultural heritage from destruction and looting, see M.V. Vlasic and H. Turku, "'Blood Antiquities': Protecting Cultural Heritage beyond Criminalization", 14 *JICJ* (2016) 1175–1197.

interests ... or public morality';<sup>12</sup> the thinning out of Afrikaans language instruction gathers steam as a matter of educational policy at the primary, secondary, and tertiary levels throughout South Africa; ISIS' demolition of sites in Nimrud, Palmyra, and mausoleums north of Baghdad as well as its trade in pilfered antiquities;<sup>13</sup> the destruction by fire of Brazil's most cherished but budgetarily starved *Museu Nacional* in Rio de Janeiro;<sup>14</sup> preservation of sites and artefacts sacred to indigenous peoples;<sup>15</sup> and exhortations for museums to 'return' objects to their places of origin (from which they were often taken by colonial or occupying powers) have increased in scale and tempo.<sup>16</sup>

This essay explores connections — whether intentional, inchoate, subtle, accidental or inadvertent — between the *Al Mahdi* case and these broader debates. What might criminally punishing the destruction of cultural property in the manner outlined by the ICC in *Al Mahdi* bring to or imply for these debates, including questions of how to approach cultural heritage in contexts of transitional justice that seek to incubate cultural changes? In this vein, this essay unspools what the ICC did in *Al Mahdi* and reflects a bit on how the ICC might have done things differently. That said, the heart of this essay is to ruminate upon the kinds of conversations — taking place afar from The Hague and courtrooms — that *Al Mahdi* might energize, open, discourage or close.

One immediate response is that the ICC has nothing to add to such conversations: such is not its goal, nor is the institution equipped to do so. The work product of the ICC — *arguendo* — is limited to technically pronouncing upon the guilt or innocence of the accused. This is a response that I have heard from some international criminal lawyers when I have presented this article

12 Balkan Transitional Justice, 'Serbian Law Says Memorials Must Commemorate 'Liberation Wars'', 29 June 2018.

13 The United Nations Security Council, moreover, has explicitly condemned the destruction of cultural heritage and religious sites and artefacts by terrorist groups. United Nations Security Council Res. 2347 (24 March 2017). In May 2015, the UN General Assembly unanimously adopted a resolution entitled 'Saving the Cultural Heritage of Iraq'. GA Res 69/281.

14 M. Andreoni, E. Londoño and L. Moriconi, 'Double Blow to Brazil Museum: Neglect, Then Flames', *New York Times*, 3 September 2018 (reporting that 'thousands, perhaps millions of significant artefacts had been reduced to ashes ... in a devastating fire' and noting that the lack of a fire-suppression system and infrastructure breakdowns (such as fire hydrants lacking water and smoke detectors not working) exacerbated the damage. See also 'Brazil museum fire: Funding cuts blamed as icon is gutted', *BBC News*, 3 September 2018 (on file with the author)).

15 F. Holder, 'Indigenous Rights and International Law', Research Paper (Monash University, School of Law) July 2018 (on file with the author); A.R. Riley, 'Straight Stealing: Towards an Indigenous System of Cultural Property Protection', 80 *Washington Law Review* (2005) 69–164, at 75.

16 So, too, have defensive ripostes to such claims. Italy, for example, has argued that the Aksum Obelisk, taken from Ethiopia during the colonial era, has naturalized now as Italian. 'Italy to keep Ethiopian Monument', *BBC Africa*, 20 July 2001, available online at <http://news.bbc.co.uk/2/hi/africa/1448531.stm> (visited 3 December 2018). In France, controversies freshly churn regarding President Macron's pledge to return 26 objects of the Quai Branly collection to Bénin which had been looted by colonial forces in 1892. See F. Nayeri, 'Return of African Artifacts Sets a Tricky Precedent for Europe's Museums', *New York Times*, 27 November 2018 (noting also that the British Museum has distanced itself from this pledge).

in public venues. While I remain sceptical that most international criminal lawyers actually feel this way about 'our' work product, in the event I am misguided, it appears (to me) that the work product of international criminal courts and tribunals, regardless of intent, nonetheless serves as a touchstone, reference point, and barometer for diverse stakeholders and observers operating outside of the field of law.

Returning quickly to my scepticism, however: high-profile criminal trials undertaken in the solemnity of The Hague do strike me as crowning themselves with considerable didactic, pedagogic, explanatory, expository, and expressive value. They regale; they circulate stories, which they authenticate through judicial prose.<sup>17</sup> Trials fill spaces, which they then imagine and construct. Certainly, the *Lubanga* case was heralded as deeply instructive in terms of contributing to narratives of child soldiering: as I have argued elsewhere, at times in a hobbled manner owing to the emaciated concept of the child soldier that was deployed (and deplored) by and through international criminal law.<sup>18</sup> What about *Al Mahdi*? What positionality does it occupy? How does the vision of cultural heritage actuated by the judgment and reparations order — the vision projected by international criminal law — filter into these broader discursive frames? How does it chime and rhyme with debates unfolding in these plots and pleats? Is the international legal vision a *reflective* one or a *reflexive* one? This essay unpacks how judicial decision-makers, and the prosecutors who teed up the *Al Mahdi* case, approach the questions of what constitutes cultural property and why cultural property matters.

Elemental among debates within cultural property theory is whether the protective impulse is internationalist or nationalist in motivation.<sup>19</sup> The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,<sup>20</sup> for example, reflects a cosmopolitan approach that envisions

17 Stories also are told in the places where international criminal law remains silent. Some of these stories are confabulations, painful 'fake news', or just denialism. For example, in Zvornik, in the former Yugoslavia, Serbs destroyed five mosques in the Balkans Wars. Yet, in brazen revisionism, Zvornik's mayor claimed that 'there were never any mosques in Zvornik' — completely gas-lighting, he insists they never existed. See *Prosecutor's Opening Statement*, available online at <https://www.icc-cpi.int/legalAidConsultations?name=otp-stat-al-mahdi-160822> (visited 29 November 2018). Other histories of cultural property destruction remain documented but not sanctioned, such as Turkish attempts to pulverize the cultural heritage of the Armenians.

18 M.A. Drumbl, *Reimagining Child Soldiers in International Criminal Law and Policy* (Oxford University Press, 2012).

19 J.H. Merryman, 'Two Ways of Thinking about Cultural Property', 80 *American Journal of International Law (AJIL)* (1986) 831–853. See also *ibid.*, at 853 (contrasting retentive nationalism with cultural internationalism; Merryman favours cultural internationalism owing to its emphasis on 'preservation, integrity, and distribution/access'). For critique of Merryman's views, see L.V. Prott, 'The International Movement of Cultural Objects', 12 *International Journal of Cultural Property* (2005) 225.

20 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954), 249 UNTS 240 (hereinafter '1954 Hague Convention'). This Convention descends from the 1863 Lieber Code, the 1899 and 1907 Hague Conventions, and the Washington Pact of 1935. In Art. 1, it defines cultural property as 'moveable or immovable property of great

the primary significance of cultural property in that it contributes to the cultural heritage of all of humanity. For the internationalist vision, the term ‘heritage’ — in particular, common heritage of humanity — is preferred over the term ‘property’ with its connotations of material ownership and rights of exclusion. The other major international instrument on cultural property is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which deals with the different context of looting and sale.<sup>21</sup> This instrument ties the importance of cultural property to individual states because that property expresses ‘the collective genius of the State concerned’.<sup>22</sup> This instrument thereby reflects a sense of cultural nationalism in that it attributes national character to the property in question, seeks its retention in its place of origin and traditional setting, and its repatriation in the case of illicit removal.<sup>23</sup>

*Al Mahdi* offers little in the way of mindful reference to either of these overarching theories. In the end, the judgment — without assignation and with oscillation — places the ICC Statute provision somewhere between these two poles of cultural property theory: though inclining more towards the internationalist justification for protection in the case of the penal sanction and towards the nationalist justification in the reparations order. The reparations decision could in fact be read to impliedly gesture toward a third approach, namely a ‘localist’ vision of cultural property protection in that nearly all the ordered funds were intended for the population of Timbuktu.

## 2. The Proceedings and their Background(s)

Armed violence became endemic in Mali beginning in January 2012. A complex situation arose. Armed groups took control of the north of the country following the retreat of official Malian forces. Among these armed groups were Al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine (‘defenders of faith’). Al Mahdi was associated with Ansar Dine. These groups sought the

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importance to the cultural heritage of every people’ and, in its preamble, affirms that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’. Destruction of a culture’s property, therefore, is seen as eliminating part of the biodiversity of humanity. This Convention requires the affixing of a ‘distinctive emblem’ (a blue and white shield), either three times or one time depending on the level of protection or identification. See Arts 16–17 1954 Hague Convention, *ibid.* Art. 28 obliges parties to criminalize breaches of the convention. See generally, P. Gerstenblith, ‘The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?’ 15 *John Marshall Review of Intellectual Property Law* (2016) 336–393, at 346; R. O’Keefe, ‘Protection of Cultural Property Under International Law’, 11 *Melbourne Journal of International Law* (2010) 339–392 (noting that no charges have been laid within the meaning of Art. 28).

21 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.

22 *Ibid.*, Art. 4(a).

23 Merryman, *supra* note 19, at 832, 846.

establishment of an independent country, called Azawad, under the control of Ansar Dine. Between April 2012 and January 2013, AQIM and Ansar Dine 'imposed their religious and political edicts on the territory of Timbuktu and its people ... through a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade ... called the *Hesbah*'.<sup>24</sup> *Hesbah* enforced *sharia* and was tasked with 'preventing, suppressing and repressing anything perceived by the occupiers to constitute a visible vice'.<sup>25</sup>

Al Mahdi (also known as Abu Turab, his *nom de guerre*) — a teacher and an ethnic Tuareg — was born in Agoune in the region of Timbuktu and, at the time of his trial, was believed to be between 30 and 40 years old.<sup>26</sup> He had received Koranic education since childhood and 'belongs to a family recognized in his community for having a particularly high knowledge of Islam'.<sup>27</sup> Although he was the head of the *Hesbah* until September 2012 he also reported to Ag Ghaly (leader of Ansar Dine) and Abou Zhed (governor of Timbuktu).

Al Mahdi had been arrested in Niger by French troops, from where he was sent to The Hague.<sup>28</sup> Al Mahdi reached a plea agreement with the Office of the Prosecutor on 18 February 2016.<sup>29</sup> His trial was held between 22 and 24 August 2016.<sup>30</sup> In *Al Mahdi*, a total of eight victims participated in the trial proceedings.<sup>31</sup>

At trial, judges noted Al Mahdi's initial reluctance to demolish the mausoleums, a decision that had been made by his superiors.<sup>32</sup> While Al Mahdi believed that any construction over a tomb was prohibited by Islamic law, he initially recommended 'not destroying the mausoleums so as to maintain relations between the population and the occupying groups'.<sup>33</sup> Nonetheless, as time passed, he agreed to conduct the attack 'without hesitation' when instructed, prepared a sermon dedicated to the destruction of the mausoleums, and 'personally determined the sequence in which the buildings/monuments were to be attacked'.<sup>34</sup> Al Mahdi was also well aware — for it was common knowledge — that mausoleums of saints and mosques of Timbuktu comprise

24 *Al Mahdi* judgment and sentence, *supra* note 2, § 31. For a poignant, painful, and utterly dignified cinematographic treatment of life in Mali under Ansar Dine in 2012, see *Timbuktu* (2014), a Franco-Mauritanian drama feature film directed by Abderrahmane Sissako.

25 *Al Mahdi* judgment and sentence, *supra* note 2, § 33.

26 *Al Mahdi* judgment and sentence, *supra* note 2, § 9.

27 *Ibid.*

28 A single ICC judge issued his arrest warrant on 18 September 2015. *Al Mahdi* judgment and sentence, *supra* note 2, § 1.

29 *Al Mahdi* judgment and sentence, *supra* note 2, § 3.

30 *Al Mahdi* judgment and sentence, *supra* note 2, § 7.

31 *Al Mahdi* judgment and sentence, *supra* note 2, § 6.

32 For the argument that it remains unclear whether Al Mahdi is the 'most responsible' for the crimes, see M. Sterio, 'Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case', 49 *Case Western Reserve Journal of International Law* (2017) 63–73.

33 *Al Mahdi* judgment and sentence, *supra* note 2, § 36.

34 *Al Mahdi* judgment and sentence, *supra* note 2, § 37.



‘an integral part of the religious life of its inhabitants’, are frequently visited, serve as places of pilgrimage, and ‘constitute a common heritage for the community’.<sup>35</sup>

The sites were razed publicly and with great force. Security cordons protected the attackers. The door of the Sidi Yahia Mosque was ‘opened’ with pickaxes that Al Mahdi had bought with *Hesbah* funds.<sup>36</sup> According to legend, that door had not been opened for 500 years. It guarded against the ‘evil eye’.<sup>37</sup> Opening it would lead to the Last Judgment. Deriding these legends as ‘superstitions’, Al Mahdi explained to journalists that destruction of the doors was one way to eradicate idolatry and heresy, while also dispelling myths which *Hesbah* ‘fear[ed] will invade the beliefs of people ... who, because of their ignorance and their distance from religion, will think that this is the truth’.<sup>38</sup>

The three trial judges determined based on the admission of guilt and related facts that Al Mahdi: supervised the execution of the operations; collected, bought and distributed the necessary tools; was present at all of the attack sites where he gave instructions and moral support; was responsible for justifying the attacks to journalists; and personally participated in the destruction of at least five sites.<sup>39</sup> Judges noted that nine of the sites were designated by UNESCO as important to international cultural heritage. Although these designations are supposed to protect cultural property, in the case of the Timbuktu shrines these designations may paradoxically have imperilled them. Al Mahdi, for instance, directly invoked the UNESCO protections as a reason to wreck one mosque: ‘Those UNESCO jackasses... they think that this is heritage. Does “heritage” include worshipping cows and trees?, he said.’<sup>40</sup>

Regarding the gravity of Al Mahdi’s crime, a central calculus in sentencing, the Trial Chamber observed that he is unlike other accused the ICC has convicted in that he was never charged with crimes against persons.<sup>41</sup> Although the judges noted that crimes against property ‘are generally of lesser gravity than crimes against persons’,<sup>42</sup> they also underscored the symbolic value, religious salience, and affective attachment generated by the Timbuktu shrines.<sup>43</sup> They were quite responsive to Prosecutor Bensouda’s argument, delivered initially in the confirmation of charges hearing, that ‘[w]hat is at stake here is not just walls and stones’.<sup>44</sup> Judges hovered around the UNESCO designation: attacking such designated sites was found to be of particular gravity. On this note, perhaps, the judges not only valued UNESCO assessments as to what

35 *Al Mahdi* judgment and sentence, *supra* note 2, § 34.

36 *Al Mahdi* judgment and sentence, *supra* note 2, § 38(viii).

37 Lostal, *supra* note 4, at 49.

38 *Al Mahdi* judgment and sentence, *supra* note 2, § 38(viii).

39 *Al Mahdi* judgment and sentence, *supra* note 2, § 40.

40 *Al Mahdi* judgment and sentence, *supra* note 2, § 46.

41 *Al Mahdi* judgment and sentence, *supra* note 2, § 77.

42 *Al Mahdi* judgment and sentence, *supra* note 2, § 77.

43 *Al Mahdi* judgment and sentence, *supra* note 2, § 78.

44 ICC, *Al Mahdi* Transcript of the Confirmation of Charges Hearing, 1 March 2016, at 13.

kind of culture is worth protecting, but also saw Al Mahdi's attacks as aimed against the international community and its organizations. The judges toggled back to the national, however, underscoring that 'the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place'.<sup>45</sup> The Trial Chamber also separately identified Al Mahdi's 'discriminatory religious motive' as additional evidence of the gravity of the impugned conduct.<sup>46</sup>

In terms of the second step of sentencing, the individualization stage, judges found no aggravating circumstances. However, they acknowledged five mitigating factors: admission of guilt; cooperation with prosecutors; demonstration of remorse and empathy; Al Mahdi's initial reluctance to carry out the destruction and the fact that he stopped the use of bulldozers at all but one of the shrines which thereby limited overall damage; and his good behaviour in detention.<sup>47</sup> Al Mahdi had (after the fact) issued a formal statement that 'begged' the people of Timbuktu for forgiveness and that affirmed that he had lost his way when he had joined the *jihadist* group.<sup>48</sup>

The reparations order — issued approximately one year later — found Al Mahdi liable for 2.7 million euros in expenses for individual and collective reparations for: (i) the damage caused by the attack on nine mosques and the Sidi Yahia Mosque door; (ii) the economic loss caused to the individuals whose livelihoods depended upon the tourism and maintenance of these protected buildings and to the community of Timbuktu as a whole; and (iii) the moral harm caused by the attacks.<sup>49</sup> The Trial Chamber identified three sets of 'victims': the inhabitants of Timbuktu (the direct victims of the crime), the population of Mali, and the international community. The reparations order echoed some of the themes pertinent to assessing the value of cultural property that had suffused the criminal conviction. That said, when it comes to tensions between internationalist justifications for protecting cultural property, on the one hand, and nationalist ones, on the other, the reparations order — while at times underscoring the value of international 'interest' as a proxy for value<sup>50</sup> — also allocated considerable salience to nationalist approaches. Interestingly, this order even transcends national approaches by referencing the reparative rights

45 *Al Mahdi* judgment and sentence, *supra* note 2, § 80. The Trial Chamber relied on the testimony of two witnesses (a Malian expert in cultural matters and a UNESCO witness). See U.S. Bishop-Burney, 'International Decisions: Prosecutor v. Ahmad Al Faqi Al Mahdi', 111 *AJIL* (2017) 126–132, at 131.

46 *Al Mahdi* judgment and sentence, *supra* note 2, § 81.

47 *Al Mahdi* judgment and sentence, *supra* note 2, § 109.

48 Simons, *supra* note 2. At trial, Al Mahdi stated: 'I am really sorry, I am really remorseful and I regret all the damage that my actions have caused.' Ellis, *supra* note 7, at 29.

49 Al Mahdi is impecunious. So the Trust Fund for Victims could step in.

50 *Al Mahdi* reparations order, *supra* note 3, § 17 ('Greater interest vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern.').

of local communities and populations.<sup>51</sup> The people of Timbuktu are able to assert reparative rights in the destruction of ‘their’ cultural property and ‘their’ cultural heritage and received nearly all the reparations for damage to protected buildings, consequential economic loss and moral harm. The Malian state received one symbolic euro. The Trial Chamber also granted ‘one symbolic euro ... to the international community, which is best represented by UNESCO’.<sup>52</sup>

### 3. Civilian Property and Cultural Property

Article 8(2)(e)(iv) ICC Statute prohibits as a war crime in non-international armed conflict intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected which are not military objectives. A similar prohibition applies to international armed conflict. Although ‘culture’ is not expressly mentioned in the definition of the crime, Al Mahdi was prosecuted for conduct prosecutors and ICC judges characterized as attacks upon religious and historical buildings and broadly cast as targeting ‘cultural property’;<sup>53</sup> a phrase that the 1954 Hague Convention expressly invokes. It is nonetheless somewhat vexing, from a legalist perspective, that the term ‘cultural’ entered the lexicon of the ICC proceedings even though it absents itself from the actual language of the prohibited crime in the ICC Statute. On the other hand, the use of the term ‘cultural property’ as shorthand for the objects of the attack reveals the heart of the proceedings which Prosecutor Bensouda made apparent in her opening statement with her somewhat trite invocation that ‘culture is who we are’.

The Trial Chamber explicitly (and approvingly) noted the Prosecutor’s decision not to charge Al Mahdi with the general crime, also proscribed by the ICC Statute, of attacking civilian property.<sup>54</sup> On this note, judges differentiated the protection of cultural objects from generic protections offered to civilian objects (including pillage). That said, they failed to engage the far deeper question as to *why* cultural property actually requires differentiated protection.

Legal scholar Eric Posner approaches this question from a law and economics perspective. Posner floats the idea that cultural property ought to be treated like regular property and, hence, as meriting whatever protection the unregulated market will offer.<sup>55</sup> While Posner himself recognizes that it may seem ‘silly’ to question what is ‘special’ about cultural property, he makes a

51 *Al Mahdi* reparations order, *supra* note 3, § 14 (‘[C]ultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future.’).

52 *Al Mahdi* reparations order, *supra* note 3, § 107.

53 *Al Mahdi* judgment and sentence, *supra* note 2, § 14.

54 *Al Mahdi* judgment and sentence, *supra* note 2, § 12.

55 E.A. Posner, ‘The International Protection of Cultural Property: Some Skeptical Observations’ (University of Chicago Public Law & Legal Theory Working Paper No. 141, 2006), available

non-trivial case that it may be no less silly to rely on markets to protect such property than on states or international organizations neither of which, in his view, necessarily 'have a strong moral right to the cultural property created by predecessor populations'.<sup>56</sup> In terms of reparations, the Trial Chamber's reference to the economic loss triggered by declining tourism instantiates a view rooted in economic gain which notably is a metric that would be used to value ordinary common property, thereby casting some support on Posner's view that cultural property and ordinary property may not be as different as may seem at first blush.

#### 4. Property and People: Devotional Use and UNESCO's Lists

The *Al Mahdi* judgment (notably on the matter of sentencing) and reparations order measured the gravity of the harm from the perspective of how much that property meant to people in real-time. Judges began with the premise that crimes against persons were more 'serious' than crimes against objects and things. Hence, when it came to the gravity of the attacks in Timbuktu, judges emphasized now these attacks affected human beings and triggered suffering in the lives they live. The Trial Chamber thereby adopted a somewhat anthropocentric model of culture and loss. It measured the value of heritage in a relational sense and not in an intrinsic sense. On the one hand, this move seems natural, self-evident and textually faithful to the language of the ICC Statute and approaches to gravity that are commonplace within criminal law. On the other hand, this move also belies far thicker and richer questions as to how to value cultural property and what exactly to protect. The inclusion of international penal sanction within the framework of conversations about cultural property thereby animates wider discursive spaces in ways that both enliven and enfeeble.

In *Al Mahdi*, the human 'value' of the shrines could be established with relative ease through the deployment of proxies. Nearly all of the shrines were protected by UNESCO as heritage sites (inscribed on the World Heritage List). The UNESCO designations weighed heavily in the minds of the judges (and in the Prosecutor's arguments).<sup>57</sup> Within the umbrella of UNESCO, the World Heritage Committee has the final say on whether a property is inscribed on

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online at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1315&context=publiclawandlegaltheory> (visited 3 November 2018).

56 *Ibid.*, at 16.

57 *Al Mahdi* judgment and sentence, *supra* note 2, § 46. The fourth sentence of the Prosecutor's Opening Statement begins: 'They were a major part of the historic heritage of this ancient city. They were also more generally a part of the heritage of Mali, of Africa and of the world. All, except one, were inscribed on the World Heritage List.' In ICTY proceedings for destruction or wilful damage of cultural property (rather than attacks), individuals were charged with and convicted for the destruction of the old town of Dubrovnik, also listed as a UNESCO World Heritage Site, and charged with but ultimately acquitted regarding the Stari Most bridge (as civilian property), which became formally listed with UNESCO in 2005 but had

the World Heritage List. This Committee meets once a year. It consists of representatives from 21 of the States Parties to the Convention Concerning the Protection of the World Cultural and Natural Heritage.<sup>58</sup> Pursuant to Article 11(1) of this Convention, the Committee shall establish, keep up to date and publish this list of properties forming part of the cultural heritage and natural heritage which it considers as having outstanding universal value in terms of such criteria as it shall have established. Outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.<sup>59</sup>

In many quarters, however, the UNESCO listing process ‘has been viewed as notoriously politicized and biased towards particular forms of heritage’.<sup>60</sup> On this note, one observer has called for the ‘identification of objective criteria independent of UNESCO designation’.<sup>61</sup> UNESCO has nonetheless (albeit understandably) been energized by the *Al Mahdi* judgment. On 6 November 2017, its Director-General, Irina Bokova, signed — to considerable fanfare — a letter of intent with Chief Prosecutor Bensouda to continue to collaborate including on a new policy initiative on cultural heritage.<sup>62</sup> The impact of UNESCO determinations therefore seems to be on the rise. If UNESCO expert designations now are key elements of gravity in the application of international criminal law, perhaps the process by which UNESCO ‘experting’ is developed should become split open or spruced up.

Also, central to the *Al Mahdi* case is that nearly all of the destroyed sites also had been routinely used by the residents of Timbuktu for religious purposes.<sup>63</sup> But what if the property was no longer being used? What if it served no religious or worship purpose? What if the property was ugly, unappreciated, ignored, dusty, dismal, and forlorn? Privately owned? What if a local population declared by democratic vote to reject the property as ‘cultural’ in nature? Ironically, the more that cultural property is loved and used the higher the likelihood that it would be rebuilt. The gravest harms, after all, tend to befall the unloved and unappreciated and unkempt. While observers may quibble about whether cultural

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been listed as a ‘UN World Heritage Site’ at the time of the attacks. Bishop-Burney, *supra* note 45, at 130.

58 See *supra* note 5. The 21 states on the World Heritage Committee at the time of writing are: Angola, Australia, Azerbaijan, Bahrain, Bosnia and Herzegovina, Brazil, Burkina Faso, China, Cuba, Guatemala, Hungary, Indonesia, Kuwait, Kyrgyzstan, Norway, Saint Kitts and Nevis, Spain, Tunisia, Uganda, United Republic of Tanzania and Zimbabwe.

59 See <https://whc.unesco.org/en/guidelines/>, Guideline 49 (all of which also provide details on procedures).

60 S. Starrenburg, ‘Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi’, EJIL: Talk! Blog of the European Journal of International Law, 25 August 2017 (on file with the author).

61 Bishop-Burney, *supra* note 45, at 132.

62 ‘International Criminal Court and UNESCO Strengthen Cooperation on the Protection of Cultural Heritage’, Press Release, 6 November 2017 (on file with the author).

63 Interestingly, the emphasis on religion was less singular in the 1954 Hague Convention (*supra* note 20), Art. 1(a) of which explicitly protected property ‘whether religious or secular’.

property ever can be truly rebuilt,<sup>64</sup> the fact remains that property that is marginal is more likely not to be rebuilt and therefore may simply disappear. The question of a community's democratic input in 'its' cultural property is an intriguing one. Communities may decide to cease registering something as protected cultural property. Obversely, communities may decide to protect something through cultural property designations precisely because they may perceive it as being threatened. The Dutch, for example, have officially placed the 'Sinterklaas Festival and Black Pete' on the National Inventory of Intangible Cultural Heritage.<sup>65</sup> Lixinski notes that 'Black Pete' (*Zwarte Piet*) is a 'Christmas tradition which includes a "helper" of Santa Claus as a black-face or just black person, who was once historically Santa Claus' African slave'.<sup>66</sup>

What if the property can be digitized and hologrammed and be 'enjoyed' that way, thereby permitting 'use' in the absence of the actual tangible object?<sup>67</sup> Would the destruction of property that has been digitized, or is capable of digital replication, be less 'grave' than the destruction of property fundamentally incapable of replication and, hence, which would fade out of the ecosystem of cultural heritage available for public enjoyment?

What about cultural property from a culture that no longer exists? Or a culture that moved away, leaving its property behind? Marina Lostal ties these questions to the *Al Mahdi* judgment's reasoning, which she chides as anthropocentric. Lostal specifically identifies as an example the destruction of the Bamiyan Buddhas by the Taliban in 2001. The Bamiyan Buddhas were two enormous statues built around the fifth century in a valley in what is now Afghanistan. The statues oversaw a community of Buddhist monasteries. Roughly 1500 years later, the Taliban (who controlled Afghanistan) decreed these statues as the product of an infidel religion and dynamited them. The Bamiyan Buddhas, unlike the mausoleums in Timbuktu, were not used by local populations in religious practices — 'there are no records indicating the presence of Buddhism in Afghanistan after 1336'.<sup>68</sup> Hence, according to Lostal, 'their destruction could not affect the social practices and structures or the cultural roots of the local people'.<sup>69</sup> She adds: 'It would lack what the Chief Prosecutor has pointed to as the common denominator of all crimes detailed by the ICC Statute — that is that "[t]hey inflict irreparable damage to the human persons [*sic*] in his or her body, mind, soul and identity'".<sup>70</sup> Palmyra in

64 Prosecutor Bensouda, in her opening statement in *Al Mahdi*, submitted that: 'Once destroyed, as noted by the UN International Criminal Tribunal for the former Yugoslavia, the restoration of cultural heritage never brings back its inherent value.' See online at <https://www.icc-cpi.int/legalAidConsultations?name=otp-stat-al-mahdi-160822> (visited 3 November 2018).

65 L. Lixinski, 'Confederate Monuments and International Law', 35 *Wisconsin International Law Journal* (2018) 549–608, at 578.

66 *Ibid.*

67 See generally, S.K. Katyal, 'Technoheritage', 105 *California Law Review* (2017) 1111–1172 (discussing the preservation and replication of antiquities in an age of sophisticated digital technologies and the prospect of 'museums without walls').

68 Lostal, *supra* note 4, at 56.

69 *Ibid.*, at 56–57.

70 *Ibid.*, at 57 (citation omitted).

Syria constitutes a similar example.<sup>71</sup> So, too, does the ancient city of Sabratha: once a ‘jewel of the Roman empire,’ currently pockmarked with mortar and small arms fire from armed conflict in Libya and which is now ‘used’ (in real-time) as a chaotic camp of departure for refugees — chased by smugglers and militias — fleeing across the Mediterranean.<sup>72</sup>

Lostal’s concern is that anthropocentrism may limit the reach of the criminal law. My concern is broader, namely, that the anthropocentrism required by criminal law may limit the imaginary of which property is protected (or understood) as cultural. The fixation on the relational value of heritage to humans may further weaken claims, in a broad variety of venues, to the intrinsic value of heritage. How instead to recognize relational value without submerging or squeezing out intrinsic value?

## 5. Silences

A cognate question not clarified by *Al Mahdi* is whether the protection of cultural property as proscribed by Article 8(2)(e)(iv) (or its analog in international armed conflict) extends only to the built structures or also covers the contents *within* those structures. Yaron Gottlieb, for example, has argued that the provision omits the contents of protected buildings and immovable structures, which means that protection for such contents would have to be found outside the cultural property provisions of the ICC Statute.<sup>73</sup> On this note, the 1954 Hague Convention identifies cultural property as both ‘moveable’ and ‘immoveable,’ thereby covering buildings and sites as well as works of art and literature.<sup>74</sup> The ICC Statute provision thereby somewhat shrinks the reach of the criminal law. More elementally: must the property be built? What if it was not ‘made’ by human hands (for example, geographic formations, such as Uluru in Australia)?

Owing to the nature of the plea bargain, *Al Mahdi* never alleged that what he did was justified by any military objective. This justification for intentionally attacking cultural property, which in various forms weaves its way through a number of proscribed war crimes, thereby remains unmapped. The 1954

71 See e.g. H. Turku, ‘When Cultural Property Becomes a Tool of Warfare: Law, Politics, and International Security’, 1 *Inter Gentes* (2017) 3–23, at 16 (‘Questions can be raised as to whether the pre-Islamic Roman Era ruins of Palmyra or the Assyrian city of Nimrud have anything in common with the predominantly Arab population that inhabits the region today. Or do these historical sites partly represent the heritage of some people who lived there once in the past?’). ISIS also has targeted the ancient city of Dura Europos, located on the banks of the Euphrates river near the Syrian and Iraqi border.

72 “‘Jewel of Roman Empire’ faces Libya dangers’, *France 24*, 3 October 2018 (document on file with the author).

73 Y. Gottlieb, ‘Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC’, 23 *Penn State International Law Review* (2005) 857–896.

74 Art. 1(a) 1954 Hague Convention, *supra* note 20.

Hague Convention for its part permitted a waiver of the obligations thereunder 'only in case where military necessity imperatively requires such a waiver'.<sup>75</sup>

In the *Al Mahdi* case, it is rather unlikely that the facts would have supported a finding that the protective obligation would cede to the exigencies of warfare. In lengthy proceedings involving the destruction of the old bridge at Mostar in Bosnia-Herzegovina, however, the ICTY did find the existence of military necessity. This bridge ('Stari Most') was designed by preeminent Ottoman architect Sinan and completed in 1566.<sup>76</sup> It spanned the Neretva River and linked the ethnically and religiously diverse neighborhoods of Mostar before the start of the Balkans Wars. Croatian forces flattened the bridge on 9 November 1993. Six commanders were indicted on many charges, including destruction of mosques, religious properties and the Stari Most.<sup>77</sup> These defendants argued that Stari Most played a vital role in supporting Bosnian Muslim forces in that it enabled them to cross the river and transport supplies and troops. Hence, they submitted that they were justified in shelling it. The ICTY had to grapple with questions of military necessity, cultural property and civilian property. An ICTY Trial Chamber came up with a convoluted verdict on the Stari Most charges. It ruled not on the basis of the bridge as cultural property but instead on the basis that it was civilian property that had been wantonly destroyed, although it underscored that the destruction also had a very serious psychological impact on the Muslim population of Mostar.<sup>78</sup> This Trial Chamber however had also found that the bridge was a military target. Still, it entered convictions for the destruction of the bridge. In November 2017, the ICTY Appeals Chamber reversed the conviction finding that the Trial Chamber had erred in that it had not established that the destruction of the bridge was not justified by military necessity. The Appeals Chamber held that the Trial Chamber's finding that the destruction of the bridge offered a definite military advantage precluded the finding that the destruction of the bridge was not necessary and, hence, justifiable.<sup>79</sup>

Yet another silence: in reaching its decision as to sentence the Trial Chamber did not turn to national law. Judges did not cull general principles of law as evidenced in a cross-section of national legal systems; nor did they review the practices of national courts in whatever cultural property destruction cases national institutions may have adjudicated. The Trial Chamber did not invoke

75 Art. 4(2) 1954 Hague Convention, *supra* note 20. For discussion of the differentiation between imperative military necessity and military objective (the ICCSt. standard) see Gerstenblith, *supra* note 20, at 379. In other war crimes prohibitions in the ICC Statute, the operative language is 'direct overall military advantage anticipated'.

76 Gerstenblith, *supra* note 20, at 371.

77 One of these defendants was Slobodan Praljak, who committed suicide in the courtroom in late 2017 when the appeals judgment was announced.

78 See also discussion *supra* notes 53 to 56 on civilian property and cultural property.

79 In regard to the destruction by Croatian armed forces of 10 mosques in East Mostar as well as Muslim property in Prozor municipality, the Appeals Chamber found that the Trial Chamber's neglect to enter convictions for such destruction as a violation of the laws or customs of war was an error. It then declined however to enter new convictions on appeal. See also generally, Brammertz, Hughes, Kipp, and Tomljanovich, *supra* note 8.



processes of valuation that national authorities and legislatures may have deployed when it comes, for example, to questions of recompense including for the devastation of indigenous cultural property.<sup>80</sup>

## 6. Bellwethers and Harbingers

Intentionally attacking cultural property may constitute an initial step in what can mutate into something far more endemic. These attacks may be a trigger to dehumanize, demoralize and depict the persecuted victim group as lacking culture and thereby as unworthy. These attacks may form part of the early stages of genocide. In this regard, noting and condemning the obliteration of cultural property can be a canary in a coalmine, so to speak, of something inchoate that portends to become even more wide-spread.

Culturally destructive conduct in Mali nonetheless triggers vexing questions regarding the re-definition of culture from *within* the group by members who wish to reconstitute cultural content.<sup>81</sup> That said, the international legal regime largely was conceptualized to protect cultural property from attack by others *outside* the state or group. In *Al Mahdi*, the trashing of idolatrous and heretical Sufi monuments by followers of Salafism straddles an interstitial position. On the one hand, this violence could be constructed as a form of group-based opposition and dominance. In addition to Mali, after all, Sufi shrines have been damaged in Egypt, Tunisia, Libya and Syria.<sup>82</sup> On the other hand, the violence remains within the overarching group and is deployed to articulate the ‘proper’ way in which to observe and commemorate the group’s putative religious practices.

And what about cultural changes provoked from without? *Al Mahdi* matters here, as well, since it limits destruction as change agent. Let us take the Hagia Sofia in Istanbul, which has grown somewhat by *bricolage* through multiple religious faiths. Is the evolution of the Hagia Sofia the proper way to ‘revise’ cultural property? Who, then, may assert rights to cultural property enforcement or reparations in such contexts — what culture does the Hagia Sofia represent?

## 7. Rights to Cultural Property?

*Al Mahdi* operationalizes the principle that it is a crime to attack cultural property during armed conflict and that designated victims should receive

80 In the USA, see e.g. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 305, 3001–3013 (2000). See also generally, Protect and Preserve Cultural Property Act, 130 Stat. 369 (2016) (implementing United Nations Security Council Resolution 2199).

81 In this regard, *Al Mahdi* could perhaps assist in the conceptualization of violence by the Khmer Rouge regime which sought *inter alia* to redefine an entire nationality. The Khmer Rouge engaged in widespread desecration of Buddhist temples and shrines, mosques, and Catholic churches. Gerstenblith, *supra* note 20, at 378.

82 *Ibid.*, at 356.

reparations for having suffered such criminal conduct. The work of the ICC in *Al Mahdi* thereby highlights the seriousness of this kind of violence and deepens the collective condemnation thereof — thereby signalling how the repudiation of such conduct is gaining strength. A next conceptual step, then, is to enquire whether the protection of cultural property during armed conflict gives *rights* to individuals who enjoy the use of cultural property to require their governments to update, maintain and preserve that property. Does a state have the duty to fight to protect its cultural property from intentional attacks by others?<sup>83</sup> If so, why should that duty on the state to protect cultural property cease in peace-time?<sup>84</sup> Might this mean that states have an ongoing duty to maintain and upkeep such property? Would letting it fall into disrepair be tantamount to a breach of a protective duty? If UNESCO or another entity determines property within the national borders of a state to constitute internationally protected cultural property or cultural heritage, then, does this pre-determine how a state may treat it? If so, arguments could arise that one way to mitigate these harms arising from negligence, lack of capacity or disinterest is for that cultural property to migrate to places where it can be properly maintained and adoptively loved: the British Museum, for example, the Met, or the Louvre. What impact would the legal requirements to protect cultural property — and rights to be claimed (by all of humanity even?) thereupon — have upon debates over preservation and colonialism. These debates implicate knotty questions, for example, about where King Tut's mask should sit (after all, his beard was broken off in the Cairo Museum and stuck back on with Crazy Glue) and where the Elgin/Parthenon Marbles should stand. In Lebanon, hundreds of artefacts were looted and destroyed by militias during the country's civil war that raged from 1975 to 1991. Many of these artefacts date to the Phoenicians. Decades later, some artefacts have returned to Lebanon.<sup>85</sup> Others — wildly damaged such that they look deranged — quietly remain on display in Beirut's National Museum. A placard in their cabinet informs visitors that '[t]he terrible condition of these objects as well as the fusion of metal, ivory, glass and stone are the result of high temperatures reached during a fire caused by the shelling of a storage area' in the museum.

83 The 1954 Hague Convention permits and regulates the transport and transfer of cultural property from one jurisdiction to another for purposes of safeguarding in times of armed conflict. See Arts 12–14 1954 Hague Convention.

84 The 1954 Hague Convention, while focused on targeting, theft, misappropriation or destruction of cultural property during war-time, also gestures towards preparatory measures in times of peace for parties to safeguard cultural property within their territories.

85 See e.g. 'Lebanon battles to get its treasures back', 28 November 2017 (on file with the author).



Photograph taken by the author, Beirut, National Museum, 10 March 2018

In the end, if the state has an international obligation to protect its cultural property, then a 'protect or expatriate' scenario (riffing off a 'prosecute or extradite' obligation in transnational criminal law) might arise. Cultural property could thereby become relocated for purposes of 'safeguarding,' which is all the more imperative, so goes the argument, since this property has become the heritage of all of humanity. The *Al Mahdi* judgment and reparations order might serve (ironically, inadvertently, unintentionally or purposefully) as a touchstone to embolden such arguments.

In this regard, injection of the ethos of the *Al Mahdi* case into the context of the practices of museums might stand at odds with current trends towards the identification and restitution of artefacts 'taken' in the colonial era. The German Museums Association, for example, has developed such guidelines.<sup>86</sup>

The Royal Museum for Central Africa (AfricaMuseum), located in Tervuren on the outskirts of Brussels, stands as a temple to the theft, pillage, and brutality of Belgian King Leopold II in the Congo. This museum has recently renovated its physical plant (between 2013 and 2018) as well as refurbished broad swaths of its mission. Recognizing that '[f]or more than 60 years [the museum] spread a colonial message', it notes that its 'current role is about informing and raising awareness'.<sup>87</sup> The museum renovation was motivated by a desire 'to present a contemporary and decolonised vision of Africa in a building which had been designed as a colonial museum'.<sup>88</sup> The official website contritely discusses the pieces that have been returned to the National Museums Institute in Kinshasa and the National Museum of Rwanda in Butare. The website, moreover, also goes out of its way to affirm that the AfricaMuseum 'has never had stuffed humans in its collections'.

## 8. Whither Transitional Justice?

To be clear, *lex lata* the war crime of intentionally attacking cultural property only applies in times of armed conflict. However, neither the logic of why this war crime exists nor why Al Mahdi was prosecuted for it is conceptually limited only to situations of armed conflict. A number of observers indeed have advocated for intentional attacks on of cultural property also to constitute a crime against humanity, which could therefore encompass conduct outside of armed conflict.<sup>89</sup> And, what is more, roots of cultural property demolition run deep in the language of genocide. Raphael Lemkin opined as such when he coined the term genocide in 1944 into which he folded the idea of the targeting of a group's cultural existence as among offenses against the law of nations. Even earlier on, Lemkin had identified the crimes of 'barbarism' and 'vandalism' as acts that ought to be proscribed. Barbarism he saw as persecution of ethnic, racial, religious or social groups. In his 1933 publication 'Acts of Vandalism', Lemkin wrote:

An attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of

86 German Museums Association, 'Guidelines on Dealing with Collections from Colonial Contexts' (2018).

87 The museum website notes that its original building was 'constructed with the personal fortune of Leopold II. This fortune was mainly constituted as a result of the capitalist management of the Congo Free State, which was marked by violence and abusive exploitation.' See online at <http://www.africamuseum.be/en/discover/myths.taboos> (visited 3 October 2018).

88 See online at <http://www.africamuseum.be/en/discover/renovation> (visited 3 October 2018).

89 See e.g. Gerstenblith, *supra* note 20, at 390; see also UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003 (noting that destruction can take place during peace-time and extending the protections afforded to cultural heritage in war-time to peace-time as a crime against humanity; noting also that destruction can be committed by a governing authority within its own territory; and also attributing state responsibility for such destruction).

a collectivity are revealed in fields of science, arts and literature.] [T]he destruction of a work of art of any nation must be regarded as acts of vandalism directed against world culture.<sup>90</sup>

The pressures of international negotiation — as well as Lemkin's obsession with the adoption and ratification of an international convention — led to a narrower definition of genocide than he had initially contemplated such that notions of 'cultural genocide', contemplated in drafts, evaporated from the final legal text.<sup>91</sup>

One of the main principles of international human rights law is that every person is entitled to a minimum standard of protection. It does not matter how cruel, hurtful, lovely, kind, appealing or misanthropic that person is. Everyone is protected. Limitations on an individual's freedom can be established (e.g. through incarceration), but cannot fall below a certain floor. Individuals cannot be destroyed or demolished. International human rights law avoids subjective assessment about the value of human life by simply saying objectively that all human life has value. Now, it is true that in practice some people are 'more' equal than others. Application of the law is uneven. But in a declaratory sense, at least, international human rights posit universality.

What if the law of cultural property borrowed this core declaratory maxim from international human rights law? This seems sensible, in that the current Special Rapporteur on Cultural Rights for the United Nations Council on Human Rights, Karima Bennouna, conceptualizes the intentional destruction of cultural heritage as a human rights violation.<sup>92</sup> Should every culture, whether contemporary or historical, be entitled to a basic common floor of protection? In such a frame, statues and symbols and art related to settler colonialism could become protected as cultural property. So, too, could Confederate monuments in the USA: there are 'at least 1,500' of them 'spread across 31 states'.<sup>93</sup> Indeed, groups concerned with the retention and preservation in public spaces of Confederate memorials have an interest in the *Al Mahdi* case and might urge its interpellation as a touchstone into ongoing debates. Confederate statues have become places of resistance and contestation and reflection in American public life. They have also become sites of tragedy, leading in one instance to the murder of a young woman in Charlottesville, Virginia,

90 R. Lemkin, *Acts Constituting a General (Transnational) Danger Considered as Offenses Against the Law of Nations* (Madrid, 1933).

91 See generally, A. Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (University of Wisconsin Press, 2017). The Sixth Committee of the UN General Assembly omitted the term 'cultural genocide' from the final text. Helga Turku notes that the Danish representative had remarked that it was 'disproportionate and illogical to include "in the same convention both mass murders in gas chambers and the closing of libraries"'. Turku, *supra* note 71, at 18 (citation omitted).

92 Lostal, *supra* note 4, at 51. See also Gerstenblith, *supra* note 20, at 389; see also incidentally the separate opinion of Judge Cançado Trindade of the International Court of Justice in *Cambodia v. Thailand*, a dispute which concerned the Temple of Preah Vihear, in which he emphasized the human right to cultural and spiritual heritage as part of customary international law. *Cambodia v. Thailand* (11 November 2013) at § 33, Request for Interpretation.

93 Lixinski, *supra* note 65, at 556.

at a political rally.<sup>94</sup> The trend is for these statues to come down and for streets and buildings to cede their names, though several state legislatures also have passed legislation prohibiting the removal or alteration of Confederate monuments.<sup>95</sup> The top commander of the Confederate forces, General Robert E. Lee, is now off the pedestal in a traffic circle in New Orleans — removed surgically by a huge crane and subsequently crated and carted away. In other contexts — for example, Stone Mountain, a massive rock sculpture just east of Atlanta that features Robert E. Lee, Confederate President Jefferson Davis, and Confederate General Thomas ‘Stonewall’ Jackson — actual removal might require blowing the carvings off with explosives.<sup>96</sup> The law school at which I teach came into existence when that same Lee served as President of the college after the Civil War. Subsequently, his name joined the pre-existing name of Washington College to form what is now Washington and Lee University. Questions of memory and naming prompted a wonderfully thoughtful report from a faculty-led Commission on Institutional History and Community in 2018.<sup>97</sup>

Some Confederate statues have been discretely removed; many others remain; and some are toppled — with alacrity — by protestors. This latter fate befell ‘Silent Sam’, a bronze on the campus of the University of North Carolina’s flagship campus located in Chapel Hill. Silent Sam was not a replica of anyone specific or in particular. He was a generic soldier. He stood from 1913 to 2018. Silent Sam had been proposed by the United Daughters of the Confederacy to commemorate the students and faculty of that university who had fought and died ‘for the South’.<sup>98</sup> Over 1000 students, faculty, and employees had enlisted with either the Union or (mostly) Confederate army — 287 lost their lives.<sup>99</sup> Silent Sam carried a little satchel with the letters C.S.A. on it, signalling his allegiance. At Silent Sam’s unveiling on 2 June 1913, presentations were made: some speakers noted the sacrifice of the students while others ragingly espoused white supremacy. Beginning in the 1960s, Silent Sam triggered consternation and anger. Calls to remove him grew. He was frequently defaced. On 20 August 2018, Silent Sam was finally felled by a

94 See online at <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html> (visited 12 December 2018).

95 In North Carolina, for example, the General Assembly passed SL 2015-170 (Cultural History Artefact Management and Patriotism Act of 2015). This Act provides that ‘An object of remembrance located on public property may not be permanently removed’, though it may be ‘relocated to a site of similar prominence, honor, visibility, availability, and access ... within the boundaries of the jurisdiction from which it was relocated’ and that this meets with approval of the North Carolina Historical Commission. See online at <https://www.ncleg.net/Sessions/2015/Bills/Senate/PDF/S22v5.pdf> (visited 12 December 2018).

96 R. Fausset, ‘Stone Mountain: The Largest Confederate Monument Problem in the World’, *New York Times*, 18 October 2018.

97 See online at <https://www.wlu.edu/presidents-office/issues-and-initiatives/commission-on-institutional-history-and-community/report-of-the-commission-on-institutional-history-and-community> (visited 12 December 2018).

98 United Daughters of the Confederacy, North Carolina Division (1906), Minutes of the 11<sup>th</sup> annual convention, available online at <https://archive.org/details/minutesofannualc1909unit> (visited 12 December 2018).

99 ‘In Memorial to Carolina’s War Dead’, *Carolina Alumni Review*, 25 April 2007.

group of protestors — freedom fighters to some, a wild mob to others. One media report indicates that: ‘As the monument toppled, protestors [were] seen kicking its head and pouring earth over it.’<sup>100</sup> A photograph, included below, captures the moment.



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What about the toppling of Saddam Hussein's statue in Baghdad — one of the iconic images of the Iraq war — and which served no military advantage whatsoever? Would that become a war crime? What about the dismantling, gouging, and removal of all those statues to Lenin and Stalin that occurred in post-communist transitions throughout Eastern Europe? Were the Czechs and Poles, and many others, under a duty to preserve these monuments and keep them in place? Under decommunization policies in Ukraine, Soviet era monuments were melted down, broken, stored in warehouses, stolen or sunk off the Crimean coast. In Budapest, Soviet commemorative statuary was not destroyed but, instead, relocated to a park on the outskirts of the city called *Szoborpark* ('Memento Park') where they can still be visited. Is the Hungarian 'way', then, now the 'right' way?

Protection of cultural property may come to interface awkwardly with transitional justice. As Posner notes: 'The history of iconoclasm is long: are all iconoclastic movements to be condemned because they destroy cultural property?'<sup>101</sup> When Lemkin initially proposed the crime of 'vandalism' in 1933, Aron Trainin, professor of criminal law at Moscow University, denounced this suggested crime because 'revolutionary fighting was incompatible with the

100 See online at <https://www.nytimes.com/2018/08/21/us/unc-silent-sam-monument-toppled.html> (visited 12 December 2018).

101 Posner, *supra* note 55, at 9.

protection of historical monuments.’<sup>102</sup> How to distinguish intentional attacks on Sufi shrines by Salafists, declared a crime in *Al Mahdi* and condemned in The Hague? How to analogize? Who to convict? Who not to charge? Following the *Al Mahdi* case, it may be that the international legal imagination offers less in the way of support for toppling and destroying cultural property which comes to be seen in the prevailing *Zeitgeist* as offensive, degenerate, or abusive.

## 9. Conclusion

This thought-piece essay traces some of the discursive implications of the *Al Mahdi* case. This essay is concerned with what the ICC did in *Al Mahdi* (and what it might have done differently or otherwise), but is far more preoccupied with positing what *Al Mahdi* (as is) might mean as a touchstone and reference point for future conversations. Interrogatory in tone, this essay builds upon the excellent scholarship the *Journal of International Criminal Justice* has published regarding *Al Mahdi* proceedings<sup>103</sup> by extending the analytic lens into new places and varied spaces.

Prosecutor Bensouda's opening that culture is important because 'culture is who we are' initiated a criminal case but, along the way, ignited a journey that opens up a whole lot more. This essay aims to speculate about this 'whole lot more'. Whether mindfully or inadvertently, the work product of the ICC in the *Al Mahdi* case adds flavour to ongoing debates regarding the protection, removal, defacement, relocation, display and destruction of cultural heritage in all forms: monuments, artefacts, language instruction, art and literature. The *Al Mahdi* judgment and reparations order could be marshalled by stakeholders in such debates — which range well beyond The Hague and criminal courtrooms — to embolden their cause(s), whatever these may be. Indeed, there is something in *Al Mahdi* to suit a broad array of arguments, including ones that might surprise and others that might seem to be at odds with the progressive and linear 'arcs of justice' favoured by human rights activists. *Al Mahdi* empowers certain claims to cultural property protection as it weakens others — it gives as it takes.

102 Weiss-Wendt, *supra* note 91, at 14. For discussion rooted in the South African experiences of colonialism and apartheid, see L. Lixinski, 'Cultural Heritage Law and Transitional Justice: Lessons from South Africa', 9 *International Journal of Transitional Justice* (2015) 278–296.

103 Brammertz, Hughes, Kipp, and Tomljanovich, *supra* note 8; Capone, *supra* note 3; Vlasic and Turku, *supra* note 11; P. Casaly, 'Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law', 14 *JICJ* (2016) 1199–1220; S.A. Green Martínez, 'Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?' 13 *JICJ* (2016) 1075–1097.