

THE FIRST CULTURAL-PROPERTY CONVICTION AT THE ICC: AN ANALYSIS OF THE *AL MAHDI* JUDGEMENT

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1 Introduction

Cultural property has generally been the subject of attack in conflict situations.¹ In recent times, however, conflicts in states such as Iraq, Syria, Libya and Mali have made such attacks more visible.² A notable example is the destruction of Palmyra. Palmyra is an ancient city in Syria and constitutes a world-heritage site.³ It is representative of major artistic developments and features distinctive decorations and construction methods.⁴ This city fell under the control of the so-called Islamic State of Iraq and Syria (ISIS), also known as the Islamic State of Iraq and the Levant, in May 2015.⁵ In August 2015, ISIS released photographs of

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¹ The conflict in Bosnia, for example, saw with it the destruction of historic sites, libraries, archives and museums. A notable example is the destruction of the national library of Sarajevo by the Bosnian Serb army during the night of 25 to 26 August 1992.

² United Nations Educational, Scientific and Cultural Organization (UNESCO) 'The Emergency Safeguarding of the Syrian Cultural Heritage Project' (2014) available at <http://en.unesco.org/syrian-observatory/emergency-safeguarding-syrian-cultural-heritage-project> (accessed 10 December 2016); UN News Centre 'UN General Assembly Calls for an Immediate Halt to "Wanton" Destruction of Iraq's Cultural Heritage' (28 May 2015) available at <http://www.un.org/apps/news/story.asp?NewsID=50992#.WEeX2ly4Ezs> (accessed 10 December 2016); 'Libya's Cultural Heritage "Being Destroyed and Plundered by Isis"' *The Guardian* 15 December 2015 available at <https://www.theguardian.com/world/2015/dec/15/libyas-cultural-heritage-being-destroyed-and-plundered-by-isis> (accessed 10 December 2016).

³ J Amos 'Palmyra: Satellite Image of IS Destruction' *BBC News* 29 August 2015 available at <http://www.bbc.com/news/science-environment-34090536> (accessed 15 June 2017).

⁴ *Ibid.*

⁵ *Ibid.* Note, however, that it is not suggested that attacks on cultural property occur only during armed conflicts. The destruction of the Buddhas of Bamiyan in Afghanistan, for example, cannot be categorised as a war crime since it did not occur during the course of an armed conflict.

the destruction of the Temple of Baalshamim, one of the temples within Palmyra, built nearly 2 000 years ago.⁶ This temple was considered the second-most important temple in Palmyra. In September 2015, ISIS released more photographs, showing the destruction of another 2 000-year old building, the temple of Bel, considered to have been the most significant structure in Palmyra.⁷

In Iraq, several attacks on cultural property have been reported. Notably, in 2006, Al-Qaeda bombed the al-Askari Mosque, one of the Shia shrines built in the city of Sammara in AD 944.⁸ In 2015, ISIS showed videos of their destruction of the 2 000-year old city of Hatra, one of the cultural sites listed on the world-heritage register.⁹ In the same year, ISIS destroyed Nimrud, another ancient city in Northern Iraq.¹⁰ In 2014, ISIS took control of the Iraqi city of Mosul and destroyed one of the famed shrines and the Mosque of Yunus.¹¹ The shrine was built on an archaeological site during the eighth century BC, while the mosque was Iraq's oldest mosque.¹² Nineveh is another ancient city that fell prey to attacks by ISIS in 2015.¹³ This city dates back to the seventh century BC

⁶ K Shaheen 'Islamic State Releases Images Said to Show Destruction of Palmyra Temple' *The Guardian* 25 August 2015 available at <https://www.theguardian.com/world/2015/aug/25/islamic-state-images-destruction-palmyra-temple-baal-shamin-isis> (accessed 10 December 2016).

⁷ J Stanton 'ISIS Show off their Destruction of 2,000-year-old Temple at Palmyra: Just Single Arch of Ancient Temple of Bel is Left Standing' *Daily Mail* 10 September 2015 available at <http://www.dailymail.co.uk/news/article-3229268/Pictured-ISIS-destruction-2-000-year-old-temple-Palmyra-left-just-one-arch-standing.html> (accessed 10 December 2016).

⁸ Global Security 'Al-Askari Mosque Bombing' (7 September 2011) available at <http://www.globalsecurity.org/military/world/iraq/samarra-mosque.htm> (accessed 10 December 2016).

⁹ K Shaheen 'Isis Video Confirms Destruction at UNESCO World Heritage Site in Hatra' *Mail and Guardian* 5 April 2015 available at <https://www.theguardian.com/world/2015/apr/05/isis-video-confirms-destruction-at-unesco-world-heritage-site-on-hatra> (accessed 10 December 2016).

¹⁰ BBC 'Islamic State Video "Shows Destruction of Nimrud"' (12 April 2015) available at <http://www.bbc.com/news/world-middle-east-32273672> (accessed 10 December 2016).

¹¹ Al Arabiya 'ISIS Destroys Prophet Sheth Shrine in Mosul' (26 July 2014) available at <http://english.alarabiya.net/en/News/middle-east/2014/07/26/ISIS-destroy-Prophet-Sheth-shrine-in-Mosul-.html> (accessed 10 December 2016).

¹² G Davies 'The Shocking Aftermath of ISIS' Trail of Destruction: Iraqi Troops Discover the Iconic Tomb of the Prophet of Jonah Smashed to Smithereens as They Retake Parts of Mosul' *Daily Mail* 28 January 2017 available at <http://www.dailymail.co.uk/news/article-4166894/ISIS-destruction-popular-Mosque-prophet-Jonah.html#ixzz4k5MnpGVW> (accessed 15 June 2017).

¹³ K Romey 'Exclusive Photos Show Destruction of Nineveh Gates by ISIS' *National Geographic* 19 April 2016 available at <http://news.nationalgeographic.com>

and it is one of the properties on the tentative list of world-heritage sites.¹⁴

In 2012, conflict erupted in Mali. The Islamist group, Al-Qaeda, joined with Tuareg rebels in northern Mali to oust the ruling government and to establish an independent section of Timbuktu. Timbuktu, a Saharan crossroads, is known popularly as ‘the city of 333 saints’ and is a known tourist destination.¹⁵ It was once a great centre of Islamic learning during the fifteenth and sixteenth centuries. This legacy lived on until the period between 30 June 2012 and 11 July 2012, when ten ancient buildings with a religious and historical nature were razed to the ground.¹⁶ Although Timbuktu was not entirely destroyed, many of its tombs did not survive.¹⁷ It is also estimated that thousands of ancient manuscripts were lost, stolen or burned during the attacks.¹⁸

Although the increasing attacks on cultural property in South Africa cannot be categorised as international crimes, they are a reminder of the reality of threats to cultural property closer to home. In recent times attacks and destruction of cultural property have manifested through student-led protests at several universities, including the University of Rhodes and the University of Cape Town.¹⁹ Most of the sites targeted are

com/2016/04/160419-Islamic-State-ISIS-ISIL-Nineveh-gates-Iraq-Mosul-destroyed/ (accessed 10 December 2016).

¹⁴ W Worley ‘Isis destroys gates to ancient city of Nineveh near Mosul’ *Independent* 12 April 2014 available at <http://www.independent.co.uk/news/world/middle-east/isis-destroys-gates-ancient-city-nineveh-mosul-a6980686.html> (accessed 23 August 2017).

¹⁵ BBC ‘Mali Rebel “to Admit” Timbuktu Mausoleum Destruction at ICC’ (24 March 2016) available at <http://www.bbc.com/news/world-africa-35897199> (accessed 10 December 2016).

¹⁶ *Ibid.*

¹⁷ This can be gleaned from an emergency assessment which indicated that about 60 000 people were still living in Timbuktu after the terrorists left. On this report, see International Medical Corps ‘Multi-sectoral Rapid Assessment Report Rapport: Timbuktu’ (2013) available at <http://internationalmedicalcorps.org/document.doc?id=278> (accessed 13 March 2017).

¹⁸ L Harding ‘Timbuktu Mayor: Mali Rebels Torched Library of Historic Manuscripts’ *The Guardian* 28 January 2013 available at <https://www.theguardian.com/world/2013/jan/28/mali-timbuktu-library-ancient-manuscripts> (accessed 10 December 2016); see, also, C English ‘Scroll Smugglers: How Timbuktu’s Secret Treasures were Saved’ *Mail & Guardian* 30 March 2014 available at <https://mg.co.za/article/2014-05-30-scroll-smugglers-how-timbuktus-secret-treasures-were-saved> (accessed 13 March 2017). Notably, according to the latter source, although it has been reported that thousands of ancient manuscripts had been stolen or destroyed, it turned out that some of them had merely been hidden and have subsequently been recovered.

¹⁹ AK Segobye ‘Africa’s Rich Heritage is Under Threat’ (27 May 2015) available at <http://theconversation.com/africas-rich-heritage-is-under-threat-42335> (accessed 20 June 2017).

associated with the apartheid era in South African history.²⁰ Perpetrators of these attacks take the view that these sites are a constant reminder of colonial oppression.²¹ However, others, including the South African Heritage Resources Agency, are of the opinion that these monuments are part of South Africa's identity²² and that their destruction deprives future generations of this heritage.²³

These examples are, of course, not exhaustive. They are, however, indicative of the role of recent conflicts in the (sometimes irreversible) plunder and destruction of some of the world's greatest cultural properties. The increase in these attacks by militant groups (such as ISIS) emphasises the need for a stronger response. One such response to this catastrophe is to hold those responsible for these acts criminally accountable. This sharply calls into focus the role of international criminal tribunals. Two of the international tribunals which have thus far dealt with cultural-property crimes are the International Criminal Tribunal for the former Yugoslavia (ICTY) and, more recently, the International Criminal Court (ICC). The ICTY defined this crime as the 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'.²⁴ The foregoing definition places emphasis on the phrase 'seizure of, destruction or wilful damage.' Taking a different approach, the ICC has defined this crime as '[i]ntentionally 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'.²⁵ The latter definition places emphasis on the phrase '[i]ntentionally directing attacks.' The extent to which the ICTY approach differs from the ICC approach, can be directly attributed to the texts of the 1993 Statute of the ICTY (ICTY Statute) and the 2002 Rome Statute of the International Criminal Court (Rome Statute) respectively.

Although the difference between the ICC and ICTY approaches is irrefutable, the decision of the ICC in the case of *Prosecutor v Ahmad*

²⁰ Ibid.

²¹ Ibid.

²² 'Destruction of Heritage Objects Deprives Future Generations of Cultural Heritage: SAHRA' *Sowetan* 18 February 2016 available at <http://www.sowetanlive.co.za/news/2016/02/18/destruction-of-heritage-objects-deprives-future-generations-of-cultural-heritage-sahra> (accessed 20 June 2017).

²³ Ibid.

²⁴ *Prosecutor v Strugar* IT-01-42-T ICTY (Trial Judgement, 31 January 2005) (the *Strugar* trial judgement) paras 298 and 299.

²⁵ *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15 (ICC Trial Chamber VIII, Judgement and Sentence, 27 September 2016) (*Al Mahdi* case).

*Al Faqi Al Mahdi (Al Mahdi case)*²⁶ creates new questions. Notably, as evident in the abovementioned incidents in Mali, Iraq and Syria, perpetrators are not merely 'directing attacks' against cultural property, but their attacks are, in many respects, destroying or damaging cultural property. With the ICC's emphasis on the notion of 'directing attacks' (as opposed to the ICTY's emphasis on 'damage'), it remains unclear whether the act of 'damage' constitutes an element of cultural-property crimes. Also, the propensity of extremist groups in recent times to broadcast their attacks is unprecedented, thus raising the issue whether this reality should be taken into account when prosecuting these crimes.²⁷ In addition, because crimes against persons are committed during conflicts, the emphasis on cultural-property crimes has become contentious. Some commentators find it unsettling for courts to concern themselves with cultural-property crimes when conflicts have a devastating impact on human beings, and question whether 'stones are more important than humans'.²⁸ These complex issues were not addressed specifically by the jurisprudence of the ICTY. However, the judgement of the ICC in the *Al Mahdi* case seems to shed some light on them.

The *Al Mahdi* case was only recently decided on 27 September 2016 and has not yet been critically analysed. Therefore, this paper aims to assess the contribution of this case to the existing international jurisprudence regarding this crime. It seeks to demonstrate that, while the judgement builds on the work of other international tribunals, in particular the ICTY, certain aspects of the ICC approach are unique, thus underscoring the distinctive viewpoint ushered in by the Rome Statute. The rest of the paper is divided as follows. The second section describes the background to the *Al Mahdi* case. The third discusses the general framework for the protection of cultural property under international law. The remainder of the sections are devoted to highlighting the significance of the *Al Mahdi* case, focusing on three components: the dichotomy between cultural-property crimes and crimes against persons; the definition of a cultural-property crime; and the broadcasting of attacks on

²⁶ Ibid.

²⁷ It is to be noted with caution that the destruction of foreign artistic and religious heritage goes back to classical times and was certainly widely published, though with less immediate effect than occurs today with the almost instantaneous publication to the international community. Nevertheless, despite communication being slower in those times, such events were still advertised as widely as possible by the dominant power.

²⁸ V Suhr 'The ICC's Al Mahdi Verdict on the Destruction of Cultural Heritage: Two Steps Forward, One Step Back?' (3 October 2016) available at <https://voelkerrechtsblog.org/the-iccs-al-mahdi-verdict-on-the-destruction-of-cultural-heritage-two-steps-forward-one-step-back/> (accessed 10 December 2016).

cultural property in the media. This analysis is conducted in comparison to selected ICTY jurisprudence.

2 The *Al Mahdi* case

In January 2012, an armed conflict erupted in northern Mali. This conflict was fought between the Malian National Defence Force and various armed groups operating within Mali. When the former retreated in April 2012, two of the armed groups, the Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), took control of Timbuktu, one of the regions in northern Mali. These armed groups exercised control over Timbuktu through a newly established local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade,²⁹ called the Hesbah.

Al Mahdi joined the Ansar Dine in April 2012. He had been born in the area and was highly regarded for his knowledge of Islam. It is for these reasons that he was contacted by the leaders of the Ansar Dine and Al-Qaeda to lead the Hesbah brigade. He accepted and subsequently led the brigade from April to September 2012. In order to execute his duties, Al Mahdi authored a document on the role of the Hesbah in the regulation of the morality of the people of Timbuktu and the suppression of certain practices.

During this time, the armed group learned of the local population's practices, some of which involved rituals at the mausoleums in Timbuktu. These mausoleums form an integral part of the religious life of the Timbuktu population and generally constitute a common heritage for the community, being frequently visited by the community for purposes of prayer and pilgrimage. The armed groups viewed the nature of these practices as unacceptable. As the leader of the Hesbah, Al Mahdi was asked to monitor the practices of the Timbuktu population regarding the mausoleums. He was to raise awareness of, and prohibit the Timbuktu population from, pursuing these practices.³⁰ In Al Mahdi's view, recourse to the mausoleums by the people of Timbuktu constituted an act of superstition and idolatry that had to be abandoned.³¹ He monitored the practices of the Timbuktu population for about a month and conducted outreach programmes, explaining to them what should and should not be done at the mausoleums.

In June 2012 the leaders of the two armed groups decided that the mausoleums should be destroyed. Al Mahdi had been consulted

²⁹ The *Al Mahdi* case (note 25 above) para 31.

³⁰ *Id* para 35.

³¹ *Id* para 38.

earlier and he was of the opinion that the mausoleums should not be destroyed. Nevertheless, the leaders of the armed groups proceeded to issue instructions for its destruction. These instructions were relayed to Al Mahdi in his capacity as the leader of the Hesbah. Although Al Mahdi was initially hesitant to have the mausoleums destroyed, he eventually agreed to arrange the attack. He wrote and delivered a sermon, the content of which focused on the destruction of the mausoleums.³² As the leader of the Hesbah, Al Mahdi also determined the pattern and sequence in which the mausoleums would be attacked.³³

Between 30 June and 11 July 2012, Al Mahdi, along with other individuals, attacked and destroyed ten of the most important and well-known sites in Timbuktu, including the Sidi Mahamoud Ben Omar Mohamed Aquit mausoleum, the Sheikh Mohamed Mahmoud Al Arawani mausoleum, the Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh AlKabir mausoleum, the Alpha Moya mausoleum, the Sheikh Muhammad El Mikki mausoleum, the Sheikh Abdoul Kassim Attouaty mausoleum, the Sheikh Sidi Ahmed Ben Amar Arragadi mausoleum, the door of the Sidi Yahia mosque and two further mausoleums adjoining the Djingareyber Mosque.³⁴ With the exception of the Sheikh Mohamed Mahmoud Al Arawani mausoleum, all these buildings had the status of protected UNESCO world-heritage sites. Al Mahdi oversaw the attack and destruction of the mausoleums and in some cases personally took part in their destruction.³⁵

He was charged with the war crime of '[i]ntentionally 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' under article 8(2)(e)(iv) of the Rome Statute. Al Mahdi pleaded guilty and was convicted on the basis of co-perpetration in accordance with article 25(3)(a) of the Rome Statute. The ICC chamber took note of Al Mahdi's position as head of the Hesbah and of his overall responsibility in the execution phase of the attacks.³⁶ His role in making logistical arrangements for the successful execution of the attacks was also taken into account.³⁷ In addition, the chamber considered that Al Mahdi had been present at all the sites during the attacks, that he had given instructions and provided moral support to the persons destroying the sites and that he had personally participated in

³² Id para 37.

³³ Ibid.

³⁴ Id para 38.

³⁵ Ibid.

³⁶ Id paras 40 and 53.

³⁷ Ibid.

the attacks that led to the destruction of at least five sites.³⁸ The chamber found that Al Mahdi's contribution was essential and that without it, the commission of these crimes would have been frustrated.³⁹ It added that Al Mahdi's contribution to the commission of these crimes was a result of his agreement with others and concluded that he was liable as a co-perpetrator.⁴⁰

3 The protection of cultural property under international law

Cultural property is protected through a range of international-law regimes, including international humanitarian law, international criminal law and international human-rights law.⁴¹ The fact that attacks on cultural property are often committed in situations of non-international armed conflicts (NIACs) raises the issue of the status of non-state armed groups in international law. For this reason, the status of non-state actors under international law is briefly discussed before the various positions concerning attacks on cultural property are considered.

3.1 *The Status of Non-state Actors under International Law*

The status of non-state actors in international law remains a subject of debate. Since non-state actors are not signatories to treaties — including treaties in terms of international humanitarian law and international human-rights law — the imposition of duties on non-state armed groups at international level is far from clear.⁴² Some commentators are of the opinion that non-state actors can be bound by rules such as international humanitarian law, by virtue of being active within the territories of states that are party to international humanitarian-law treaties.⁴³ However, this

³⁸ Ibid.

³⁹ Id para 53.

⁴⁰ Id para 54.

⁴¹ On these regimes, see KL Alderman 'The Human Right to Cultural Property' (2011) 20 *Michigan State International Law Review* 69; R O'Keefe 'Protection of Cultural Property under International Criminal Law' (2010) 11 *Melbourne Journal of International Law* 339; AF Vrdoljak 'Cultural Heritage in Human Rights and Humanitarian Law' in O Ben-Naftali (ed) *International Human Rights and Humanitarian Law* (2001) 250–302, also available at <http://www.heritage.sense-agency.com/assets/Uploads/sg-7-12-vrdoljak-heritage-en.pdf> (accessed 23 June 2017).

⁴² Notably, art 27 of the 1969 Vienna Convention of the Law of Treaties establishes the *pacta sunt servanda* rule which is to the effect that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. As non-state armed groups are often not parties to treaties, the binding nature of these treaties is often questioned.

⁴³ See, eg, S Sivakumaran 'Binding Armed Opposition Groups' (2006) 55

position is not without criticism. Ryngaert, for example, submits that it would be problematic to assume that non-state actors are bound by treaties that they are not party to.⁴⁴ In Ryngaert's view, this assumption is problematic, since non-state armed groups often consider themselves to be the least represented groups by states.⁴⁵ With the doubt surrounding the imposition of duties upon non-state actors, international criminal law has been considered by commentators to be a convenient fall-back position. Schabas, for example, is of the opinion that

[I]f human rights law has shown itself to be somewhat limited with respect to non-State actors precisely because it is focused on the obligations of the State towards individuals within its jurisdiction, this is not the case when it comes to individual liability for international crimes.⁴⁶

The problem with the above position, however, is that international criminal law, and, in particular, the jurisdiction of the ICC, only extends to individuals.⁴⁷ Non-state actors cannot be prosecuted by the ICC.

Another argument that has been advanced to surmount the non-binding nature of international law rules on non-state actors, concerns the customary international law nature of certain rules.⁴⁸ Some rules, including international humanitarian-law rules, have attained the status of customary international law.⁴⁹ Thus, the argument has been made that

International and Comparative Law Quarterly 369 381. However, for a contrary view, see A Cassese 'The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts' (1981) 30 *International and Comparative Law Quarterly* 416 429.

⁴⁴ C Ryngaert 'Non-state Actors and International Humanitarian Law' Institute for International Law Working Paper 2008 available at <https://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf> (accessed 23 August 2017) 4–5. See, also, C Ryngaert 'Non-state Actors in International Law: A Rejoinder to Professor Thirlway' (2017) 64 *Netherlands International Law Review* 155.

⁴⁵ Ryngaert (2008) (n 44 above).

⁴⁶ WA Schabas 'Punishment of Non-state Actors in Non-international Armed Conflict' (2002) 26 *Fordham International Law Journal* 907 932.

⁴⁷ For example, under art 25(1) of the Rome Statute, the ICC has jurisdiction over natural persons.

⁴⁸ See, eg, M Sassòli 'Transnational Armed Groups and International Humanitarian Law' Program on Humanitarian Policy and Conflict Research, Harvard University, HPCR Occasional Paper Series 40, 2006.

⁴⁹ For instance, one view holds that the obligations of states to protect cultural property in situations of armed conflict has attained the status of customary international law. See, eg, R O'Keefe et al *Protection of Cultural Property: Military Manual* (2016) available at <http://openarchive.icomos.org/1739/1/Protecting%20Cultural%20Property%20Military%20Manual%20UNESCO%20Blue%20Shield%20246633e.pdf> (accessed 23 August 2017) 4; AF Vrdoljak 'Intentional Destruction of Cultural Heritage and International Law' 2007 available at https://www.researchgate.net/publication/45578915_Intentional_

all parties, including non-state actors, are bound by these, regardless of whether or not they are members of the treaties.⁵⁰ This view, however, has not escaped criticism, with some commentators contending that non-state actors do not participate in the formation of customary international law.⁵¹ To remedy this, it has been suggested that ‘the only solution to this problem consists of – to the extent possible – securing the non-State actor’s consent to be bound.’⁵² Nevertheless, commentators such as Schabas insist that international criminal law remains a viable avenue for holding to account those individuals responsible for attacks on cultural property.

Having briefly discussed the status of non-state actors under international law, I now turn to the position of the various branches of international law relating to attacks on cultural property.

3.2 *The Branches of International Law Dealing with Attacks on Cultural Property*

International humanitarian law encompasses rules developed to regulate the conduct of armed conflicts.⁵³ Sources of international humanitarian law can be found in treaties and in rules of customary international law.⁵⁴ The earliest codification of rules pertaining to the protection of cultural property can be traced back to treaties such as the 1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land and its Annex (1907 Hague Convention).⁵⁵ Although treaties such as the 1907 Hague Convention provided for the protection

Destruction_of_Cultural_Heritage_and_International_Law (accessed 23 August 2017) 1–21.

⁵⁰ Sassòli (note 48 above) 41.

⁵¹ See, eg, Ryngaert (2008) (note 44 above) 8; A Roberts & A Sivakumaran ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ (2012) 37 *The Yale Journal of International Law* 107–109.

⁵² Ryngaert (2008) (n 44 above) 13.

⁵³ G Kemp ‘International Humanitarian Law’ in H Strydom (ed) *International Law* (2015) 370.

⁵⁴ M Dixon *A Textbook on International Law* 6 ed (2007) 23–52.

⁵⁵ The 1907 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, arts 27 and 56. Art 27 provides: ‘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’. For an even earlier national codification of this prohibition, see the 1863 Instructions for the Government of Armies of the United States in the Field (Lieber Code), arts 35 and 36.

of cultural property, this was not its only purpose. The first treaty to comprehensively address the protection of cultural property, is the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict (1954 Convention).⁵⁶ This Treaty came into force in 1954 and defines cultural property as

movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.⁵⁷

Although the 1954 Convention was the first seminal treaty to be fully devoted to the protection of cultural property, its scope was subject to criticism, resulting in the adoption of additional protocols to supplement it. The First Protocol to the 1954 Convention sought to address a number of gaps, including the Convention's failure to afford protection to movable cultural property and the exportation of cultural property during armed conflicts.⁵⁸ The Second Protocol was adopted at The Hague in 1999 and it sought to address gaps pertaining to the interpretation and application of the 1954 Convention.⁵⁹ This latter protocol addresses a number of issues in detail, including military necessity, military objectives as well as measures to be taken by states during peace time.

Aside from the 1954 Convention and its two protocols, the two 1977 protocols additional to the four Geneva Conventions⁶⁰ further provide for the protection of cultural property in situations of armed conflict. Article 53 of the 1977 Protocol Additional to the Geneva Conventions of

⁵⁶ The 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention.

⁵⁷ *Id* art 1(a).

⁵⁸ The 1954 First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict.

⁵⁹ The 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

⁶⁰ These were all signed on 12 August 1949 and are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention); the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).

12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) and article 16 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (AP II), are phrased identically and state that

[W]ithout prejudice to the provisions of The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

It is clear from the above provision that this list of protected property is somewhat less inclusive when compared to the list offered by the 1954 Convention. However, the provision explicitly states that the 1954 Convention should not be prejudiced. Commentators are of the opinion that the emphasis placed on the 1954 Convention in both articles 53 and 16 of AP I and AP II respectively, suggests that in the event of a conflict between the 1954 Convention on the one hand and APs I and II on the other, the 1954 Convention takes precedence, subject, of course, to the states concerned being members of it.⁶¹ According to the International Committee of the Red Cross' (ICRC) commentary on articles 53 and 16 of AP I and AP II respectively, this phraseology suggests that these articles 'did not modify the relevant existing instruments'.⁶² Although AP I and AP II make provision for the protection of cultural property, their originating documents, the 1949 Geneva Conventions, which constitute the main treaty framework of the post-world war international humanitarian law, did not devote specific provisions to the protection of cultural property. This arguably underscores the limited regard accorded to attacks on cultural property at that time in comparison with other war crimes and crimes against humanity.

The existing treaty provisions on international humanitarian law regarding the protection of cultural property, such as AP I and AP II, are further supplemented by customary international law. As already said above, it is generally accepted that the obligations of states to protect cultural property in situations of armed conflict has attained the status

⁶¹ O'Keefe et al (note 49 above) 3.

⁶² ICRC 'Protection of Cultural Objects and of Places of Worship' (1987) available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=501D619BA5E17158C12563CD00434AF5> (accessed 14 March 2017).

of customary international law.⁶³ Thus, even states that are not members of these treaties are under obligation to afford protection to cultural property in situations of armed conflict; this is because the nature of the obligation upon states is regarded as *erga omnes*.⁶⁴ Courts, including the ICTY, have confirmed the customary international-law status of the protection of cultural property in situations of armed conflict, underscoring the fact that the rules codified in various international humanitarian-law treaties, including the 1907 Hague Convention, form part of customary international law.⁶⁵ Also, the 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (2003 Declaration) contains provisions that extend the protection of cultural property beyond situations of conflict to also encompass peace situations. The preamble of the 2003 Declaration provides that the development of rules of customary international law pertaining to the protection of cultural property, covers both 'the protection of cultural heritage in peacetime as well as in the event of armed conflict'.⁶⁶ Indeed, article IV of the Declaration imposes an obligation on states to conduct peace-time activities in a manner that ensures the protection of cultural property. However, whether or not the customary international-law protection accorded to cultural property extends to peace-time situations still remains controversial.

International criminal law, as a branch of international law dealing with individual criminal responsibility, provides a framework on acts that constitute international crimes.⁶⁷ The statutes establishing international criminal tribunals and courts have been keen to proscribe attacks on or

⁶³ See the sources cited in note 49 above.

⁶⁴ F Francioni 'The Human Dimension of International Cultural Heritage Law: An Introduction' (2011) 22 *European Journal of International Law* 9 13. Francioni submits that the obligation *erga omnes* finds support in the text of a number of international treaties such as the 1954 Convention, of which its preamble provides 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'. He is of the opinion that the Convention's reference to words such as 'people' and 'the cultural heritage of all mankind' underscores 'the idea of an integral obligation owed to the international community as a whole (*erga omnes*) rather than to individual states on a contractual basis'.

⁶⁵ See, eg, *Prosecutor v Dario Kordić and Mario Cerkez* IT-95-14/2-T (ICTY Trial Judgement, 26 February 2001) (the *Kordić* trial judgement) para 206; the *Strugar* trial judgement (note 24 above) paras 227 and 230; *Prosecutor v Tihomir Blaškić* IT-1995-14-T (ICTY Trial Judgement, 3 March 2000) (the *Blaškić* trial judgement) para 168; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136 para 89.

⁶⁶ See the preamble of the 2003 Declaration.

⁶⁷ A Cassese *International Criminal Law* 2 ed (2008) 3–10; A Zahar & G Sluiter *International Criminal Law: A Critical Introduction* (2008) 3–13.

damage to cultural property as international crimes. Notably, both the ICTY Statute and the Rome Statute proscribe these acts as war crimes.⁶⁸ Although these acts are not explicitly included in the list of crimes against humanity or genocide, courts, most notably the ICTY, have, in some instances, interpreted damage to cultural property to constitute a crime against humanity.⁶⁹ Moreover, as mentioned earlier, in defining crimes against cultural property, the ICTY Statute refers to the notion of ‘damage’ while the ICC Statute uses the term ‘directing attack’. The jurisprudence of the ICTY, however, appears to suggest that the latter notion, rather than the former one, represents the customary international-law position. Notably, in *Prosecutor v Tadić*, the ICTY Appeals Chamber explicitly referred to article 19 of the 1954 Convention as a treaty rule which forms part of customary international law binding on parties to non-international armed conflicts.⁷⁰ Additionally, the chamber noted that articles 53 and 16 of AP I and AP II respectively, both of which prohibit the directing of attacks on cultural property, represent an expression of customary international law.

International human-rights law also provides a valuable framework for the protection of cultural property. Most provisions under international human-rights treaties do not specifically make mention of cultural

⁶⁸ Arts 8(2)(b)(ix) and 8(2)(e)(1)(iv) of the 1998 Rome Statute; art 3(d) of the ICTY Statute.

⁶⁹ The *Blaškić* trial judgement (note 65 above) para 425. Notably, in this case, the ICTY Trial Chamber ruled that the attacks of Serbian forces on the Muslim population, as well as the destruction and plunder of property, in particular of institutions dedicated to religion and education, amount to persecution of that population and is thus a crime against humanity. Similarly, in the *Kordić* trial judgement (note 65 above) para 207, the ICTY Trial Chamber noted that when institutions dedicated to religion are destroyed or wilfully damaged with the required discriminatory intent, this amounts to an act of persecution and a crime against humanity. The chamber noted that ‘[t]his act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of “crimes against humanity”’.

⁷⁰ *Prosecutor v Tadić* IT-94-1-A (ICTY Appeals Chamber Interlocutory Appeal on Jurisdiction Judgement, 2 October 1995) paras 98 and 127. In this regard, see, also, *Prosecutor v Hadžihasanović* IT-01-47-AR73.3 (ICTY Appeals Chamber, Interlocutory Appeal of Trial Chamber, 11 March 2005) paras 44–48; EJ Techera ‘Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited’ (2007) 4 *Macquarie Journal of International and Comparative Environmental Law* 1 18. For a contrary view, see Y Gottlieb ‘Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC’ (2005) 23 *Penn State International Law Review* 857 869, who is of the opinion that international instruments on cultural property such as the 1954 Convention and its two Protocols ‘have yet to reach that status’.

property. Nonetheless, a broad and generous interpretation of some provisions leaves room for the protection of cultural property to be read into the existing provisions. A prime example of such a provision is article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights of 1966.⁷¹ This article imposes an obligation on member states to 'recognize the right of everyone to take part in cultural life.' The Committee of Economic, Social and Cultural Rights (CESCR), in its General Comment 21, is of the view that because of 'the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected.'⁷² The CESCR underscores that states are under obligation to respect and protect cultural heritage in all its forms, in times both of war and of peace, as well as in the event of natural disasters.⁷³ It can, therefore, be deduced that the CESCR recognises that the protection to be accorded to cultural property does not cease after the conflict has ended. It carries on even in peace situations. Moreover, this obligation does not only extend to violations by states, because the CESCR emphasises that 'the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering' with the cultural identity of individuals.⁷⁴ Furthermore, the CESCR also emphasises that the normative content of the right guaranteed under article 15(1)(a) demands of states to ensure access to and preservation of cultural goods.⁷⁵ Additionally, attacks on cultural property belonging to sub-national groups automatically place this issue within the realm of international human-rights law. Some treaties and declarations contain provisions calling upon states to protect the rights of sub-national groups. For example, the 1989 Indigenous and Tribal Peoples Convention imposes upon states the obligation to adopt special measures that are appropriate for safeguarding members of sub-national groups, persons, institutions, property, labour, cultures and environment.⁷⁶

It is not practical to exhaust all the existing treaties on the protection of cultural property. However, the 1972 World Heritage Convention

⁷¹ The 1966 International Covenant on Economic, Social and Cultural Rights.

⁷² UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No 21: Right of Everyone to Take Part in Cultural Life (art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2009) E/C.12/GC/21 (GC 21).

⁷³ *Ibid.*

⁷⁴ *Id* para 50.

⁷⁵ *Id* para 6.

⁷⁶ Art 4 of the International Labour Organization's 1989 Indigenous and Tribal Peoples Convention available at <http://www.refworld.org/docid/3ddb6d514.html> (accessed 23 June 2017).

deserves mention.⁷⁷ This Convention refers to the term ‘heritage’ and not ‘property’ used by other conventions, including the 1954 Convention. The term ‘heritage’ only emerged during the twentieth century. It is broader in scope and accordingly affords wider protection than that offered by the term ‘property’.⁷⁸ The argument is that the term ‘heritage’ extends to ‘international protection of culture other than masterpieces and monuments’.⁷⁹ It is important to note, however, that there is still no consensus in the cultural-heritage literature as to the appropriate terminology to be used. That said, the 1972 Convention obliges states to afford protection to both cultural heritage⁸⁰ and natural heritage.⁸¹ Member states are obligated to identify, protect, conserve, present and transmit cultural and natural heritage to future generations.⁸² In addition to identifying natural and cultural heritage, a member state is obliged to ‘submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list’ of protected heritage. Notably, in 1977, Mali deposited a document of acceptance with regard to the 1972 Convention.⁸³ In the *Al Mahdi* case, this fact influenced the decision of

⁷⁷ The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 Convention).

⁷⁸ M Frigo ‘Cultural Property v Cultural Heritage: A “Battle of Concepts” in International Law?’ (2004) 86 *International Review of the Red Cross* 367 369.

⁷⁹ A Strecker ‘The Human Dimension to Landscape Protection in International Law’ in S Borelli & F Lenzerini (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (2012) 327 349.

⁸⁰ In terms of art 1 of the 1972 Convention (note 77 above), cultural heritage encompasses (a) architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; (b) groups of buildings, either groups of separate or connected buildings, which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; (c) works of man or the combined works of nature and man, as well as areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

⁸¹ Id art 2, which provides that natural heritage encompasses (a) natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; (b) geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; and (c) natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

⁸² Id art 4.

⁸³ The ratification data is available at <http://whc.unesco.org/en/statesparties/>

the court with regard to the gravity of the crime. The ICC held that due to the fact that the sites affected were UNESCO world-heritage sites, their attack was of special concern as their destruction did not merely affect the direct victims of the crimes in Timbuktu, 'but also people throughout Mali and the international community.'⁸⁴ A similar approach was evident in the decisions of the ICTY with regard to similar cases.⁸⁵

The next part of this paper looks at three components essential to this discussion, namely the dichotomy between crimes against persons and crimes against property, the definition of cultural property and the implications of the publication of attacks on cultural property. This discussion is geared towards demonstrating the contribution of the *Al Mahdi* case (read with the Rome Statute) to the existing international framework pertaining to this crime. Once again, this analysis is made in comparison to the established body of ICTY jurisprudence on this subject.

4 The dichotomy between cultural-property crimes and crimes against persons

One commentator predicted a backlash in regard to the ICC prosecutor's decision to prosecute cultural-property crimes committed by *Al Mahdi*, opining that

[p]olitically, there will be those who will question why Bensouda is focusing on ancient sites rather than going after rape, torture and murder convictions, but destruction of cultural heritage is not a second-rate crime.⁸⁶

Another commentator expressed his concern about the prosecutor's emphasis on cultural property crimes and said that

[I]n the wake of [the *Al Mahdi*] judgement...one must balance the significance of this decision with the court's failure to successfully prosecute more serious crimes. ...[T]here is a clear hierarchy of crimes in terms of seriousness. It can hardly be argued that the destruction of objects, culturally significant though they are, rises to the same level of gravity as crimes that may result in the deaths of thousands, even millions of people. ...The ICC is a court of limited jurisdiction and limited

(accessed 13 March 2017).

⁸⁴ The *Al Mahdi* case (note 25 above) para 80.

⁸⁵ See, eg, *Prosecutor v Miodrag Jokic* IT-01-42/1-S (ICTY Trial Chamber I, sentencing judgement, 18 March 2004) para 53 (the *Jokic* case).

⁸⁶ O Bowcott 'ICC's First Cultural Destruction Trial to Open in The Hague' *The Guardian* 28 February 2016 available at <https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague> (accessed 10 December 2016).

funding. Given these constraints, the Court should make its impact felt most strongly by prosecuting individuals responsible for the most serious crimes, namely those crimes that result in the death, rape, or torture of persons.⁸⁷

These commentaries exemplify the ongoing debate on whether international criminal courts should concern themselves with cultural-property crimes when conflicts have a devastating impact on human beings. Although there seems to be general consensus that cultural property should be protected, efforts to prosecute cultural-property crimes have caused considerable debate. When bringing charges against Al Mahdi, the ICC prosecutor, Fatou Bensouda, emphasised that 'what is at stake is not just walls and stones. The destroyed mausoleums were important from a religious, historical and identity point of view.'⁸⁸ A similar tone is echoed in the words of the UNESCO head, Irina Bokova, who observes that '[c]ulture and heritage are not about stones and buildings – they are about identities and belongings. They carry values from the past that are important for the societies today and tomorrow'.⁸⁹ Not surprisingly, courts are increasingly making cultural-property crimes a priority – the *Al Mahdi* case constituting a good example.

Some commentators, however, remain sceptical about the emphasis placed on these crimes, contending that such emphasis may leave some 'scratching their heads', especially in light of the numerous crimes committed against persons.⁹⁰ Destruction of ancient statues,

⁸⁷ M Wilcosky 'Keeping the Nuremburg Legacy Alive: A Criticism of the ICC Al-Mahdi Prosecution' (2016) 63 *Office of the Director of Public Prosecutions New Zealand E Newsletter* 7–8 available at <http://dpp.govmu.org/English/Documents/Issue63.pdf> (accessed 10 December 2016).

⁸⁸ See 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of the Confirmation of Charges Hearing in the Case against Mr Ahmad Al-faqi Al Mahdi' (1 March 2016) available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> (accessed 10 December 2016). Aside from statements such as this one, the various instruments on the protection of cultural property have consistently underlined the use of terminology such as 'special protection', 'enhanced protection' and property of 'outstanding universal value'.

⁸⁹ I Bokova 'Statement of the Head of UNESCO at the Commemoration of the 40th Anniversary of the World Heritage Convention' (12 December 2012) available at <http://unesdoc.unesco.org/images/0021/002187/218792e.pdf> (accessed 10 December 2016).

⁹⁰ J Keller 'Why ISIS's Destruction of Ancient Art is More than a War Crime' *The Daily Dot* 17 March 2015 available at <http://www.dailydot.com/opinion/isis-war-crimes-genocide-ancient-art/> (accessed 10 December 2016); M Frulli 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency' (2011) 22 *European Journal of International Law* 203–208; Wilcosky (note 87 above) 8.

though heinous, is generally considered a minor crime when measured against the distressing crimes committed against human beings.⁹¹ Some commentators have expressed the view that exclusive focus on cultural-property crimes could send the wrong message, namely that ‘stones are more important than humans’.⁹² Criticism has also been directed at the *Al Mahdi* judgement, with commentators submitting that although his conviction was a clear victory in as far as cultural-property crimes are concerned, it was a setback for crimes against persons, considering that there was reason to believe that Al Mahdi was responsible for a number of crimes against persons, including that of rape.⁹³ This debate highlights the dichotomy between cultural-property crimes and crimes against persons. The question that arises is whether the emphasis placed on cultural-property crimes suggests that it is of greater priority/gravity than crimes against persons? Does ICTY case law offer insight into this debate and, if not, how does the *Al Mahdi* case resolve this issue?

In the case of *Prosecutor v Jokic*, the ICTY Chamber consistently highlighted the special nature of the protection accorded to cultural property.⁹⁴ However, this substantiation hardly offers a definitive response to the claim that the emphasis on cultural-property crimes erodes the gravity of crimes against persons. If anything, the chamber’s view upsets critics. In the ICTY case of *Prosecutor v Strugar*, sections of the ICTY Trial Chamber judgement discussed the special nature of protection accorded to cultural property.⁹⁵ The closest the *Strugar* judgement came to addressing the dichotomy between cultural-property crimes and crimes against persons, is in its reflection on the differences in sentences applicable to crimes against property and crimes against persons. In this regard, the chamber held that ‘the crimes against persons of which the

⁹¹ Wilcosky (note 87 above) 8.

⁹² Suhr (note 28 above); see, also, Wilcosky (note 87 above); SG Martinez ‘The ICC Dropped the Ball on Analyzing the Impact of Cultural Destruction on Timbuktu’s Population’ *Justice Tribune*, 28 October 2016 available at <https://www.justicetribune.com/blog/icc-dropped-ball-analysing-impact-cultural-destruction-timbuktus-population> (accessed 10 December 2016); E Bussey ‘Mali: ICC Trial Over Destruction of Cultural Property in Timbuktu Shows Need for Broader Accountability’ (Amnesty International, 22 August 2016) available at <https://www.amnesty.org/en/latest/news/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/> (accessed 10 December 2016).

⁹³ Martinez (note 92 above); Bussey (note 92 above).

⁹⁴ The *Jokic* case (note 85 above) para 53. Significantly, the Chamber in the *Jokic* case ruled that ‘since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town’.

⁹⁵ The *Strugar* trial judgement (note 24 above) paras 227–233.

Accused has been found guilty would have been punishable in the former Yugoslavia by sentences ranging from 5 to 20 years of imprisonment, and the crimes against property by sentences ranging from 1 to 15 years of imprisonment'.⁹⁶ It could be inferred from this ruling that sentences for crimes against persons are generally more severe than sentences for property crimes, possibly suggesting that crimes against property are seen as less serious than crimes against persons. This inference, however, does not directly address the controversial dichotomy between cultural property and crimes against persons.

Fortunately, the *Al Mahdi* case offers insight on this issue. The chamber endorsed the view that cultural property enjoy special protection, different from protection accorded to civilian property.⁹⁷ It noted, without equivocation, that cultural property is 'protected as such, not generically as civilian objects'.⁹⁸ Notably, the Rome Statute makes no explicit mention of such special protection. However, by explicitly elaborating on this issue, the chamber seemed to highlight the special protection accorded to cultural property. Moreover, although the Rome Statute does not elaborate on the rationale behind the special protection accorded to cultural property, the chamber provided clarity on this issue, underscoring that the special protection accorded to cultural property reflects 'the particular importance of international cultural heritage'.⁹⁹ However, the chamber cautioned that 'not all crimes forming the grounds for a criminal conviction are necessarily of equivalent gravity and the Chamber has the duty to weigh each by distinguishing, for example, between those against persons and those targeting property'.¹⁰⁰ Specifically, the chamber held that 'Mr Al Mahdi is not charged with crimes against persons but with a crime against property'.¹⁰¹ It then concluded that 'even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons'.¹⁰² Although this ruling may seem obvious, the chamber's explicit statement is of particular importance amidst arguments by commentators that emphasis on cultural-property crimes could be perceived as an erosion of the gravity of crimes against persons. Arguments that stones are more valuable than humans, crumble significantly when measured against this ruling.

Of course, it is not suggested that an argument cannot be made that the exclusive focus on cultural crimes erodes accountability for crimes

⁹⁶ Id para 474.

⁹⁷ The *Al Mahdi* case (note 25 above) para 16.

⁹⁸ Ibid.

⁹⁹ Id para 17.

¹⁰⁰ Id para 72.

¹⁰¹ Id para 77.

¹⁰² Ibid.

against persons. However, neither can this simply be assumed, as some commentators have done. Even supposing the ICC were to be faulted for not prosecuting crimes against persons committed in Mali, an argument that seeks to tie the failure of the ICC to prosecute these crimes to its decision to prosecute cultural-property crimes, is not only problematic, but fundamentally flawed. It is also to be emphasised that, in addition to the crimes for which Al Mahdi was charged, the prosecutor continues to investigate other crimes that may have been committed against persons in Mali.¹⁰³ Thus, it may be premature to criticise, unless critics seek to also argue that there is a particular order in terms of which crimes should be prosecuted. This would raise issues of prosecutorial discretion. Therefore, the question whether Al Mahdi could have been prosecuted for other crimes, such as rape, is a different issue altogether, and one that falls outside the scope of the present discussion. What is clear, though, is that in prosecuting cultural-property crimes, the ICC ensured that the perpetrator was held to account. Prosecution by the ICC of these crimes did nothing more than that. The prosecution of cultural-property crimes does not necessarily mean that stones are now more important than human beings. Moreover, the Rome Statute proscribes cultural-property crimes. The ICC can prosecute cultural-property crimes, because the Rome Statute includes these on the list of international crimes. Arguably, much of the criticism directed at the ICC for prosecuting cultural-property crimes is largely overstated and misplaced.

It also bears mentioning that experts have not, even once, argued that cultural property is more valuable than human life. This position finds support in the words of an archeologist, who submits that

[T]hey beheaded one archaeologist and they have killed and enslaved hundreds of people, not to mention all of the displaced Iraqi and Syrian refugees that have been forced to leave their country. On a humanitarian level, you have to first think about the people – the heritage comes second, always. I have to repeat this because there is no question that all of us who have lived there worry more about our colleagues and our friends there than we do about the sites.¹⁰⁴

¹⁰³ For the status of investigations into international crimes allegedly committed in Mali, see 'Situation in the Republic of Mali – ICC-01/12' available at <https://www.icc-cpi.int/mali> (accessed 23 June 2017). The website shows that investigations into the situation in Mali are still ongoing.

¹⁰⁴ H Ghorashi 'This is a Genocide: Art Historian Zainab Bahrani on ISIS's Destruction of Cultural Heritage' (Art News, 11 November 2015) available at <http://www.artnews.com/2015/11/11/this-is-a-genocide-art-historian-zainab-bahrani-on-isis-destruction-of-cultural-heritage/> (accessed 10 December 2016).

However, the question remains: does the ICC's ruling, namely that crimes against persons are of greater gravity than crimes against cultural property, mean that these attacks were merely attacks on buildings?¹⁰⁵ Perhaps not. Although the chamber in *Al Mahdi* held that crimes against persons are of greater gravity than cultural-property crimes, it did not rule out the effects of these attacks on the local and international population. Notably, the chamber considered the far-reaching impact of the destruction on the Timbuktu population, thus highlighting that the livelihood of persons may be inseparable from cultural property.¹⁰⁶ In determining the appropriate sentence to be handed down, the chamber took note of the fact that the Timbuktu mausoleums 'are an integral part of the religious life of its inhabitants'.¹⁰⁷ The chamber gave serious consideration to the fact that the people of Timbuktu benefited from these mausoleums, in particular for purposes of prayer and pilgrimage.¹⁰⁸ The chamber also gave due regard to the fact that the people of Timbuktu were emotionally attached to the mausoleums, with many of them perceiving these as sources of protection.¹⁰⁹ The chamber concluded that the mausoleums were not only religious buildings, but also had symbolic, psychological and emotional value for the inhabitants of Timbuktu.¹¹⁰ Destroying them, in the chamber's view, had the effect of breaking the soul of those people.¹¹¹ What is evident from the chamber's approach, is that attacks on cultural property are often tantamount to attacks on persons in light of the benefits derived from such property.

Some commentators may question whether it is apt for an international court to discuss at such length the various ways in which cultural property benefits the civilian population. Most experts have been quick to dismiss approaches that link the protection of cultural property to its

¹⁰⁵ Martinez (note 92 above).

¹⁰⁶ On this issue, see the commentary by Keller (note 90 above), who submits as follows: 'I don't believe that anyone would weigh the value of 3 000 statues against human life, but history shows that crimes against culture are inseparable from crimes against persons and communities'. Importantly, also note that the *Strugar* trial judgement (note 24 above) had earlier taken this reality into account when the chamber noted that 'the shelling [of the Old Town] resulted in long-term physical, psychological and emotional suffering of the victims' (para 460). Therefore, the *Al Mahdi* case merely built on the work of the ICTY in order to usefully concretise the point that there exists a relationship between crimes against property and crimes against humans.

¹⁰⁷ The *Al Mahdi* case (note 25 above) para 34; see, also, the *Strugar* trial judgement (note 24 above) para 460.

¹⁰⁸ The *Al Mahdi* case (note 25 above) paras 78–80.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

usage by the civilian population. For instance, Frulli is of the view that '[h]ospitals need special protection because their destruction implies the killing of many civilians and impairs possible use by other civilians in the continuing conflict; churches and schools as well, in other respects'.¹¹² To her, 'the civilian-use approach sets as a clear priority the safeguard of civilians; protection is afforded basically only to the buildings and it serves the main purpose of sparing civilian lives'.¹¹³ Scatena adds that 'culture and cultural heritage should ideally stand alone; and crimes against cultural heritage should be tried isolated from any notion linking it to civilians'.¹¹⁴ According to this view, not all cultural property is used by civilians. The argument, therefore, is that if protection of cultural property is associated with civilian usage or the role it serves in sparing the lives of civilians, then a certain section of cultural property will be excluded from protection, because not all cultural property serves this purpose. Indeed, some commentators go a step further to argue that placing cultural property on the so-called bandwagon of civilian property, such as hospitals and religious buildings – as is the case in the provision on cultural property under the Rome Statute – risks undermining the special nature of protection accorded to cultural property.¹¹⁵ Cultural property is protected as such, whereas buildings, such as hospitals and religious structures, are protected mainly because of the benefits they offer to the civilian population.¹¹⁶ Commentators call such an approach a civilian-use approach, which, in many respects, fails to take cognisance of the emphasis that cultural property deserves protection above and beyond its material dimension.¹¹⁷ Instead, they propose a cultural-value approach,¹¹⁸ which guarantees protection to cultural property regardless of its material dimension. Although these authors indeed have a point, the question remains at what point this link should be excluded: at the definition stage, the sentencing stage or both? Is it problematic for this link to be considered in assessing the gravity of this crime?

¹¹² Frulli (note 90 above) 207.

¹¹³ *Ibid.*

¹¹⁴ M Scatena *Voluntary Destruction of Cultural Heritage and International Criminal Law* (LLM Dissertation, Turin University, 27 June 2015) available at http://www.academia.edu/15367341/Voluntary_destruction_of_cultural_heritage_and_international_criminal_law (accessed 10 December 2016).

¹¹⁵ See, for example, Frulli (note 90 above) 211, who submits that the Rome Statute regresses in terms of its 'inclusion of historic monuments together with hospitals and places where the sick and wounded are collected'.

¹¹⁶ *Id.* 203–217.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

However, the reality is that, on several occasions, attacks on cultural property have had a direct bearing on the civilian population, thus bringing into question whether the dichotomy between the cultural-value and the civilian-use approaches should be invoked rigorously. Commentators submit that in destroying cultural property, perpetrators, on a number of occasions, seek to destabilise and manipulate the local population.¹¹⁹ The link between persons and cultural-property crimes can, therefore, not be ruled out. This link becomes increasingly apparent where the cultural property destroyed is situated within communities that derive spiritual, religious, economic and social enrichment from the sites.¹²⁰ In such a scenario, the impact of attacks on the civilian population is more pronounced and, strictly speaking, it becomes extremely hard to divorce attacks on cultural property from attacks on persons. Arguably, it is in this regard that the *Al Mahdi* ruling resonates. Moreover, taking this reality into consideration at the sentencing stage, as the chamber did in the *Al Mahdi* case, does not, per se, undermine a cultural-value approach; this is so because the term 'usage' is not an element of cultural-property crimes and, therefore, protection of cultural property would still not be dependent on it.

In sum, crimes against persons are of greater gravity than crimes against property. However, difference in gravity does not suggest that crimes against persons are more worthy of prosecution than crimes against property.

¹¹⁹ E Halas 'Issues of Social Memory and their Challenges in the Global Age' (2008) 17 *Time and Society* 103 113; D Bennett 'Exploring the Impact of an Evolving War and Terror Blogosphere on Traditional Media Coverage of Conflict' (2013) 6 *Media, War and Conflict* 37; I Bokova 'UNESCO Calls for Mobilization to Stop "Cultural Cleansing" in Iraq' (27 February 2015) available at <http://www.unesco.org/new/en/geneva/about-this-office/single-view/news/unesco> (accessed 11 July 2017). Notably, following the attacks by ISIS on the Mosul Museum in Iraq in 2015, Bokova was of the view that the tragedy was more than a cultural issue and that 'terrorists use the destruction of heritage in their strategy to destabilize and manipulate populations so that they can assure their own domination'.

¹²⁰ For example, Palmyra was not a historical site only; it was also a home to tens of thousands of people. Its destruction had a devastating impact on the lives of those who had derived benefit from it. Also, in the *Jokic* case (note 85 above) para 51, the ICTY Trial Chamber conceded that 'the Old Town was a "living city"... and the existence of its population was intimately intertwined with its ancient heritage'.

5 Defining cultural-property crimes

The term 'cultural property' does not feature anywhere in the ICTY or Rome Statutes. The first convention to explicitly mention cultural property was the 1954 Convention.¹²¹ Both the ICC and ICTY have since adopted the term, using it to describe 'institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science buildings.'¹²² Presently, there is no real consensus as to what the exact nature of a cultural-property crime is and it would indeed be ambitious to expect a universally accepted definition of cultural property. Thus, there is no standard definition of cultural property. Although some international conventions contain similar definitions,¹²³ in most instances the definitions across conventions are varied.¹²⁴ Commentators have also attempted to give meaningful content to the term. Their definitions too have varied and no commentator can purport to have been able to offer an all-encompassing definition to this term. For example, Prott and O'Keefe, in their contribution on cultural property or heritage, regard cultural property as 'manifestations of human life which represent a particular view of life and witness the history and validity of that view'.¹²⁵ For Koboldt, it is 'an expression or representation of the cultural identity of a society in a particular period'.¹²⁶ Loulanski is of the opinion that the term encompasses 'culture and landscape that are cared for by the community and passed on to the future to serve people's need for a sense of identity and belonging'.¹²⁷ The manner in which cultural property is conceptualised thus, varies.

However, the issue for discussion in this section is not so much whether there should be a universal definition of the term 'cultural property'. Indeed, nomenclature will often vary over time. Rather, of

¹²¹ Art 1 of the 1954 Convention (note 56 above).

¹²² The *Al Mahdi* case (note 25 above) para 14; the *Strugar* trial judgement (note 24 above) paras 61 and 227; the *Jokic* case (note 85 above) para 23.

¹²³ For example, both the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects define cultural property as property which 'on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science'.

¹²⁴ For example, compare the ICC and ICTY definitions.

¹²⁵ LV Prott & PJ O'Keefe "'Cultural Heritage" or "Cultural Property"' (1992) 1 *International Journal of Cultural Property* 307.

¹²⁶ C Koboldt 'Optimizing the Use of Cultural Heritage' in M Hutter & I Rizzo (eds) *Economic Perspectives on Cultural Heritage* (1997) 68.

¹²⁷ T Loulanski 'Revising the Concept for Cultural Heritage: The Argument for a Functional Approach' (2006) 13 *International Journal of Cultural Property* 207 209.

importance for the present discussion is the fact that the definition or concept has major implications for the nature of the conduct deemed to constitute an international crime against cultural property. This part, therefore, discusses the definitions adopted by the ICTY and ICC regimes, with a view to assessing the nature of conduct punishable under each. In particular, the sections highlight the implications of the definition adopted by the ICC for accountability of international crimes pertaining to attacks on cultural property.

5.1 *The Strugar approach*

The ICTY has prosecuted a number of cultural-property crimes. Perhaps the most significant and well known of these is the *Strugar* trial judgement.¹²⁸ The case against Strugar concerned events which took place in Croatia, where forces of the Yugoslav People's Army under the command of, among others, Strugar, shelled an ancient town on 6 December 1991. Pavle Strugar, a retired lieutenant-general of the then Yugoslav People's Army (JNA), was found guilty in his official capacity of the destruction or wilful damage done to cultural property under article 3(d) of the ICTY Statute.¹²⁹ The trial chamber was satisfied that, as the superior commander of the JNA forces, which had perpetrated the unlawful shelling of the Old Town of Dubrovnik, Strugar had failed to put a stop to these attacks when he could and should have done so.¹³⁰ In addition, he failed to ensure that the perpetrators were punished.¹³¹

The *Strugar* trial judgement came a year after the ICTY *Jokic* decision, which also concerned the destruction of cultural property.¹³² In *Jokic*, the chamber adopted the position in article 16 of AP II, which specifically prohibits the act of 'directing attacks' against cultural property.¹³³ The chamber also adopted the 1987 ICRC Commentary on AP II,¹³⁴ which emphasises that article 16 prohibits the act of directing attacks at cultural property, irrespective of whether or not the attacks result in actual damage.¹³⁵ According to the *Jokic* case, this approach provided

¹²⁸ The *Strugar* trial judgement (note 24 above).

¹²⁹ This provision reads as follows: 'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'.

¹³⁰ The *Strugar* trial judgement (note 24 above) paras 446–464.

¹³¹ *Ibid.*

¹³² The *Jokic* case (note 85 above).

¹³³ See art 16 of AP II. See, also, the *Jokic* case (note 85 above) paras 47–50.

¹³⁴ *Jokic* case (note 85 above) paras 47–50.

¹³⁵ International Committee of the Red Cross 'Commentary on the Additional

more stringent protection to cultural property and was to be preferred.¹³⁶ The *Jokic* case adopted this approach despite the fact that the definition of this crime under the ICTY Statute refers to ‘damage to’ cultural property. Importantly, however, the approach adopted in the *Jokic* case represents the prevailing position under customary international law, which, as noted earlier, prohibits directing attacks (and not damage) at cultural property.¹³⁷ The *Strugar* trial judgement, however, departed from this position, preferring an approach that flows directly from the text of the ICTY Statute.

A key issue in the *Strugar* trial judgement was whether damage is an element of a cultural-property crime. The chamber referred to a number of international conventions on the protection of cultural property, including to article 27 of the 1907 Hague Regulations, article 4 of the 1954 Hague Convention and article 16 of AP II.¹³⁸ Having examined the scope of these instruments, it concluded that ‘while the aforementioned provisions prohibit acts of hostility “directed” against cultural property, Article 3(d) of the [ICTY] Statute explicitly criminalises only those acts which result in damage to, or destruction of, such property’.¹³⁹ According to the chamber, ‘a requisite element of the crime charged in the Indictment is actual damage or destruction occurring as a result of an act directed against this property’.¹⁴⁰ The chamber rejected the application of the attacks-based approach as invoked in the *Jokic* case and, in so doing, excluded the notion of ‘directing attacks’ as an element of the crime. On its own, the act of directing attacks cannot lead to criminal liability under the ICTY Statute, since in the ICTY’s view, ‘actual damage was necessary for a criminalisation of the act’.¹⁴¹ This stance was endorsed by the ICTY Appeals Chamber.¹⁴² When *Strugar* appealed the decision of the trial chamber, he raised a number of grounds. Although the notion of damage did not constitute one of the grounds of appeal, the appeals chamber,

Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949’ (1987) available at <https://www.icrc.org/en/publication/0421-commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949> (accessed 23 August 2017) paras 2067 and 2069–2072.

¹³⁶ The *Jokic* case (note 85 above) paras 47–50.

¹³⁷ See the sources cited in note 49 above.

¹³⁸ The *Strugar* trial judgement (note 24 above) paras 229 and 303–307.

¹³⁹ *Id* para 308.

¹⁴⁰ *Ibid*.

¹⁴¹ C Ehlert *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge’s Destruction of Cambodia’s Heritage* (2013) 131.

¹⁴² *Prosecutor v Strugar* IT-01-42-A (ICTY Appeals Chamber, Appeal Judgement, 17 July 2008) (the *Strugar* appeal).

in addressing the other grounds of appeal, did not depart from the trial chamber's stated preference of the damage-based approach.¹⁴³

Nevertheless, questions regarding the appropriateness of this latter approach remain. Experts are of the opinion that a damage-based approach is undesirable and ought to be rejected for its failure to afford adequate protection to cultural property.¹⁴⁴ They submit that in order to penalise an individual, 'it [should suffice] that the attack was intentionally directed at the protected property'.¹⁴⁵ Incidentally, even with this contemptuous criticism, the *Strugar* approach (that is, the damage-based approach) continues to be the prevailing one in ICTY case law.¹⁴⁶ One of the reasons for the significance of the *Al Mahdi* case is that it does not employ a damage-based approach in defining cultural-property crimes. The ICC's approach in the *Al Mahdi* case is based on the text of the Rome Statute.

5.2 *The Al Mahdi approach*

Crimes against cultural property under the Rome Statute are proscribed in the identical articles 8(2)(b)(ix) and 8(2)(e)(iv), with the former applying to situations of international armed conflicts and the latter to NIACs. The *Al Mahdi* chamber invoked the latter provision, based on the fact that the conflict in Mali was an NIAC.¹⁴⁷ It therefore departed from the prevailing position under ICTY case law. In unambiguous terms, the chamber ruled that 'the jurisprudence of the ICTY is of limited guidance given that, in contrast to the [ICC] Statute, its applicable law does not govern "attacks" against cultural objects but rather punishes

¹⁴³ Id paras 264, 265, 272, 273, 277 and 278.

¹⁴⁴ See, eg, Frulli (note 90 above) 212; O'Keefe et al (note 49 above) 351 and 375.

¹⁴⁵ Frulli (note 90 above) 212.

¹⁴⁶ See, eg, *Prosecutor v Martić* IT-95-11-T (ICTY Trial Chamber I, 12 June 2007) paras 95–97 (the *Martić* case). In this case the chamber adopted the approach of the *Strugar* trial judgement. Despite criticism levelled against a damage-based approach, some commentators are of the opinion that this latter approach, as applied in the *Strugar* trial judgement, may in some respects afford broader protection to cultural property than an approach that places emphasis on directing attacks. Some have argued that a 'directing attack-based' approach, akin to the one entrenched in the Rome Statute, may fail to encompass '[u]nlawful acts of hostility against cultural property other than attacks, such as its demolition by the planting of explosives or by bulldozers'. The *Strugar* approach, which places emphasis on damage, takes into account other forms of damage, including those not linked to directing attacks. On this view, see O'Keefe (note 41 above) 355. See, also, L Arimatsu & M Choudhury 'Protecting Cultural Property in Non-international Armed Conflicts: Syria and Iraq' (2015) 91 *International Law Studies* 641 680.

¹⁴⁷ The *Al Mahdi* case (note 25 above) paras 17 and 18.

their “destruction or wilful damage”¹⁴⁸. In its view, the legal contexts are totally different, because the laws applicable to the ICC and ICTY are different: the notions of damage, as applied by the ICTY, are not legal elements of cultural–property crimes under the Rome Statute.¹⁴⁹ The chamber emphasised that ‘[a]rticle 8(2)(e)(iv) of the [ICC] Statute criminalises the act of directing a specific kind of attack irrespective of whether the buildings in question are destroyed’.¹⁵⁰ In essence, it affirmed that, even if there was no damage to cultural property, an individual is not released of liability.

What is immediately apparent in the *Al Mahdi* case, is that damage does not constitute an element of a cultural–property crime. Hence, one of the significant ways in which the *Al Mahdi* case differs from existing ICTY jurisprudence on this crime, is that it treats the act of ‘directing attacks’ against cultural property as important in its own right, rather than in the more limited sense of limiting it to damage of cultural property. Additionally, it reaffirms the prevailing position under customary international law which, as alluded to earlier, prohibits directing attacks (but not damage) against cultural property. This position also garners favour from commentators, who have argued for the rejection of the damage-based approach. The chamber’s approach is supported by the history of the negotiations around article 8(2)(e)(iv) of the Rome Statute. The *travaux préparatoires* clarifies that in drafting this provision, the majority of the delegations took the view that actual damage to cultural property should not be required for the act to be criminalised.¹⁵¹

A pertinent question, however, remains: does the fact that emphasis is placed on ‘directing an attack’ suggest that damage should, under no circumstances, inform the decisions of a court? No decisions by international tribunals have yet shed any light on this matter. The ICC in the *Al Mahdi* case, however, offers some insight. Notably, although the chamber rejected the idea that damage is an element of a cultural–property crime, it made explicit reference to damage throughout the judgement. For example, the chamber considered that ‘most of the 10 sites were completely destroyed’.¹⁵² It further added that ‘Al Mahdi and the attackers accompanying him directed an attack on these buildings,

¹⁴⁸ Id para 16.

¹⁴⁹ Ibid.

¹⁵⁰ Id para 59.

¹⁵¹ K Dörmann ‘Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-international Armed Conflicts’ (2001) 83 *International Review of the Red Cross* 461 466–471.

¹⁵² The *Al Mahdi* case (note 25 above) para 78.

resulting in destruction or significant damage to all of them'.¹⁵³ These and other statements suggest that the ICC was alive to the reality of the damage caused by the act of directing attacks on the mausoleums in Timbuktu. What the *Al Mahdi* case, therefore, accentuates, albeit indirectly, is that the terms 'attacks' and 'damage' may be interrelated.¹⁵⁴ In fact, some attacks may result in damage. However, this does not transform the notion of damage to an element of a cultural-property crime.

Even more important is the *Al Mahdi* chamber's use of evidence regarding damage. When sentencing Strugar, the ICTY trial chamber took cognisance of the fact that about 55,9 per cent of buildings in Dubrovnik had been damaged¹⁵⁵ and ruled that such destruction constitutes an aggravating factor.¹⁵⁶ Significantly, in the Strugar trial judgement the notion of damage was relevant at two levels, namely at definition level pertaining to the elements of cultural-property crimes and at sentencing level, where it played a role as an aggravating factor.¹⁵⁷ In contrast, the *Al Mahdi* chamber drew a distinction between the notions of damage as an element of a cultural-property crime and damage as an aggravating factor. In particular, when assessing the gravity of the crimes committed by Al Mahdi, the chamber took the impact of the destruction into account and concluded that 'the crime for which Mr Al Mahdi [was] convicted [was] of significant gravity'.¹⁵⁸

What is readily apparent in the *Al Mahdi* case is that although it is a serious crime to direct attacks at cultural property, it is an even more serious crime if such an attack results in damage of cultural property. However, some questions posed by commentators such as O'Keefe remain unanswered.¹⁵⁹ He notes that '[a]s regards the requisite material elements of the offence, destruction and damage of cultural property outside the context of an attack is not unlawful if and to the extent that, in the words of Articles 8(2)(b)(xiii) and 8(2)(e)(xii) of the [Rome] Statute, it is imperatively demanded by the necessities of war'.¹⁶⁰ In other words, if the notion of 'directing attacks' is not established, acts of damage cannot be punished under the ICC regime. O'Keefe argues, for example, that damage to cultural property by way of explosives or bulldozers does

¹⁵³ Id para 45.

¹⁵⁴ Ehler (note 141 above) 129.

¹⁵⁵ See 'Siege of Dubrovnik' available at https://en.wikipedia.org/wiki/Siege_of_Dubrovnik#Aftermath (accessed 13 March 2017).

¹⁵⁶ The *Strugar* trial judgement (note 24 above) paras 229–309 and 460–461.

¹⁵⁷ Ibid.

¹⁵⁸ The *Al Mahdi* case (note 25 above) para 78.

¹⁵⁹ O'Keefe et al (note 49 above) 355.

¹⁶⁰ Ibid.

not qualify as attacks within the meaning of articles 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute.¹⁶¹

Considered together, it would be unrealistic to expect an all-encompassing definition of the term 'cultural property' from commentators or even conventions. It is, therefore, to be expected that the existing definitions will often vary. What is undisputable, however, is that the nature of the definition adopted by a given regime has major implications for the nature of accountability afforded to cultural property under international criminal law. The discussion above confirms that the definition adopted by the ICC in accordance with the Rome Statute affords broader protection to cultural property on account of its preference of the term 'directing attacks' over that of the term 'damage'.

6 Broadcasting of Attacks on Cultural Property in Media

Warlords know this. They target culture because it strikes to the heart and because it has powerful media value in an increasingly connected world.¹⁶²

These words of Irina Bokova, the director of UNESCO, highlight the interface between the media and the perpetrators of attacks on cultural property. Coverage of attacks on cultural property in the media is not a new phenomenon. However, recent conflicts have initiated unprecedented changes in terms of the *modus operandi* of attacks on cultural property. Extremist groups are increasingly turning to new modes of technology to disseminate information on their activities. The strategic use of technology is highlighted in the information released via social media, with armed groups such as ISIS gaining notoriety for broadcasting news on their activities. There are multiple videos available on the internet showcasing the destruction of cultural property. These videos include footage of the smashing of artifacts at archeological sites, the breaking and bulldozing of archaeological structures, the bombing of shrines and tombs, the destruction of statues using sledgehammers and the burning of libraries and archives.¹⁶³ The reach and impact of these broadcasts is undeniable. What remains unresolved, however, is whether this new tendency has any implications for the prosecution of crimes against cultural property.

¹⁶¹ Ibid. For a contrary view, see Ehlert (note 141 above) 130.

¹⁶² I Bokova 'World Heritage Sites Attacked During War' (13 February 2013) available at http://www.cultureindevelopment.nl/disaster%20and%20war%20and%20culture/1756/World_Heritage_sites_attacked_during_war (accessed 10 December 2016).

¹⁶³ Shaheen (notes 6 and 9 above).

Experts argue that the digital age has caused massive changes in the way information is communicated across the globe.¹⁶⁴ There has been a shift from traditionally controlled mass communication to individually networked communication. This has had major implications for a number of fields, including that of cultural property. Experts draw a distinction between traditional communication and networked communication. Traditional communication encompasses distribution of information from central sources, such as television, newspapers and radio.¹⁶⁵ This form of communication often entails mainstream journalists, who are subject to rigorous control in terms of the information they disseminate. In contrast, the digital age has seen a proliferation of non-centralised networked communication, including non-traditional sources such as e-mail, teleconferencing, WhatsApp, blogs, Facebook, Twitter, LinkedIn and Instagram.¹⁶⁶ This allows individuals to further share the information.¹⁶⁷ Generally, these networks are not subject to stringent controls. As a result, they are sometimes clouded with idiosyncratic perspectives from a variety of participants.¹⁶⁸ This state of affairs has profoundly shifted the mode and content of information disseminated to the public.

Developments in technology have been used to advance purposes other than attacks on cultural property.¹⁶⁹ However, this same technology

¹⁶⁴ See, generally, MT Poe *A History of Communications: Media and Society from the Evolution of Speech to the Internet* (2011).

¹⁶⁵ G Cardoso 'From Mass to Networked Communication: Communicational Models and the Informational Society' (2008) 2 *International Journal of Communication* 587; C Smith 'Social Media and the Destruction of World Heritage as Global Propaganda' (2015) 27 available at <http://eprints.ucm.es/35077/1/Conferenciainaugural.pdf> (accessed 23 August 2017) 35; RS Zaharna 'The Soft Power Differential: Network Communication and Mass Communication in Public Diplomacy' (2007) 2 *The Hague Journal of Diplomacy* 213 216; P Stone 'Human Rights and Cultural Property Protection in Times of Conflict' (2012) 18 *International Journal of Heritage Studies* 271 274.

¹⁶⁶ Bennett (note 119 above) 37–53; Smith (note 165 above) 36; K McDonald 'ISIS Jihadis' Use of Social Media and "the Mask" Reveals a New Grammar of Violence' *The Conversation* 24 June 2014 available at <http://theconversation.com/isis-jihadis-use-of-social-media-and-the-mask-reveals-a-new-grammar-of-violence-28355> (accessed 10 December 2016); L Jun 'Rumor, Mobile Phone, and Resistance in Contemporary China' (2013) available at <http://lup.lub.lu.se/search/ws/files/6254076/38143358> (accessed 23 August 2017).

¹⁶⁷ McDonald (note 166 above).

¹⁶⁸ *Ibid.*

¹⁶⁹ See UNESCO '#Unite4Heritage Worldwide Social Media Campaign to Protect Endangered Cultural Heritage' available at <http://www.unite4heritage.org/en/unite4heritage-celebrating-safeguarding-cultural-heritage> (accessed 10 December 2016). For example, in March 2015, UNESCO initiated the '#Unite4Heritage' worldwide social-media campaign to protect endangered cultural heritage. The

has enabled insurgent groups to broadcast videos, photographs and information on their attacks on cultural property and humans. Extremist groups have successfully exploited the potential of the global reach of networked communication, especially due to its speed and its lack of control. This has enabled them direct access to the public's attention. Traditionally, communication of victories by armed groups primarily targeted a local populace. However, the current media revolution has changed this rhetoric. Extremist groups are in possession of the necessary means – social media – to broadcast information anywhere in the world.¹⁷⁰ The purpose of these broadcasts is to demoralise not only the local populace, but also the international community.¹⁷¹ Both the perpetrators and the intended audience are aware of the universal importance of cultural property.¹⁷² As a result, information on attacks constitutes a means to exploit cultural ties, to inflict trauma on the local and international community¹⁷³ and, as some commentators posit, to advance terrorism.¹⁷⁴ Overall, the tendency of insurgent groups to broadcast attacks is unsettling, thus underscoring the need for this reality to be given due attention.

The publication of attacks on cultural property has featured prominently in the international jurisprudence on cultural-property crimes, including ICTY case law. In the case of *Prosecutor v Naletilic*,¹⁷⁵

campaign also sought to encourage individuals to support and volunteer for causes of cultural-heritage protection.

¹⁷⁰ Bennett (note 119 above); Smith (note 165 above) 40; R Bevan *The Destruction of Memory: Architecture at War* (2006).

¹⁷¹ Smith (note 165 above) 40.

¹⁷² B Schwartz & T Bayma 'Commemoration and the Politics of Recognition: The Korean War Veterans Memorial' (1999) 42 *American Behavioral Scientist* 946; E Nemeth 'Collecting Cultural Intelligence: The Tactical Value of Cultural Property' (2011) 24 *International Journal of Intelligence and Counter Intelligence* 217; F Mucci 'Intentional Destruction of Cultural Heritage by ISIS: The Reaction of the International Community Against this Specific Aspect of the Aggression to Peace and Human Rights' (2016) 2 *Peace Processes and Human Dignity On-line Review of Law and Politics* 1.

¹⁷³ I Tharoor 'Timbuktu's Destruction: Why Islamists Are Wrecking Mali's Cultural Heritage' *Time* 2 July 2012 available at <http://world.time.com/2012/07/02/timbuktus-destruction-why-islamists-are-wrecking-malis-cultural-heritage/> (accessed 23 August 2017).

¹⁷⁴ A Kearney 'Ethnicity, Cultural Wounding and the "Healing Project": What Happens When the Wounded Survive?' (2014) 14 *Ethnicities* 597; BS Frey & D Rohner 'Protecting Cultural Monuments against Terrorism' (2007) 18 *Defence and Peace Economics* 245; DL Altheide 'The Mass Media, Crime and Terrorism' (2006) 4 *Journal of International Criminal Justice* 982 988.

¹⁷⁵ *Prosecutor v Naletilic aka 'Tuta' & Vinko Martinovic aka 'Štela'* IT-98-34-T (ICTY Trial Chamber Judgement, 31 March 2003) (the *Naletilic* case) para 175.

also an ICTY case pertaining to cultural-property crimes, one of the issues the ICTY Chamber had to resolve was whether the accused, Naletilic, had been present at one of the crime scenes. The chamber resolved this issue in the affirmative by relying on evidence of media coverage for identification purposes.¹⁷⁶ It also took cognisance of the wide media coverage of the events in question and dismissed claims made by some witnesses that no violations had occurred.¹⁷⁷ Similarly, in *Prosecutor v Martić*,¹⁷⁸ the ICTY Trial Chamber took into account evidence of media coverage in evaluating Martić's participation in a number of crimes, including cultural-property crimes. In particular, the chamber took note of the fact that Martić had appeared on television and had admitted to having ordered the shelling of cultural property.¹⁷⁹ In the chamber's view, the extensive media coverage of the attacks constituted 'persuasive evidence which [was] further supported by circumstantial evidence' that Martić had participated in these crimes.¹⁸⁰ The chamber also relied on evidence of media coverage in the *Strugar* trial judgement in order to assess the individual criminal liability of the accused. The chamber considered that the events leading to the attacks on cultural property received broad media coverage; so much so that the accused, in his capacity as a commander, could not plead lack of awareness of the circumstances of these attacks.¹⁸¹ Therefore, relying on the principle of command responsibility, the chamber held that Strugar was criminally liable for failing 'to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof'.¹⁸²

¹⁷⁶ Ibid.

¹⁷⁷ Id para 430.

¹⁷⁸ The *Martić* case (note 146 above).

¹⁷⁹ Id para 320.

¹⁸⁰ Id para 456.

¹⁸¹ The *Strugar* trial judgement (note 24 above) paras 183, 184, 419 and 422. Notably, command responsibility in accordance with art 7(3) of the ICTY Statute requires that 'the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof'.

¹⁸² The *Strugar* trial judgement (note 24 above) paras 183, 184, 419 and 422. See, however, the *Strugar* appeal judgement (note 142 above) para 87 and footnote 241 of the judgement, in which this issue was further clarified. First, the appeals chamber observed that 'the Trial Chamber's conclusion that Strugar knew of the events of October and November 1991 is reasonable when due regard is paid to the evidence as a whole'. The appeal chamber, however, clarified that the fact that 'there is no evidence that Strugar actually had access to this evidence [media coverage]', limited the weight to be attached to the evidence of media coverage in assessing Strugar's knowledge of the attacks. Essentially, the role of the media was further played down.

It is therefore clear from the abovementioned ICTY case law that the chamber directly engaged with evidence of media coverage in arriving at its decisions. However, these are the only three ICTY cases where evidence of media coverage was considered. From this, it is evident that these chambers limited the use of this information to either prove the occurrence of events leading to the commission of the crimes in issue, or to prove the participation of the accused. In the *Strugar* trial judgement, for example, the chamber considered the evidence relating to media coverage for the purpose of establishing Strugar's knowledge of the attacks, with a view to grounding his liability on the basis of command responsibility. Moreover, in the same case, the ICTY Chamber referred to the broadcasting of attacks by 'cameramen of the world media',¹⁸³ a form of dissemination which is arguably a far cry from the broadcasting that insurgent groups, such as ISIS, have in recent times embarked on.

In the *Al Mahdi* case, the chamber relied on evidence of the wide publication of attacks, including Al Mahdi's interviews with journalists, to establish his physical presence at the various crime scenes.¹⁸⁴ Evidence of the broadcasting of these attacks was also considered when assessing his liability as a co-perpetrator of these crimes.¹⁸⁵ Therefore, the chamber's use of this evidence builds on the jurisprudence of the ICTY chambers.

The *Al Mahdi* case, however, went even further. The chamber used this evidence to assess the gravity of cultural-property crimes, thereby creating a new perspective to the role of evidence regarding media coverage in the prosecution of cultural-property crimes. Notably, the coverage of the attacks by the media was among the factors that the *Al Mahdi* chamber took into consideration when assessing the gravity of the cultural-property crimes committed by the accused. The chamber noted that the 'the impact of the attack on the population was heightened by the fact that it was relayed in media'.¹⁸⁶ The dual role of evidence of media coverage, as introduced by the *Al Mahdi* case, is an important development in the international jurisprudence on this crime. When sentencing perpetrators of these crimes, this case sets the pace for taking into account the current media revolution, in which insurgent groups are manipulating developments in technology to spitefully broadcast attacks on cultural property. Of course, it is wrong to assume that the tendency to broadcast attacks, especially by extremist groups, will cease completely now that the *Al Mahdi* case has recognised the impact of this aspect.

¹⁸³ The *Strugar* trial judgement (note 24 above) para 183.

¹⁸⁴ The *Al Mahdi* case (note 25 above) paras 38–40.

¹⁸⁵ *Id* paras 40, 53 and 55.

¹⁸⁶ *Id* para 78.

However, the explicit recognition of this reality is not only crucial, but also reassuring in that it sends a strong message to perpetrators, namely that the use of both traditional and social media to broadcast attacks will not go unpunished.

7 Conclusion

This paper set out to assess what the *Al Mahdi* case adds to existing international jurisprudence on cultural-property crimes. It has examined three components of the judgement – its definition of cultural-property crimes, its reflections on the broadcasting of attacks on cultural property in the media and its discussion of the gravity of crimes against cultural property in relation to the gravity of crimes against persons. All these components make the judgement unique, thus ushering in a new era in terms of how this crime can be prosecuted. Significantly, the contribution made by the *Al Mahdi* chamber is based on the text of the Rome Statute.

From this discussion, three conclusions are drawn. First, crimes against cultural property can be committed when attacks are directed against cultural property. The extent of the damage may inform the decision of the court on other issues, including the nature of the sentence handed down. However, absence of damage does not render an attack any less of a war crime. Secondly, the act of broadcasting attacks by perpetrators of this crime will not go unpunished. In particular, judges have the discretion to consider the publicity of attacks on cultural property in the media as an aggravating factor or as an additional ground for complaint. Notably, the publicising of footage on attacks on cultural property cannot in itself aggravate the crime, because the crime had already taken place. Rather, a court reserves the discretion to consider it in assessing the gravity of the original crime. Thirdly, although crimes against persons are considered to be more serious than crimes against property, this difference does not render crimes against property less worthy of prosecution.