Heritage Strikes Back

The Al Mahdi Case, ICC's Policy on Cultural Heritage and the Pushing of Law's Boundaries

Mirosław Michał Sadowski

McGill University, Polish Academy of Sciences and Universidade Aberta

ORCID 0000-0002-2048-2073

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SUMMARY

The purpose of this paper is to answer the eponymous questions by focusing on the 2016 ICC judgement in the Al Mahdi case and the analysis of the ICC's 2021 Policy on Cultural Heritage created in its wake, which will shape our perception of cultural heritage protection in the years to come.

ABSTRACT

Images of genocide, mass graves and torn families come to mind when one hears the term 'war crime'. But does cultural heritage have similar legal rights? Is it protected by the Rome Statute? What lies in the future for cultural heritage protection against destruction? And where do the boundaries of law lie with regards to the rights of cultural objects? The purpose of this paper is to answer these questions by focusing on the International Criminal Court's (ICC) judgement in the Al Mahdi case in 2016 and the analysis of the ICC's Policy on Cultural Heritage created in 2021 in its wake, which will shape our perception of cultural heritage protection in the years to come. In the first, introductory part of the paper the author ponders upon the concept of cultural heritage, trying to understand why it matters. In turn, the second part of the article focuses on the investigation of the many faces of interactions between cultural heritage and law. The third part of the paper is devoted to the analysis of the Al-Mahdi case heard before the ICC. The author explains how the case was brought before the ICC and the way in which the Court reached its now precedent-setting decision, showing the various ways in which it pushed the boundaries of law and our understanding of what constitutes a war crime. In the fourth part of the paper the author turns his attention to the Policy on Cultural Heritage proposed by the ICC in June 2021 in close collaboration with UNESCO, looking into the new paths it puts forward for cultural heritage. The concluding part of the paper is focused on the question of what the ICC's Policy means for the future of the prosecution of the crimes against cultural heritage, with the author asking whether it may be an effective tool and deterrent in fighting against the destruction of world's heritage, and wondering how the rights of monuments may be further broadened in the coming years.

KEY WORDS

Cultural heritage, heritage protection, International Criminal Court (ICC), UNESCO, Rome Statute, Al Mahdi

Introduction

Whenever I think about cultural heritage as a concept, I am taken back to the first North American conference I participated in. Having spoken about the interactions between cultural heritage and law previously, I was slightly taken aback when the post-presentation discussion was focused not only on the finer points of my research, but also on whether something like cultural heritage exists at all and what rights it may have, if any.[1] Over the years, similar questions were always raised whenever I mentioned cultural heritage in Canada and US, but never in Europe, where the concept seems to be taken completely for granted.

These experiences made me realise that conceptualising cultural heritage as an idea already means pushing the boundaries of our thought, all the more so in connection with law. How to explain why something needs to be protected in perpetuity, while another building, monument or an object may easily be destroyed or simply allowed to slide into oblivion? The myriad of national and international regulations has attempted to enclose cultural heritage within the realms of law, protecting it from destruction; however, quite often law reacts only when people themselves act to preserve heritage in peril. In a number of cases law's boundaries are pushed in order to provide the protection.

In the first two parts of the paper I return to my earlier work, once again pondering on the question of cultural heritage and the various ways law finds to define and preserve it. Then I move to study a case which forever pushed the concept of cultural heritage protection, ultimately investigating the institutionalisation of its aftermath, ruminating upon the future of law's relationship with cultural heritage.

[1] The conference in question was the 10th McGill's Graduate Law Students Association Annual Conference (13-14 May 2017) and the questions "What actually is cultural heritage? Can we say it truly exists? What should be law's role in protecting it, if any?" were raised by Vincent Dalpé, now a dear friend. The vivid panel discussion, chaired by Prof. Shauna Van Praagh, prompted not only my further research into cultural heritage, but also led to my dream of joining McGill, where I have been enrolled in the Doctor of Civil Law (DCL) programme since 2019.

Part One: Conceptualising Cultural Heritage

Having ventured to compare and contrast the different definitions of cultural heritage twice before (Sadowski 2017; 2018) I would propose that we perceive it as the broadly understood tangible and intangible products of cultural past (ranging from buildings through whole urban landscapes and then traditions to digital cultural heritage[2]), of notable historical, social, religious, artistic, architectural, etc., importance for the local, regional, national and (or) global community which has a dynamic relationship with them based on collective memory. Importantly, the past in question may be very recent; what matters for a cultural product to be recognised as a part of cultural heritage is its importance and meaningfulness for current and potentially also future generations. For this reason, cultural heritage may be – and often is – preserved by legal provisions, which, depending on its perceived importance, may allow its reconfiguration or prohibit almost any changes even to the surrounding landscape completely.

The issue I would like to ruminate on here, however, is related less to the definition of cultural heritage and more to its nature, as only by understanding why cultural heritage matters – in a way answering the question I recalled in the introduction – may we comprehend the significance of the Al-Mahdi case and the need for the 2021 International Criminal Court's (ICC) Policy on Cultural Heritage. In this analysis I propose to follow key features of cultural heritage as identified by Vecco – historic and artistic value; cultural value; collective memory value; and its identity-building value (2010, 324) – with a particular focus on the two latter ones which, I would argue, while less obvious than the former, are particularly important in distinguishing cultural heritage objects from other historic, artistic, and cultural objects.

Nonetheless, it is the historic and artistic value which is most noticeable in the majority of tangible cultural heritage objects. These "monuments and sites" are thus recognised for these qualities and protected from "nature and human beings" in the hope of preserving "their full richness of the authenticity of materials, form, design and setting" for the future (Wijesuriya 2010, 234). It is this authenticity, resulting in cultural heritage having a 'universal value',

[2] Digital cultural heritage is an increasingly important form of heritage in the present day, the role of which in shaping our collective memories and identity often ignored (Haux et al 2021).

Jokiletho remarks (2006, 3), as well as its integrity, vital when it comes to planning processes and the defining of limits of restoration (2006, 2), that is key in assigning historic and artistic value to cultural objects.

The second feature of cultural heritage lies in its cultural value, the 'cultural layer' created by "people's activities" (Verdu & Karro 2012, 339). Through the evolution of the idea, as it "reappeared within a meaningful social context" on the local and global scale (Loulanski 2006, 217), the concept of cultural heritage came to also encompass the different cultural objects, both material and immaterial, "from language to sacred objects, and from rock music to 'queer spaces'," with the various "economic, political and social relations that weave in and through" them (Winter 2013, 541) together forming cultural heritage.

The third of the main reasons cultural heritage is of such value is due to collective memories attached to it; as Vecco remarks, "the capacity of the object to interact with memory" is vital for it to be recognised as cultural heritage (Vecco 2010, 324). As I have noted elsewhere, collective memory is "a social memory, one which is not created individually, but within a group, with one person having a wide array of collective memories functioning on different levels" and, importantly it may be "influenced by a number of factors, in particular by governments, both on the local and the national level" (Sadowski 2020, 211). One could argue that objects of cultural heritage are places of memory *par excellence*, those places (whether real or imaginary) which carry such significance that they may invoke the collective memories of the past simply through their image or mention (Sadowski 2020, 213-215). For this reason, the tangible objects of cultural heritage often become heavily politicised and even destroyed – their erasure speaks volumes.

The relationship between cultural heritage and collective memory has already been noticed by the 'father' of the latter concept, Maurice Halbwachs. He remarked how collective memory becomes attached to certain places and even if a place itself changes, it lives on in the minds of the people (Halbwachs 1980, 129), noting that the 'unchanging' places never cease to influence people: "habits related to a specific physical setting resist the forces tending to change them. This resistance best indicates to what extent the collective memory of these groups is based on spatial images" (Halbwachs 1980, 133). People and places have a particular relationship, one which leads a community to have "its thoughts as well as its movements […] ordered by the succession of images from [the] external objects" (Halbwachs 1980, 133). Should an attempt be made to alter this relationship through the changing of

the objects of major significance – of cultural heritage – people will protest, even though the objects have been constructed in the past, as "the force of local tradition comes forth from this physical object, which serves as its image" (Halbwachs 1980, 133).

Importantly, if the collective memories attached to them were to disappear, the "significance" of cultural heritage objects "may also decline in the public imaginary" (Meskell 2015, 2) – not necessarily, however. While "cultural heritage requires memory," and despite the fact that "in order to be cultural heritage" cultural objects "must be remembered and claimed as patrimony," they may still be recognised as cultural heritage "even if their original meaning is lost or poorly understood" (Silverman & Ruggles 2007, 12). This may be the case of not only ancient ruins, but also such instances when borders change and people are resettled; while the old collective memories linked to cultural heritage will disappear, the new inhabitants may choose to regard cultural objects of the 'foreign' past as elements of their own identity as in the case of my hometown of Wrocław, which integrates its pre-WWII German past into the Polish present.

Linked to its relationship with collective memory (Girard 1998, 48), the final major value of cultural heritage lies in its identity-building role. A "key component" of identity (Weber 2000, 5), cultural heritage acts as "a source which provides legitimacy to […] the positing of identity" (Wagner 2000, 9). Through the connection of the present to both past and the future, it inspires "a process of participation" and the production of "civil consciousness," as efforts towards cultural heritage preservation oblige "people to a continuous confrontation among particular and general interest" (Girard 1998, 35). Strengthening "cohesion and social ties in societies" (Weber 2000, 6) as it anchors identities and thus allows communities to 'recognise themselves' in it, cultural heritage provides a sense of belonging, "of integration, of cohesion, of community awareness, of common values, of specificity" also today in the times of globalisation (Girard 1998, 44-45).

With heritage and identity interdependent on one another – as there is "no identity without an act of remembrance of some origin(s) and that, which is remembered as origin(s), is constructed into the identity's heritage (Wagner 2000, 17) – the particularly vital role of intangible heritage in the process of identity building needs to be stressed. As Skrzypaszek observes, by providing "inspiration and drive," intangible cultural heritage creates an 'impetus' which "directs the formation of the contemporary identity to

discover meaning and purpose. Its inspirational value empowers the existential experience, but it also leans towards future orientation," thriving "with passion and vision as long as individuals take the time and effort to" protect and engage with cultural heritage (2012, 1496-1497).

Art and history, culture, collective memory and identity, the intertwined values of cultural heritage, provide us with an answer as to why it is protected – thus, I propose to move to the question of its relationship with one of the major instruments in heritage conservation: law.

Part Two: Cultural Heritage and Its Relationship with Law

When analysing the interactions of cultural heritage and law it first needs to be stressed once again that in a way cultural heritage as a concept pushes the boundaries of law by itself: as it has been noted, while the expression 'heritage' comes from inheritance law (Ferrazzi 2021, 744), in general law needs to rely on other disciplines in order to frame cultural heritage within its boundaries (de Clipelle 2021, 639), and the term itself is a compromise (Ferrazzi 2021, 750). But, more importantly, the interactions of cultural heritage with law in many ways further push the law's boundaries, forming a network of mutual interactions (see Figure 1), which I analyse below.

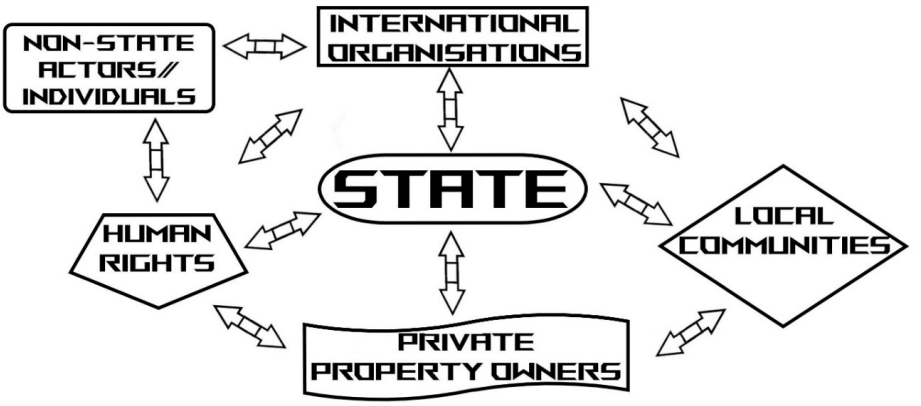

Figure 1 – the simplified network of interactions between various actors of cultural heritage and law (source: author).

When it comes to cultural heritage and law, even the most common of interactions, these between private property owners and the state, are impacted. Given that the public and private interests concerning the preservation and conservation of cultural heritage, as well as control of the heritage trade, are often opposed to each other, it may be difficult to reach a compromise satisfying the state, representing the common interest, and the property rights of the individual owner of a cultural object (Zeidler & Łągiewska 2021, 665).

It is the state that remains at the centre of cultural heritage protection: while cultural heritage belongs to all of humanity, it is the country where it is located that bears the responsibility for and costs of its preservation (Wangkeo 2003, 192). This often puts the state in another conflict, one "with fundamental principles of international law—state sovereignty and the right of non-intervention" (Wangkeo 2003, 187), as in certain instances there might exist valid reasons for the destruction of cultural heritage, but at the same time a country is bound to protect it by various international provisions.

There are two main possible explanations as to why a state may choose to destroy some of its cultural heritage, but only one of them may be recognised as justifiable: economic development, provided that the country in question "makes a good faith effort to pursue the least destructive means," attempts to "mitigate the negative effects" of the planned development, and establishes that the proposed destruction is not a violation of the human rights of a particular (e.g. minority) group (Wangkeo 2003, 264-265). In turn the second reason, iconoclasm, is perceived as a 'direct violation' of human rights and may not be seen as legitimate under any circumstances (Wangkeo 2003, 266). However, as Wangkeo notes, a country's decision regarding its heritage should only be assessed on the international forum if the cultural object in question is of global importance (Wangkeo 2003, 267), and most importantly, the best interests of local communities living in the presence of cultural heritage always needs to be taken into account (Wangkeo 2003, 269).

This is often not the case, particularly in non-Western societies, which, having inherited colonial cultural heritage protection laws, find themselves with an ill-suited legal framework, one "over-emphasising colonial architecture and often ignoring traditional […] laws and cultural practices," failing to acknowledge the diverse relationships between people and places (Ndoro 2015, 136-137). Importantly, local communities may be impacted not only by the state, but also by decisions of international organisations. As it has been noted, inscription on UNESCO's World Heritage List, while beneficial

for tourism, may have damaging consequences both for the traditional way of life and the site in question (Independent 2014), potentially even leading to "displacement and gentrification" (Larsen 2018, 299).

This is just one example as to why, when it comes to cultural heritage protection, the influence of international organisations and international law cannot be underestimated. Among them UNESCO (the United Nations Educational, Scientific and Cultural Organization) is of particular importance, responsible for creating the network of international conventions encompassing the various aspects of cultural heritage which need to be protected, from cultural property in case of war to underwater cultural heritage to intangible cultural heritage (Meskell & Brumann 2015, 23).

While this is not the place for a closer analysis of the deeply fragmented international framework concerning cultural heritage, it needs to be noted that UNESCO is not the only organisation concerned with its preservation: other notable ones include, *inter alia*, the International Council of Museums (ICOM), the International Council on Monuments and Sites (ICOMOS), the International Council for Archives (ICA) and the International Federation of Library Associations and Institutions (IFLA), which together founded the International Committee of the Blue Shield (ICBS) in 1996 (Massue & Schvoerer 2001, 1); today known simply as the Blue Shield, it is tasked with assessing threats to heritage and preparing for risks it may encounter, e.g. by managing inventories or promoting emergency response plans (Blue Shield 2019). In addition, various regional frameworks of cultural heritage protection are also in place, for example created by the Council of Europe and the European Union, which, however, are focused on the role of cultural heritage "as a vehicle for the construction of a European identity" (Lanciotti 2021, 196-197).

With cultural heritage recognised as a major contributor "to the maintenance of peace" (Scovazzi 2021, 167), the question of human rights represents another dimension of the interactions between cultural heritage and law, with the two 'interrelated' (Morawa & Zalazar 2018, 211), occasionally even in conflict with one another (Silverman & Ruggles 2007, 6), as "human rights constitute a universal category," whereas "the concept of cultural heritage is culturally, temporally, and geographically specific" (Logan 2007, 44).

Nevertheless, the two have come closer in recent decades as a result of the shift from the state to international perspective of what cultural heritage entails – to "a fuller and more complete perception of its human dimension"

(Lancinotti 2021, 206) – including not only tangible, but also intangible heritage, a major "step in recognising cultural diversity" (Logan 2012, 235).

As Logan notes, "managing" the intangible aspects of cultural heritage has major implications – amongst them "the most direct and difficult [are] human rights implications" since one is dealing with embodied and living heritage" and "it is ethically impossible to 'own' people in the way that we can own, buy and sell, destroy, rebuild or preserve the tangible heritage of places and artefacts" (Logan 2012, 236). Moreover, in certain instances part of a community's intangible heritage, a particular cultural practice, may be in direct conflict with human rights (Logan 2012, 239).

Tangible cultural heritage's relationship with human rights may also pose issues: as mentioned above, protection of a particular site may lead to infringements of the local communities' human rights (Ekern et al. 2012, 214), which always should be, but often are not included in the process of heritage management (Logan 2007, 49-50). Also, particular individuals or groups (e.g. minorities) may be prohibited from challenging the "orthodox, homogenising or dogmatic interpretations" of cultural heritage (Silberman 2012, 253), leading to conflict.

The final aspect of the interactions between cultural heritage and law as presented on Figure 1, involving non-state actors and individuals engaging in the destruction of heritage, deeply connected to the question of human rights, is going to be the subject of my analysis in the following part of the article, on the example of the Al Mahdi case, which is of particular interest also due to its precedent-setting effect, one pushing the boundaries of law in a number of ways.

Part Three: Heritage Strikes Back or the Al Mahdi Case

On 27 September 2016, following only three days of trial a month earlier, Ahmad Al Faqi Al Mahdi was found guilty of the war crime of intentionally directing attacks on Timbuktu's cultural heritage by the International Criminal Court (ICC 2018, 1). While it is not the place of this paper to provide a detailed overview of the case itself, I propose to look at its particular elements, those which pushed the boundaries of cultural heritage protection as well as international criminal law and demonstrated new ways of dealing with crimes committed by non-state actors.

Between June and July 2012, in his capacity as the leader of Hisbah, the morality police established by Ansar Eddine, an Al Qaeda in the Islamic Maghreb (AQIM)-associated movement, Al Mahdi was responsible for leading the destruction of ten cultural heritage objects: the mausoleum Sidi Mahamoud Ben Omar Mohamed Aquit; the mausoleum Sheikh Mohamed Mahmoud Al Arawani; the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabir; the mausoleum Alpha Moya; the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi; the mausoleum Sheikh Muhammad El Mikki; the mausoleum Sheikh Abdoul Kassim Attouaty; the mausoleum Ahmed Fulane; the mausoleum Bahaber Babadié; and the door of Sidi Yahia mosque (ICC 2018, 1).

Following the referral of the case by the government of Mali in 2012, the ICC's Office of the Prosecutor (OTP) began its investigation in 2013, which led to an arrest warrant for Al Mahdi issued two years later and ultimately to his surrender to the ICC by Niger's authorities. After the trial in The Hague, Al Mahdi was unanimously found guilty by Trial Chamber VIII and sentenced to nine years of imprisonment, with time spent in detention deducted. A year later, in 2017, a reparations order was issued in the case, which was, for the most part, ultimately confirmed in 2018 by the Appeals Chamber (ICC, 2018, 1-2).

The Al Mahdi case is often said to be a case of 'many firsts' (Chiricioiu 2017, 5) as it pushed the boundaries of law in a number of ways. Most importantly, it was the first prosecution before an international tribunal solely on the basis of destroying cultural heritage (Bishop-Burney 2017, 130). As it has been noted by both the Court and the witnesses, Timbuktu's cultural objects play a vital role in the local community's religious life (Pinton 2020, 363), as well as the whole country's identity and collective memories, with their destruction also negatively impacting global society (Pinton 2020, 357-558). Thus, by choosing to try this case, ICC sent out a strong signal with regard to the protection of cultural heritage, elevating it to *ius cogens* of international law (Cole 2017, 452) and also underlining the growing consensus that "the destruction of cultural heritage should be equated to an attack on the values of humanity as a whole" (Roman 2019, 122-123), taking "a significant step towards understanding the full impact of international crimes on individuals, communities, and societies" (Wierczyńska & Jakubowski 2017, 712).

This point of view also in a way addresses the criticisms of some in academia who argued that hearing a case related only to the destruction of

heritage does not meet the gravity threshold (Sterio 2017, 66-67; 70-72), as the ICC is reserved only for the most serious crimes concerning the international community (Günay 2019, 253-256). In a way this question is a return to the debate mentioned in the introductory part of this paper. However, the Court itself stressed that while, in general, crimes against objects are less grave than those committed against people, the fact that the destroyed "buildings had held religious, symbolic, and emotional value for the people of Timbuktu," as well as being, barring one, on the UNESCO World Heritage list, "meant that their destruction affected not only the Malian people, but also the international community more broadly" (Bishop-Burney 2017, 128). This not only proved that the ICC refuses to engage in creating "a hierarchy of the crimes within its Statute" (Johnsen 2017, 36), but also underlined the intangible side of cultural heritage (Lostal 2017, 50), showing how "the destruction of cultural heritage cannot be assessed in a similar way as the destruction of other property" (Wierczyńska & Jakubowski 2017, 713) given that it is "'an affront to' values of heritage and human identity inseparable to the physical existence of these site" (Dijkstal 2019, 399).

Looking at other particularities of the Court's approach towards the case, the new understanding of the term 'attack' in the Article 8 (2) (e) (iv) of the Rome Statute, the basis of Al Mahdi's conviction, represents another 'first', with the Court arguing that an attack on objects may take place not only during, but also "outside the conduct of hostilities" (Mathias 2021, 66-68), even "after the [cultural] object has fallen into the hands of the adversary" (Bagott 2020, 43). This approach has led some researchers to believe "that Al Mahdi did not commit the crime for which he was convicted", as his actions took place after Timbuktu fell into the hands of Ansar Eddine and thus may not have constituted an attack (Schabas 2017, 76-77). Mathias refutes this argument, remarking that looking closely at the earlier Ntaganda case, an "ambiguous footnote 3147 could potentially bridge the differences in interpretations" of the meaning of attack between this and Al Mahdi cases (2021, 75), potentially proving a more established way of understanding what an attack means for the Court. Even more convincingly, however, Esterling and John-Hopkins note that Schabas' argument ignores the realities of an "internecine communal violence that has a nexus to a surrounding armed conflict" (2018, 25), which was clearly the situation in Timbuktu, as it was ultimately the people, their beliefs (Burrus 2017, 339), identity and collective memories which were the actual target of the attack (Dijkstal 2019, 406-407).

Procedural economy was another *novum* of the Al Mahdi trial: instead of the usual elongated proceedings, a swift trial and conviction, the shortest in the Court's history (Capone 2018, 647-558), improved the ICC's battered image (Sterio 2017, 67-68), serving not only as a deterrent for future acts of violence towards cultural heritage, but also promoting reconciliation (Esterling and John-Hopkins 2018, 48). I agree with Sterio that this shows that pursuing cases against "lesser-known defendants" who can actually be brought to justice may be a better strategy for the Court than issuing "arrest warrants against defendants who are unlikely to find their way to The Hague," as "limited justice may be better than no justice at all" (2017, 73). Such an approach also proves that when it comes to cultural heritage, where human rights law and international law fail – in particular with regard to the instances of its destruction by non-state actors – international criminal law seems to be the best approach for its protection (Esterling and John-Hopkins 2018, 12).

Notably, the Al Mahdi case was the first time an Islamist extremist stood trial before an international tribunal (Sterio 2017, 69), which was used as a part of the defence team's strategy, who used the argument of a "clash between two world views, part of a broader struggle over the meaning of Islam" as motivating Al Mahdi's actions (Badar & Higgins 2017, 2). Ultimately this avenue of thinking was not tested before the Court as, in another 'first' before the ICC, Al Mahdi plead guilty (Chiricioiu 2017, 5), which led to the Prosecutor's recommendation of sentencing him for nine to eleven years (Chiarini 2021). Importantly, taking responsibility for his actions has been recognised as an element of the peace and reconciliation process in Mali, helping to alleviate "the victims moral suffering" (Pinton 2020, 366), all the more so given that despite the plea, the Court still thoroughly investigated the matter, developing "for the historical record and collective memory an account that is rich in historical and anthropological detail," one illustrating "the significance of cultural heritage as well as the impact that its obliteration had on the cultural life and identity of a group" (Esterling & John-Hopkins 2018, 46).

The case was also innovative when it comes to reparations, as an international tribunal needed to consider "how to compensate for damages while at the same time examining how cultural heritage is understood" for the first time (Pinton 2020, 370). Interestingly, it was not only the inhabitants of Timbuktu and the people of Mali that were recognised as victims (Capone 2018, 651), but also the international community as a whole, represented in the eyes of the court by UNESCO, most likely chosen on the basis of its broad

membership and involvement in cultural heritage protection (Dachlan 2018, 39). While prioritising individual reparations to the citizens of Timbuktu for economic and moral losses (Capone 2018, 656), with Al Mahdi liable for 2.7 million euros (Dijkstal 2019, 403), and offering only one euro of reparations to UNESCO – and one euro to Mali – the latter's symbolic value also spoke volumes (Pinton 2020, 372-273). Moreover, in addition to monetary compensation, the ICC ordered Al Mahdi's apology to be published on its website (Neumann 2018, 619), as well as broadcast in a video form in the local language of the people living in Timbuktu, potentially with a cathartic effect for the community (Buis 2020, 136-137). This decision, along with several memorialisation projects aimed at strengthening the local community (Pinton 2020, 376-378), further underlined the innovative reconciliatory nature of the ICC's reparations order, showing the Court's understanding that "where the destruction of cultural heritage has taken place, reconstruction of the sites does not by itself equal reparation" (Dachlan 2018, 42).

While it did set a precedent, it needs to be noted that the boundaries of cultural heritage protection might be pushed even further than in the Al Mahdi case: as both Rossi (2017, 97) and Wierczyńska and Jakubowski (2017, 716-717) note, crimes against cultural heritage may potentially be recognised by ICC not only as war crimes, but also as crimes against humanity and even genocide, depending on the approach and their scale. The next, final section of the paper deals with the 2021 ICC's Policy in Cultural Heritage which sheds some light on the ways in which the future prosecutions of crimes against cultural heritage may look like.

Part Four: The Aftermath of Al Mahdi – ICC's Policy on Cultural Heritage

Following the Al Mahdi case, in its 2019-2021 Strategic Plan, the Office of the Prosecutor made a commitment to complete its work on "the adoption of a comprehensive policy on the protection of cultural heritage within the Rome Statute legal framework" (OTP 2019, 5). The Policy on Cultural Heritage, ultimately adopted in June 2021, is in a way a commentary on the Rome Statue from the perspective of cultural heritage, one particularly valuable as it was written from the inside of ICC (OTP 2021). While this is not a place to examine it minutely, focusing on some of its particularities may help make

predictions as to the ways in which cultural heritage protection is going to develop in the next decade.

Recognising the Al Mahdi's case symbolic role in para. 6, the goal of the Policy, as noted in para. 19 and 20, is the enhancement of OTP's protection of cultural heritage, providing it with "clarity and guidance" when applying the Rome Statute to the cases involving cultural heritage; strengthening "the prevention of harm to" and protection of cultural heritage; working with and supporting other partners in protecting cultural heritage; contributing "to the ongoing development of international jurisprudence" related to cultural heritage; and raising "awareness regarding the importance of the protection of cultural heritage."

Interestingly, in para. 14 the Policy departs from the Statutory term 'cultural property' used in articles 8 (2) (b) (ix) and 8 (2) (e) (iv), seeing is as too tangible-centred, too narrow to cover the wide variety of crimes related to cultural rights, instead proposing the much broader term of cultural heritage. In para. 3, 4, 15 and 17 the Policy proposes OTP's own definition of what constitutes cultural heritage, regarding it as "a unique and important testimony of the culture and identities of peoples," a "bedrock of cultural identities," which "incorporates both tangible and intangible expressions of human life," including not only cultural property, but also other cultural products and processes. Additionally, in para. 16 the Policy enumerates what may be regarded as cultural heritage for its purposes, i.e. secular and religious buildings; culturally valued buildings or their groups; sites as "man-made works;" movable objects; underwater cultural heritage; intangible cultural heritage; and natural heritage. Cultural heritage related crimes, it is noted in para. 2, "are a pervasive feature of the atrocities within the Court's jurisdiction." Furthermore, in para. 24 it is stressed that the OTP "pays particular attention to the investigation and prosecution" of cultural heritage related crimes, which it hopes will have the positive effect of preventing them and at the same time raise awareness of the importance of heritage protection, while noting in para. 26, 27 and 28 that such crimes can not only "be multifaceted in nature" and "motivated by various reasons," but also affect the victims directly and indirectly in a number of ways – economic, spiritual, educational – impacting on their human rights as well as violating international humanitarian law. Importantly, both human rights and IHL are recognised for their role in cultural heritage protection.

The Policy stresses that war crimes (as in the Al Mahdi case) are the most 'straightforward' classification of cultural heritage crimes under the Rome

Statute (para. 40-47). Interestingly, however, the Policy proposes – seemingly pushing the limit of the understanding of a war crime of directing attacks on cultural objects in para. 47 – that any particularly serious attack on not only "cultural property in the meaning of the 1954 Hague Convention and 1977 Additional Protocols" but also "world heritage in the sense of the World Heritage Convention" may be regarded as such "irrespective of the regard in which such objects may be held by their immediate society at the material time." This perspective elevates the global aspect of cultural heritage's value to that of particular importance and may prove valuable in prosecuting these cases of heritage destruction where the local communities (unlike in the Al Mahdi case) feel indifferent or even hostile towards cultural objects in their vicinity.

The Policy also highlights acts other than war crimes which may be committed in relation to cultural heritage, of which of particular interest are: crimes against humanity, with OTP aiming to regard cultural heritage crimes as such "whenever appropriate" (para. 61); attacks against civilian populations, with cultural heritage being possibly "the primary target" of such an attack "given the collective importance of cultural heritage for civilian communities as such" (para. 64); extermination, with crimes against cultural heritage potentially a "part of this scheme, since they can lower a group's morale, change power dynamics, and weaken resistance, thereby facilitating mass killing" (para. 67); torture, given that the destruction of "heritage can aggravate mental suffering" (para. 71); and genocide, as cultural heritage crimes, while they "do not *per se*" amount to "acts of genocide" may very well "constitute evidence of the perpetrator's intent to destroy" a group, potentially including various elements constituting genocide, e.g. forced removal of children, which "is likely to have a profound effect on the access to, practice of, and continuation of a group's cultural heritage" since "children are the conduit of cultural heritage to future generations" (para. 78-88).

Importantly, the Policy does not limit OTP's role in protection of cultural heritage to persecutory and deterrence aspects: as noted in para. 11, it may take preventative action through the education of general public. Moreover, it may also galvanise and support "efforts to document and preserve cultural heritage at risk of destruction," working together with outside partners on that matter (para. 9), given that, in order to overcome issues with evidence collection in the cases of heritage destruction, OTP "has developed in-house forensic capacities for the recording of the identified evidence on site, such

as 3-D mapping, 3-D laser scanning, 3-D modelling and drone imagery, as well as capacities in geographic information systems" (para. 105). The OTP may also "provide support and encouragement to national proceedings" in the matters of cultural heritage related crimes in those instances where ICC's involvement is not necessary (para. 10), as well as work closely with "specialised partners in the field" of cultural heritage protection, including UNESCO in particular (para. 129), the organisation with which it had collaborated in the creation of the Policy. One can only hope that in the near future we will see the Policy applied in practice and also further refined, hopefully leading to increased protection of cultural heritage worldwide.

Conclusion

Looking at the bigger picture, the 2021 Policy provides a certain rereading of the Rome Statute from the perspective of cultural heritage, pushing its boundaries in this direction. It not only provides a broad definition of cultural heritage protection, fit for the challenges it faces in the 21st century, but also demonstrates the wide variety of dangers it faces in the present day, establishing a promise of persecution of crimes against it. Most importantly, the Policy provides us with an extremely broad catalogue of crimes which may impact cultural heritage, whether these are a main or intermediate goal, showing why it needs to be protected, not only on the local or national, but also on the global scale – it is an integral part of our humanity, a vital element of our identity and collective memories, and a bridge between the past and the present.

Returning to the initial question of why cultural heritage matters, one could answer perversely that it matters because people are willing to destroy it. While not diminishing the direct impact of crimes against persons, with the Al Mahdi case came the realisation in international criminal law that acts committed on cultural objects also have the profound effect on people – because, as Ferrazzi notes, "cultural heritage is a medium, since it is a fundamental part of the process of human enrichment and helps in setting a strong moral and ethical framework" (2021, p. 763).

Over the past decades, law has enveloped cultural heritage with a network of various relations and interactions, creating an intricate web aiming for its protection. it is a web not without holes, however, in particular in those instances where crimes were committed by non-state actors. Larsen recently

argued that "whereas the Roman maxim *Inter arma silent leges* concerned the silence of law in times of war, we need to recognise the silence of rights in times of heritage" (Larsen 2018, p. 300). The judgement in the Al Mahdi case and the new ICC's Policy on Cultural Heritage are major steps in the direction of bringing cultural heritage, its legal protection framework and human rights, together, potentially leading to better protection of our heritage. While I am cautiously optimistic, only the coming years will show how effective the new Policy is going to be, and how much further the boundaries of law are going to be pushed when it comes to cultural heritage protection.

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