

The Destruction of Cultural Property in Timbuktu: Challenging the ICC War Crime Paradigm

‘By inflicting cultural damage on present generations, the enemy seeks to orphan future generations and destroy their understanding of who they are and from where they come’¹

1. Introduction

Cultural property has been destroyed, looted and trafficked throughout history, particularly during conflict situations.² In many instances, the property that is destroyed belongs to, and / or represents, minority groups and its destruction impacts significantly on minority culture. ISIS, and related jihadist groups, have, in recent times, actively engaged in the deliberate destruction of cultural property in numerous States, including Iraq, Syria, and Mali. This has been described as ‘cultural cleansing’ by the Director-General of UNESCO,³ as jihadist groups aim to eradicate all signs of ‘other’ cultures within its newly formed State. The destruction of cultural property is now a strategy of war, with the objective being to eliminate cultural diversity and pluralism, ‘erase all sources of belonging and identity, and destroy the fabric of society.’⁴ The International Criminal Court (ICC) recently (2016) heard the case of *Prosecutor v Al Mahdi*, which focused specifically on the destruction of cultural property in Mali during a non-international armed conflict. The defendant was charged, under Article 8 of the ICC Statute, with the war crime of directing attacks against cultural property.⁵ Mr Al Mahdi, a member of the fundamentalist Islamic group, Ansar Dine, had been in charge of the *Hisbah*, the morality brigade set up in Timbuktu. One of his roles was to oversee the destruction of a number of religious monuments and mausoleums in the city.⁶ The decision to attack these sites was made by the Ansar Dine leadership, as a result of their Wahabi interpretation of the Islamic concept of *ziyara*, or ‘visitation’. They believed that the visitation and veneration of burial monuments, which was a common practice among the local minority Sufi Muslim population, was idolatrous and, therefore, contravened Islam. The rationale behind Mr Al Mahdi’s and Ansar Dine’s actions in attacking these sites was to halt the religious practices of the local

¹ Abtahi 2001, 2.

² United Nations 2016.

³ See Bokova 2015, 289.

⁴ Ibid, 290.

⁵ See Frigo 2004, 367.

⁶ The conflict “is a complex and multidimensional mixture of long-term fundamental grievances by diverse actors and groups” for which there was no one single cause. See Francis 2013, 2.

religious minority population of Timbuktu and destroy their culture and history because it differed from its own.

The ICC has jurisdiction over war crimes, crimes against humanity, genocide and aggression. However, destruction of cultural property falls only within the remit of war crimes under the Statute. A question that arises from the recent spate of destruction of cultural property is, does the war crime of directing attacks against cultural property adequately represent the impugned behaviour?

Prior to the enactment of the ICC Statute, the protection of cultural property was included in a number of international legal instruments, as well as in customary law, and had also been analysed before international criminal tribunals. Despite the many legal sources which seek to regulate attacks on cultural property, there have been divergent approaches to how cultural property should be dealt with under the legal framework. Some international instruments seek to proscribe attacks on cultural property because such property constitutes civilian property, while other instruments highlight the need to protect cultural property as a result of its importance to humanity. The former approach does not include any consideration of the value of property destroyed to a particular culture of minority group, but rather focuses explicitly on the characterisation of the property as civilian or military, and classifies such attacks as war crimes. However, cultural property is not attacked just because of its status as civilian property; rather it is generally attacked as it is symbolic of, or represents, a particular group or culture, as is clearly illustrated in the actions of groups such as ISIS and Ansar Dine. This article submits that a better characterisation of such behaviour would be a crime against humanity, as this would encompass the motivations of the attacks, as an act of persecution against the civilian population, and the impact on the victims. Section 2 of the article sets out the history of the legal framework on the protection of cultural property, prior to the adoption of the Rome Statute. Section 3 then focuses on the legal framework concerning the destruction of cultural property at the ICC and analyses the case of *Al Mahdi*, and Section 4 looks at the cultural renaissance currently occurring in Mali.

2. The Protection of Cultural Property under International Law

International law provisions seeking to protect cultural property can be traced back to 19th century and instruments such as the Lieber Code 1863,⁷ the 1874 Declaration of Brussels,⁸ the 1880 Oxford Code,⁹ and the Hague Regulations 1899.¹⁰ In the twentieth century, Articles 27 and 56 of the 1907 Hague Regulations of 1907¹¹ also sought to protect cultural property. In addition, the 1919 Commission on Responsibility identified “wanton destruction of religious, charitable, educational, and historic buildings and monuments” as a war crime.¹² The justification for protecting cultural property in these instruments was its status as a non-military or civilian object. One of the basic tenets of international humanitarian law is the principle of distinction, which requires that civilian objects not be the subject of attack.¹³ In this approach, the protection of cultural property is paralleled with the protection of other civilian objects, including hospitals and religious sites. Its value to humanity is not recognised as a reason for its protection.

However, other international treaties recognise that the need to protect cultural property is incumbent upon the international community because of its importance to humanity. This rationale is seen in the Hague Convention of 1954. Its Preamble states that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”¹⁴ This Convention has been updated by means of two protocols,¹⁵ thus underscoring the importance of the contribution of cultural property to humanity. Additional instruments on cultural property adopted by UNESCO also underline the importance of cultural property to all

⁷ Instructions for the Government of Armies of the United States in the Field. Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863.

⁸ Project of an International Declaration concerning the Laws and Customs of War, signed at Brussels, 27 August 1874.

⁹ The Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), adopted by the Institute of International Law at Oxford, September 9, 1880.

¹⁰ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

¹¹ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Articles 27 and 56.

¹² Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 *The American Journal of International Law* 95 (No. 1-2, 1920), p.115.

¹³ International Committee of the Red Cross Customary IHL Rule 7. Henckaerts and Doswald-Beck 2005.

¹⁴ Preamble, Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague, 1954.

¹⁵ First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, adopted at The Hague, 14 May 1954 and Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, adopted at The Hague, 26 March 1999.

of humankind.¹⁶ These divergent approaches to the protection of cultural property have been identified by Frulli as the ‘civilian use’ approach and the ‘culture-value’ approach.¹⁷ Both approaches are recognised by international customary law in IHL Customary Rule 38.¹⁸

The shift to a broader understanding of cultural property was precipitated by growing attention being focused on cultural rights and the rights of minorities at the United Nations. Article 27 of the Universal Declaration of Human Rights, adopted in 1948, provides:

‘(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.’¹⁹

While cultural rights may be regarded as the ‘Cinderella’ of human rights,²⁰ as they have been neglected in comparison to other categories of rights, work on completing the International Covenant on Economic, Social and Cultural Rights, began in 1948, and this instrument was adopted in 1966, thereby spanning the same period when the 1954 Convention on Cultural Property was being drafted. In addition, the cultural rights of minorities were also being discussed and developed during the same period, culminating in Article 27 of the International Covenant on Civil and Political Rights. This states:

‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’²¹

The development of universal human rights treaties, including those relating to minorities, had an impact on how the destruction of cultural property was dealt with before international tribunals in practice. A number of international criminal tribunals include provisions

¹⁶ See UNESCO instruments on cultural property, <http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html>, accessed 10 April 2017.

¹⁷ Frulli 2011, 203.

¹⁸ This states: ‘A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.’ Henckaerts and Louise Doswald-Beck 2005.

¹⁹ Proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

²⁰ Claridge and Xanthaki 2016, 61.

²¹ International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966.

concerning the prosecution of attacks on cultural property,²² including Article 3(d) of the ICTY Statute, which includes among the violations of the laws or customs of war in respect of which the Tribunal has jurisdiction, ‘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’.²³ The wording of the Statute clearly indicates a civilian use approach, however, in practice, the Tribunal has taken a much broader approach, and has recognised the inextricable connection between a people and its culture. In the case of *Prosecutor v. Kordić and Čerkez*, for example, the Tribunal identified the destruction of places of worship as persecution as a crime against humanity because it amounted to ‘an attack on the very religious identity of a people’.²⁴ In addition, in the case of *Krstić*, the Tribunal considered that the destruction of mosques constituted an attempt to erase the identity of the group and, as such, that it constituted ‘evidence of an intent to physically destroy the group’.²⁵ Thus, attacks against cultural property have been viewed as both crimes against humanity and as evidence of genocide by the ICTY, not just as war crimes, as provided for in its Statute. In this regard, Martínez concludes that ‘the icty has consistently included the destruction of cultural and religious heritage within the facts constituting the widespread and systematic attack against civilian populations. Regarding the crime of persecution, the destruction or damage of the cultural heritage must be related to the intent to discriminate and, when the destroyed or damaged heritage is exclusively valuable for one specific population, the ICTY has consistently affirmed that such destruction is de facto discriminatory’.²⁶

3. The Protection of Cultural Property and the Rome Statute

Unfortunately, the Rome Statute limits itself to ‘a civilian use rationale’ for the protection of cultural property. According to Article 8(2)(e)(iv) of the Statute:

²² The Statute of the International Criminal Tribunal for Rwanda, Art. 4 (f) and the Statute of the Special Court for Sierra Leone, Art. 3 (f) mention only pillage as a war crime related to cultural property. Art. 7 of the Law on the Extraordinary Chambers of Cambodia provides for prosecution pursuant to the provisions of the 1954 Hague Convention.

²³ Updated Statute of the International Criminal Tribunal of the Former Yugoslavia, adopted 25 May 1993 by Resolution 827, as amended 7 July 2009 by Resolution 1877.

²⁴ *Prosecutor v. Kordić and Čerkez*, 17 December 2004, icty Appeals Chamber Judgment, IT-95-14/2-A, <www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf>, accessed 11 April 2017, para. 207.

²⁵ *Prosecutor v. Krstić*, 2 August 2001, icty Trial Chamber Judgment, IT-98-33-T, www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf, accessed 11 April 2017, para. 508.

²⁶ See Green Martínez 2016, 1087.

‘[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, provided they are not military objectives...’

in non-international armed conflicts is a war crime. The destruction of cultural property in international armed conflicts is also classified as a war crime under Article 8(2)(b)(ix). Frulli comments that in the context of the ICC Statute, ‘a more specific cultural-value oriented approach to the criminalization of acts against cultural property committed in times of armed conflict would be coherent with the overall developments in the field of international criminal law, constantly evolving into a more sophisticated body of law.’²⁷

The question arises if the ICC could, influenced by international human rights law, including those rules protecting the rights of minorities, interpret the Statute’s provisions broadly to characterise attacks on cultural property as crimes against humanity or evidence of genocide as the ICTY had previously done? The first and, so far, only ICC case to deal with the destruction of cultural property is *Prosecutor v Al Mahdi*, emanating from the non-international armed conflict in Mali. Mali has a population of approximately 15 million people and includes several ethnic groups. It is one of the poorest and least developed countries in the world and has suffered ‘decades of drought, persistent food shortages, locust infestations, civil wars and recurrent political instability.’²⁸ In addition, conflicts in neighbouring States have spilled over into Mali. The conflict in Mali ‘is a complex and multidimensional mixture of long-term fundamental grievances by diverse actors and groups’²⁹ for which there was no one single cause. Zyck and Muggah state that ‘Mali and the Sahel are embedded in what might be called a regional conflict system’³⁰ and that ‘simmering humanitarian, development and governance crises are intersecting with global, regional and local security concerns.’³¹

While the State had been showcased as a shining example of democracy in Africa from the 1990s onwards, in reality Mali was very unstable and fragile. In 2002, The Economist Intelligence Unit called Mali “a bulwark against radical Islam in Africa”³² and the State was seen as being committed to *laïcité* in the aftermath of 9/11. However, this changed as Islamic

²⁷ Frulli 2011, 216.

²⁸ Francis 2013, 4.

²⁹ *Ibid*, 2.

³⁰ Zyck and Muggah 2013, 1.

³¹ *Ibid*, 1.

³² Economic Intelligence Unit 2002, 47.

fundamentalism began to rise in the region. There have been ongoing tensions between the minority Tuareg population (making up approximately 10% of the Malian population)³³ and the central government since 1962, as the Tuaregs have attempted to gain independence from the Northern region, with the aim of creating an independent state of Azawad.³⁴ A concerted rebellion began in 2012, fuelled by weapons and soldiers from the Libyan conflict, led by the *Mouvement national de liberation de l'Azawad* (MNLA). However, the violence also streamed from other causes, and can be divided into three separate streams.³⁵ First, the war of independence fought by Tuareg ethnic groups in the north of the State. Second, the conflict precipitated by the military coup and the overthrow of the democratically elected government, replacing President Amadou Touré with Captain Amadou Sanogo. Third, the conflict caused by Islamic extremists to take control of the state and impose Sharia law. These streams overlap and intertwine but the motivations behind the violence in each stream are different. It is the third stream, from which the attacks on the city of Timbuktu emanated.

Mali ratified the Rome Statute on 16 August 2000 and its government referred the 'situation in Mali since January 2012' to the Office of the Prosecutor (OTP) of the ICC in July 2012.³⁶ During its preliminary examination of the Situation in Mali the OTP reported that as of around 17 January 2012, a non-international armed conflict was ongoing in the territory of Mali between the government forces and a number of organised armed groups, including the *Mouvement national delibération de l'Azawad* (National Movement for the Liberation of Azawad, MNLA), al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine and the *Mouvement pour l'unicité et le jihad en Afrique de l'Ouest* (Movement for Oneness and Jihad in West Africa, MUJAO) and 'Arab militias'. Other Islamist groups, such as Boko Haram, were also active in the region according to some reports.³⁷ In addition, the OTP stated these groups were also involved in a conflict between each other, with no involvement from the governmental armed forces,³⁸ illustrating the ethnic tensions underlying the conflict. The OTP then opened an investigation into alleged crimes committed on the territory of Mali since 2012 on 16 January 2013.

³³ Keita 1998, 5.

³⁴ Ibid, 5.

³⁵ ICC Office of the Prosecutor 2013, para. 4.

³⁶ See letter of referral from the Malian Minister for Justice to the Prosecutor, 13 July 2013. Available at: <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

³⁷ ICC Office of the Prosecutor 2013, para. 29.

³⁸ Ibid, para.3.

The ICC issued an arrest warrant for Mr Al Mahdi on 18 September 2015³⁹ in respect of the intentional directing of attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, between about 30 June 2012 and 10 July 2012, and he was subsequently surrendered to the ICC by the Republic of Niger on 26 September 2015. He made his initial appearance before the Court on 30 September 2015⁴⁰ and the Document containing Charges was filed by the Prosecutor on 17 December 2015.⁴¹ This contained a single charge alleging that Mr Al Mahdi was responsible for the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute.⁴² On 18 February 2016, the parties reached a plea agreement regarding the charge.⁴³ The Confirmation of Charges hearing took place in March 2016, with the charges being confirmed on March 24.⁴⁴ During this hearing Mr Al Mahdi informed the Court of his intention to plead guilty to the charges. The trial took place between 22 and 24 August 2016,⁴⁵ during which Mr Al Mahdi made an admission of guilt. The judgment was issued on 27 September, with Mr Al Mahdi being sentenced to 9 years in prison.⁴⁶

As stated above, Mr Al Mahdi was the leader of the morality police put in place in Timbuktu in Mali by the Islamic fundamentalist group Ansar Dine. The *Hisbah* was responsible for the destruction of numerous buildings and sites of cultural value, many of which were listed on the UNESCO World Heritage List.⁴⁷ As head of the *Hisbah*, Mr Al Mahdi had control over the destruction of cultural property. The Pre-Trial Chamber found that the mission of the *Hisbah* was ‘to prevent apparent vice and to promote virtue as well as to carry out charitable tasks’.⁴⁸ This organisation was tasked with ‘the prevention of anything that can be considered as

³⁹ Arrest Warrant, Al Faqi Al Mahdi, ICC-01/12-01/15-1-Red, Pre-Trial Chamber I, 18 September 2015.

⁴⁰ ICC-01/12/01/15-T-1-ENG.

⁴¹ ICC-01/12-01/15-62, ICC-01/12-01/15-63 and –AnxA (Arabic translation); ICC-01/12-01/15-70 and –AnxA-Corr (English translation).

⁴² Chef d’accusation retenu par l’Accusation contre Ahmad AL FAQI AL MAHDI, 17 December 2015, ICC-01/12-01/15-62.

⁴³ Annex 1 to the Version publique expurgée du «Dépôt de l’Accord sur l’aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi», 25 février 2016, ICC-01/12-01/15-78-Conf-Exp, 25 February 2016, ICC-01/12-01/15-78- Anx1-tENG-Red (confidential English translation notified on 21 June 2016, public redacted version notified on 19 August 2016 and public redacted English translation notified on 9 September 2016).

⁴⁴ Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016.

⁴⁵ ICC-01/12-01/15-T-4-Red-ENG, ICC-01/12-01/15-T-5-Red-ENG, ICC-01/12-01/15-T-6-ENG.

⁴⁶ *The Prosecutor v Al Mahdi*, Verdict and Sentence, ICC-01/12-01/15-171, 27 September 2016.

⁴⁷ UNESCO’s World Heritage Convention Nomination Documentation. See: <http://whc.unesco.org/en/nominations/>.

⁴⁸ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, 24 March 2016, icc, Pre-Trial Chamber I, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, www.icc-cpi.int/CourtRecords/CR2016_02424.PDF, accessed 10 April 2017, para. 46.

worshipping the tombs, such as building the dome over the tomb'.⁴⁹ The incidents of which Mr Al Mahdi was found guilty took place in the city of Timbuktu between 30 June 2012 and 11 July 2012. The city had been under the control of a number of fundamentalist Islamic groups, including Al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine, between early April 2012 and January 2013.⁵⁰ Mr Al Mahdi was involved in various aspects of the Ansar Dine and AQIM administration and was in direct contact with the leaders of Ansar Dine and AQIM, including Iyad Ag Ghaly (Ansar Dine leader), Abou Zeid (who governed Timbuktu under the armed groups), Yahia Abou Al Hammam (an AQIM chief) and Abdullah Al Chinguetti (a religious scholar and member of AQIM). In June 2012 Ag Ghaly, after consultation with other Islamic leaders in the region, decided to destroy the mausoleums.⁵¹ While Mr Al Mahdi put forward the proposition that all Islamic jurists agree on the prohibition of any construction over a tomb, he nevertheless recommended against destroying the mausoleums in order to maintain a good relationship between the occupying groups and the local population.⁵² In spite of this advice Ag Ghaly gave orders to proceed with the destruction of mausoleums to Abou Zeid, and he in turn informed Mr Al Mahdi,⁵³ who wrote a sermon on the destruction of the mausoleums which was read out at Friday prayer.⁵⁴ Mr Al Mahdi declared publicly that the decision to attack the sites was purposefully taken, stating 'nous agissons ainsi parce que nous voulons le demolition des dômes.'⁵⁵ He also proclaimed that the destruction of the domes had been ordered by 'le Messenger' and that the destruction was not prohibited by the religious sources which he had consulted.⁵⁶ Mr Al Mahdi decided the order in which the sites were to be attacked⁵⁷ and personally participated in the attacks and / or oversaw them.⁵⁸ Video-tapes of Mr Al Mahdi participating in the attacks had been introduced into evidence by the Prosecution. In all, 10 of the most important cultural sites in Timbuktu were attacked and destroyed by Mr Al Mahdi and others as part of the same common plan. These were: the Sidi Mahamoud Ben

⁴⁹ Ibid., para. 47.

⁵⁰ Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 3-5; Video of Ouman Ould Hamaha speaking about Ansar Dine's control of Timbuktu, MLI-OTP-0018-0352, from 00:00:00 to 00:00:41, MLI-OTP-0033-5448 (full French transcript); Video of Ansar Dine at Timbuktu airport, MLI-OTP-0018-0345; Video of Ansar Dine's flag at Timbuktu airport, MLI-OTP-0018-0195; Video of interview with Ansar Dine's member from the airport of Timbuktu, MLI-OTP-0018-0197 (Transcript, MLI-OTP-0033-5436); Statement by P-65, MLI-OTP-0020-0019-R01, 0059-0063; Statement by P-66, MLI-OTP-0019-0296-R01, 0299, 0304-06.

⁵¹ Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 38.

⁵² Ibid. para. 37.

⁵³ Ibid, paras. 24, 38-40.

⁵⁴ Ibid. Para. 44.

⁵⁵ Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 49.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid, para 51.

Omar Mohamed Aquit Mausoleum, the Sheikh Mohamed Mahmoud Al Arawani Mausoleum,⁵⁹ the Sheik Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum,⁶⁰ the Alpha Moya Mausoleum,⁶¹ the Sheik Mouhamad El Mikki Mausoleum,⁶² the Sheik Abdoul Kassim Attouaty Mausoleum,⁶³ the Sheik Sidi Ahmed Ben Amar Arragadi Mausoleum,⁶⁴ the door of the Sidi Yahia Mosque,⁶⁵ the Bahaber Babadié Mausoleum and the Ahmed Fulane Mausoleum, both adjoining the Djingareyber Mosque.⁶⁶

These sites were either fully or partially destroyed and all but one site was classified as world heritage and protected by the UNESCO 1972 Convention on the Protection of the World Cultural and Natural Heritage.⁶⁷ During the case, comments made by Mr Al Mahdi during the attack on the Djingareyber Mosque, were reiterated. He stated: “It’s probably the oldest mosque here in town, and is considered a heritage site [...] a World Heritage Site. There are so many rumours relating to these shrines [...]. Those UNESCO jackasses – this [...] they think that this is heritage. Does ‘heritage’ include worshipping cows and trees?”⁶⁸ This illustrates some of Mr Al Mahdi’s motivations for the attacks and his disrespect for other cultures. His actions were not motivated by a wish to destroy civilian property, but rather focused much more on a desire to destroy rid Timbuktu of cultural diversity, i.e. a lack of respect for the culture of ‘others’ and a wish to destroy religious representations which were not in line with his own beliefs.

Despite the narrow focus of the text of the Rome Statute on destruction of cultural property as a war crime only, both the Prosecutor and the Chamber focused on the importance of cultural property and its benefits for mankind throughout the case. Indeed, it could be said that both took a ‘culture-value approach’ as to why attacks on cultural property should be criminalised. At the Confirmation of Charges hearing, the Prosecutor stated that: ‘[t]he destruction of such monuments constitutes the annihilation of structures that had survived the ravages of time and which stood as testimony to Timbuktu’s glorious past and important place in history and to its people over generations’.⁶⁹ In a similar vein, the Chamber stated that destruction of the

⁵⁹ Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 64-65.

⁶⁰ Ibid, 66-72.

⁶¹ Ibid, 73-78.

⁶² Ibid, 85-86.

⁶³ Ibid, 87-88.

⁶⁴ Ibid, paras. 82-84.

⁶⁵ Ibid, paras. 89-95.

⁶⁶ Ibid, paras. 96-103.

⁶⁷ Ibid, para. 33.

⁶⁸ *The Prosecutor v Al Mahdi*, Verdict and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 46. This quote came from Video, MLI-OTP-0018-0148 (Translated Transcript, MLI-OTP-0025-0337, 0340).

⁶⁹ Office of the ICC Prosecutor 2016 (a).

UNESCO heritage sites ‘does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.’⁷⁰ The Chamber thus concluded that the targeted sites were not simply religious buildings ‘but had also a symbolic and emotional value for the inhabitants of Timbuktu’ and that this was ‘relevant in assessing the gravity of the crime committed.’⁷¹ The importance of cultural property to humanity is, therefore, an important theme throughout the case of *Al Mahdi*. However, neither the Prosecutor nor the Chamber attempted to characterise the attacks on cultural property in Mali as crimes against humanity or as evidence of genocide. The case is therefore rather curious, with the charge not exactly fitting the crime. Mr Al Mahdi’s guilty plea truncated the Trial proceedings however, and if the Court had more time to delve into Mr Al Mahdi’s motivations for the destruction of the mausoleums, perhaps it may have seized the opportunity to address this curiosity, and such an approach is certainly possible, as highlighted by Martínez, who states that ‘[e]ven though the definition of the crime against humanity of persecution does not make explicit reference to cultural property, it can be applied to sanction the destruction of cultural property, it can be applied to sanction the destruction of cultural property...’⁷²

4. The Aftermath

As mentioned above, Timbuktu was overrun in 2012 by rebel groups, including Ansar Dine, carrying Libyan weapons, which imposed Sharia law, banned music and whipped people who did not adhere to their code. The destruction of the mausoleums was an attempt to destroy the cultural pluralism of the city and a mark of disrespect to the Sufi religious group. The tombs which were destroyed were those of Sufi saints, who are thought to protect the city against evil spirits. The impact of the destruction on the local inhabitants was extreme. This was summed up in evidence given by the Malian expert on cultural matters who had testified that ‘destroying the mausoleums ... aimed at breaking the soul of the people of Timbuktu’.⁷³ However, the local community in Timbuktu has been resilient, and the destroyed sites have undergone reconstruction, with the help of UNESCO and a number of donors, including the EU. This began in 2015 with the inauguration of the destroyed mausoleums, which have since been

⁷⁰ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, 27 September 2016, ICC Trial Chamber VIII, Judgment and Sentence, ICC-01/12-01/15, para. 80.

⁷¹ *Ibid*, para. 79.

⁷² Green Martínez 2016, 1080.

⁷³ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, 27 September 2016, ICC Trial Chamber VIII, Judgment and Sentence, ICC-01/12-01/15, para. 79.

consecrated. The consecration ceremony, held at the Mosque of Djingareyber in 2016, was intended to invoke the divine mercy ‘to provide the basis for peace, cohesion and tranquillity’,⁷⁴ and ‘also represent the rejection of intolerance, violent extremism and religious fundamentalism’⁷⁵, which had destroyed the city’s cultural heritage.

Speaking at an event to mark the reinstallation of the Sacred Gate of Sidi Yahia, the Director-General of UNESCO, Irina Bokova, stressed the importance of heritage protection for the spirit of the local community, stating: ‘The reinstallation of the sacred gate, a religious and cultural landmark of Timbuktu, marks a new and decisive step in Mali’s reconstruction and peace building work. This—along with the reconstruction of the mausoleums of Timbuktu and the trial of those responsible for their destruction at the International Criminal Court—sends strong message to all extremists.’⁷⁶ Bokova has also highlighted the importance of the restoration work to ‘ensure that the people of Mali can reclaim heritage that is essential to their identity and that can contribute to reconciliation. This is vital for Mali and this is important for the rest of the world because World Heritage is common to all of us.’⁷⁷

On 17th August 2017, Trial Chamber VIII of the ICC issued a Reparations Order in the case of *Al Mahdi*, concluding that Mr Al Mahdi is liable for €2.7 million in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city.⁷⁸ Because Mr Al Mahdi is indigent, the Chamber encouraged the Trust Funds for Victims to complement the reparations award and directed it to submit a draft implementation plan for 16 February 2018.

The Chamber considered the observations of the ICC Prosecutor, the Defence, the Legal representatives of Victims representing the 139 reparations applicants, the Trust Fund for Victims, and the ICC Registry, as well as four appointed experts and *amici curiae*, including UNESCO, when deciding on reparations. Throughout this decision, the Chamber placed emphasis on the value of cultural property to the people of Mali and the harm caused to them as a result of its destruction. The Chamber recalled a witness statement, which stated that the destruction ‘carries a message of terror and helplessness; destroys part of humanity’s shared memory and collective consciousness, and renders humanity unable to transmit its values and knowledge to future generations.’⁷⁹

⁷⁴ UNESCO 2016 (a).

⁷⁵ Ibid.

⁷⁶ UNESCO 2016 (b).

⁷⁷ UNESCO 2014..

⁷⁸ *Prosecutor v Al Mahdi*, ICC-01/12-01/15, Reparations Order, 17 August 2017.

⁷⁹ Second Expert Report, ICC-01/12-01/15-214-AnxII-Red2, para. 44.

The Chamber ordered reparations for three categories of harm: damage to the attacked historic and religious buildings, consequential economic loss, and moral harm. In addition to the €2.7 million in expenses for individuals and collective reparations, the Chamber ordered one symbolic euro to be received by the Malian State and UNESCO, given its role in the protection of cultural property. The Chamber also ordered that collective reparations be made in the form of memorials and commemoration ceremonies, and that, as a symbolic gesture, the video of Mr Al Mahdi's apology to victims be posted on the ICC website. It is clear that the reparations order focused intently on the damage and harm done to the population of Mali and to humanity in general as a result of the destruction of the cultural property in Mali, appreciating the broader, culture value, approach to the protection of such property, which does not fit with the formulation of the crimes in the Rome Statute.

Conclusion

The Rome Statute has taken a very conservative, 'civilian-use' view of attacks on cultural property by classifying attacks against such property as war crimes, and failing to see the potential characterisation of such attacks as crimes against humanity or evidence of genocide. In taking this approach, there has been a failure to appreciate the inextricable link between cultural property and the people it represents. There has also been a failure to appreciate the motivations of groups such as Ansar Dine and ISIS in destroying cultural property. As stated by Bokova, '[c]ultural cleansing is a tactic of war, used to destabilize populations and weaken social defences. The destruction of heritage undermines wellsprings of identity and belonging, paving the way to social disintegration. Eliminating the layers of history, cities, and homes affects people's perceptions of the past and present and shadows their confidence in a future where their rights and dignity would be respected.'⁸⁰ Given the strengthening of cultural rights and the rights of minorities since the first international legal instruments seeking to protect cultural property were adopted, it is surprising that the Rome Statute took such a narrow approach. This narrow approach is even more surprising, given the creativity of the ICTY in this area. The ICC Statute is, therefore, a step back with regard to the protection of cultural property. However, it is still open to the ICC to broaden out the understanding of attacks on cultural property and characterise them as crimes against humanity and genocide in its practice. While the case of *Al Mahdi* was disappointing from this perspective, it is hoped that the Court will grasp the opportunity if presented again.

⁸⁰ Bokova 2015, 291.

From a practical perspective, the acceptance of the destruction of cultural property as a crime against humanity would allow for the prosecution of such destruction during peace time. This is very significant, as attacks on cultural property belonging to minority or other groups is often the first sign that conflict will begin. In this vein, Petrovic comments that ‘...cultural property is indivisible from people’s identity and dignity, and for [that] reason...such property’s wilful destruction is usually a precursor to human tragedy.’⁸¹ From an ideological perspective, it is important that the full and true story behind attacks on cultural property is told, from motivations to impacts on victims. When analysing the motivations of Mr Al Mahdi and the impacts on the population of Timbuktu, Mali, and indeed, the whole of humanity, it is clear to see that a crime against humanity is a better fit than a war crime, as this recognises that cultural property is destroyed to persecute or destroy a group’s identity, and also recognises the contributions of cultural property to the whole of humanity.

⁸¹ Petrovic 2013, 382.

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