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PROSECUTING CRIMES AGAINST CULTURE: THE CONTRIBUTIONS OF THE *AL-MAHDI* AND *NTAGANDA* CASES TO THE ICC APPROACH TO CULTURAL PROPERTY PROTECTIONS

*Samira Mathias**

INTRODUCTION

Nestled on the Dalmatian Coast, the Old Town of Dubrovnik maintained several 15th and 16th century historic structures from its time as a prospering maritime capital.¹ In 1979, the Old Town of Dubrovnik was inscribed on the World Heritage List, conferring World Heritage Status to all the structures within.² This meant that even the walls were protected. The collective fabric of the town had a significance that transcended the value of each individual building.³ But in October 1991, Dubrovnik was engulfed in hostilities between the Yugoslav People's Army and Croatian forces.⁴ Over the next few months, several buildings were destroyed or damaged by indiscriminate shelling.⁵

The Old Town became a symbolic landmark in the case of *Prosecutor v. Strugar*, when the former General (J.N.A.) Commander Pavle Strugar was prosecuted for destruction of cultural property under Article 3(d) of the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁶ In fact, the Trial Chamber noted in that case that the Old Town is legally distinct from the rest of Dubrovnik because it was protected in its entirety by virtue of its World Heritage listing.⁷ Dubrovnik was destined to symbolize another development of cultural heritage law: the recognition of intangible cultural heritage. Every year since 1190, the town has celebrated the festivity of Saint Blaise.⁸ The festival is marked by an ephemeral atmosphere of ringing church bells, the release of white doves, and a conglomeration of tourists and worshippers who gather to pay

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¹ George Wright Forum, *Dubrovnik's Old City: The Destruction of a World Heritage Cultural Site*, 11 GEORGE WRIGHT SOCIETY 11, 11 (1994).

² Croatiaweek, *Croatia's 10 UNESCO World Heritage sites*, CROATIAWEEK, (June 1, 2020) <https://www.croatiaweek.com/croatias-10-unesco-world-heritage-sites/>

³ See generally George Wright Forum, *supra* note 1.

⁴ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement ¶ 1.

⁵ *Id.* ¶ 50.

⁶ See generally *id.*

⁷ See Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶¶ 279, 327 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

⁸ *Festivity of Saint Blaise, the patron of Dubrovnik*, UNESCO: INTANGIBLE CULTURAL HERITAGE <https://ich.unesco.org/en/RL/festivity-of-saint-blaise-the-patron-of-dubrovnik-00232>.

homage to Saint Blaise.⁹ In 2009, this feast was inscribed on the Representative List of Intangible Cultural Heritage under the Convention for the Safeguarding of Intangible Cultural Heritage.¹⁰

Cultural heritage laws have evolved over time, with the recognition that cultural differences shape aspects of religion, art, or history that are most important to communities. Generally, some communities focus on tangible infrastructure as the pivot of their historical heritage, others elevate an intangible aspect—a religious practice, ritual, or tradition—to prime importance. Cognizance has expanded over time to include, not just oral traditions and intangible values, but also historic areas, natural landscapes, and impermanent religious or cultural structures, where the process of periodic building is of significance to the community.

While heritage laws protect cultural heritage during peacetime, generally, it is during a situation of war that properties and values most important to communities come under distinctly targeted or incidental threat. But international law does not manifest any consistent definition of what qualifies as cultural property or the degree of protection extended to it.

This Article will unfold in three segments. Part I offers an overview of international law protections of cultural property. This sets the stage for the rest of the Article to explore the importance of Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute in the broad scheme of cultural property protection under international law. Next, Part II will raise important questions about the interpretation of these Articles. Finally, Part III will identify the scope of these Articles and the limitations imposed by the Statute.

I. AN OVERVIEW OF INTERNATIONAL LAW PROTECTIONS OF CULTURAL PROPERTY

There are several instruments under public international law and, more specifically under international humanitarian law, to protect cultural property during armed conflict. Some of the most important ones are discussed below:

⁹ *Decision of the Intergovernmental Committee: 4.COM 13.31*, UNESCO: INTANGIBLE CULTURAL HERITAGE <https://ich.unesco.org/en/decisions/4.COM/13.31>.

¹⁰ *See generally Festivity of Saint Blasie, supra* note 8.

A. *The Hague Convention (IV) (1907)*

Article 27 of the Hague Regulations protected buildings dedicated to religion, art, science, charitable purpose, historic monuments, hospitals, and places for the sick and wounded during bombardments or sieges.¹¹ Four things were important to note about this provision.

First, while these buildings were protected from attack as long as they were not being used for military purposes, there was no provision within the Hague Regulations that prohibited the use of these buildings *for* military purposes.¹²

Second, Article 27 only applied to sieges and bombardments.¹³ Article 56 was a corresponding provision applicable to situations of belligerent occupation that protected cultural institutions that were either private or the property of the State, from seizure, destruction, and willful damage. Third, while the only justification for bombardment was when the building was used for military purposes by the opposing side, Article 27 did not in and of itself prohibit destruction by torching, demolishing, razing, or other means if the sole purpose was to create impediments for the enemy, i.e. if the action could be justified by military necessity.¹⁴ Finally, the Hague Regulations did not include any provisions for individual criminal responsibility. Notably, the 1907 Regulations have received customary law status.¹⁵ This is particularly pertinent as it reserves a customary status for the protection of cultural property during armed conflict.

B. *The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)*

Article 1 of the 1954 Convention expanded the protection of cultural property by defining it as “both movable and immovable property of great importance to the cultural heritage of every people.”¹⁶ This extension to movable property included collections of books, archives, and reproductions thereof, as well as buildings that house such important movable cultural property whether

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 art. 27, Oct. 18, 1907, International Peace Conference, The Hague, Official Record (Oct. 18, 1907) [hereinafter *Hague Regulations, 1907*].

¹² ROGER O’KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* 25 (James Crawford et al. eds., 2006)

¹³ *See Hague Regulations, 1907, supra* note 11, art. 27.

¹⁴ O’KEEFE, *supra* note 12, at 25–26.

¹⁵ S.C. Res. 25704, ¶ 35, (May 3, 1993); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 89 (July 9).

¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, Aug. 7, 1954, 249 U.N.T.S. 240, art. 1 [hereinafter CPCPAC].

for preservation, exhibition, or as shelter.¹⁷ This was a particularly high threshold to meet. As a result, properties would need to constitute “heritage” to receive protection. Furthermore, while protection was extended to situations of both internal and international armed conflict, there were no treaty provisions for criminal prosecution. Article 28 transferred the burden of prosecution and penalization of individuals to contracting parties who would have to effect the penalties through internal legislation and judicial activities.¹⁸

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

In the 1950s, the planned construction of the Aswan Dam across the River Nile in Egypt was criticized for posing flooding dangers to several heritage sites in the associated valleys, including the famous Abu Simbel temples.¹⁹ This raised international concerns. The temples were successfully relocated with financial and technical aid from UNESCO and international donors.²⁰ However, this sparked a movement, and the 1972 World Heritage Convention materialized. The protective scope of the Convention is restricted due to the necessity for the immovable property, to have “outstanding universal value”.²¹ Whether the object qualifies to this standard of “outstanding universal value” is something the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage determines.²² For these purposes, the sites must meet at least one of six cultural criteria.²³ Alternatively, one of the four natural criteria could also be satisfied for the purposes of enlisting natural heritage. The protection, management, authenticity, and integrity of properties are also considered important when evaluating whether a site should be listed.²⁴ The definition of cultural property was expansive in that it not only protected buildings and monuments, but also sites, which can best be described as combined works of man and nature that are ascribed importance for aesthetic,

¹⁷ *Id.*

¹⁸ *Id.* art. 28.

¹⁹ See generally Gihane Zaki, *Abu Simbel: the story of an extraordinary rescue*, 90 WORLD HERITAGE 22, 22–30 (2019).

²⁰ *Id.* at 30.

²¹ See Convention for the Protection of the World Cultural and Natural Heritage, (Nov. 16, 1972) 1037 U.N.T.S. 15511, art. 1); CPCPAC, *supra* note 16, art. 1.

²² 1037 U.N.T.S. 15511, art. 11.

²³ Operational Guidelines for the Implementation of the World Heritage Convention, UNESCO Doc. WHC.17/01, (Jul. 12, 2017) par. 77, <https://whc.unesco.org/en/guidelines/>.

²⁴ *Id.* ¶ 78.

ethnological, or anthropological values.²⁵ However, the Convention does not criminalize damage or destruction to such sites.²⁶

D. *The Rome Statute of the International Criminal Court (1998)*

The Rome Statute has two distinct provisions on the protection of cultural property during armed conflict—Articles 8(2)(b)(ix) and 8(2)(e)(iv). Arguably, offenses against cultural property would also be subsumed within the war crimes of extensive destruction and appropriation of property,²⁷ destroying or seizing the enemy’s property,²⁸ and pillage.²⁹

This manifested in the jurisprudence of the court in the Katanga Judgment where destruction of property, including churches and schools, were prosecuted or considered for prosecution under the war crime of destroying the enemy’s property.³⁰ These two Articles have great significance due to their inclusion in the Statute. As they are *lex specialis* provisions for protection of cultural property within the Rome Statute, they automatically envision individual criminal responsibility for criminal acts during war time, as opposed to the Intangible Cultural Heritage Convention and the World Heritage Convention, which lack penal provisions.³¹ The 1954 Hague Convention also lacks automatic criminalization, instead requiring states to implement disciplinary or penal measures within the scope of their “ordinary criminal jurisdiction.”³² These Articles also provide an option for the international community when a State that has jurisdiction over the case is unable or unwilling to prosecute him,³³ or when there is inaction on the part of that State.³⁴

Finally, in light of widespread attacks on cultural heritage in Mali, Iraq, and Syria, the protection of cultural property has become a pressing priority.³⁵ If the

²⁵ 1037 U.N.T.S. 15511, art. 1.

²⁶ *See generally id.*

²⁷ Rome Statute of the International Criminal Court common art. 7-8, July 17, 1998, U.N. Doc. A/Conf183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute].

²⁸ *Id.* arts. 8(2)(b)(xiii), (e)(xii).

²⁹ *Id.* arts. 8(2)(e)(v), (b)(xvi).

³⁰ *See Prosecutor v. Katanga*, Case No. IIC-01/04-01/07, Judgement pursuant to article 74 of the Statute, ¶¶ 882, 922, 924, (Mar. 7, 2014).

³¹ *See generally* 1037 U.N.T.S. 15511; CPCPAC.

³² *See* CPCPAC, *supra* note 16, art. 28.

³³ Rome Statute, *supra* note 27, arts. 17 (1)(a), (b).

³⁴ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07 OA 9, Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78, (Sept. 25, 2009).

³⁵ *See generally UNESCO strengthens action to safeguard cultural heritage under attack*, UNESCO: MEDIA SERVICES (Aug. 12, 2014), http://www.unesco.org/new/en/media-services/single-view/news/unesco_

ICC discovers a way to extend jurisdiction to situations where the perpetrator is a national of a non-party State, or where the crime was committed on the territory of a non-party State (as seen with ISIS in Iraq), these provisions in the Rome Statute would become critical to prosecutions of cultural crimes.

II. RAISING IMPORTANT QUESTIONS ABOUT THE ROME STATUTES

A. *The Evolution of Articles 8(2)(b)(ix) and 8(2)(e)(iv)*

Article 8(2)(b)(ix) and Article 8(2)(e)(iv) apply to international and non-international armed conflicts, respectively.³⁶ The Articles mirror each other. The Preparatory Committee in 1996 initially contemplated a rather high threshold for the protection of cultural property, which included: clearly *recognized* historic monuments, works of art, or places of worship; constituting the cultural and spiritual *heritage* of peoples; specially *protected* under the aegis of international organizations; resulting in *extensive destruction* from the attack; and not used by an *adverse party* as part of its military effort and not within the *immediate proximity* of its military objectives.³⁷ The final version adopted by the Preparatory Committee was chosen to reflect Article 27 of the Hague Regulations of 1907, requiring the following elements: there had to be an attack; the attack had to be intentional; the attack had to be directed against one or more buildings; the buildings had to be dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places for the sick and wounded; and the buildings were not military objectives.³⁸

Over the course of the Preparatory Committee's deliberations, several versions were scrutinized. The final version was chosen with caution and specific intent. However, it must be strictly interpreted per fundamental principles of criminal justice. So, why was this version of the Rome Statute chosen? The next Section explores answers to these questions. Each of these crimes have contextual elements for international or non-international armed conflicts, but the elaboration of contextual elements has been omitted in order to focus on the specific elements that are the crux of the protection. The

strengthens action to safeguard cultural heritage und/.

³⁶ Rome Statute, *supra* note 27, arts. 8(2)(b)(ix), (e)(iv).

³⁷ M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 90, (2005).

³⁸ Draft Consolidated Text, Preparatory Committee on the Establishment of an International Criminal Court 11-21 February 1997 Working Group on definition of crimes, A/AC.249/1997/WG.1/CRP.2, (Feb. 20, 1997).

discussion below describes the salient features of the present versions of Articles 8(2)(b)(ix) and 8(2)(e)(iv).

1. *There Must be an “Attack”*

In *Prosecutor v. Abu Garda*, the Court relied on the definition of “attack” in Article 13 of Additional Protocol II to the Geneva Conventions of 1949 to explain that attacks are “acts of violence against the adversary, whether in offence or in defence.”³⁹ This definition applies to non-international armed conflicts, and the corresponding definition in Article 49 of Additional Protocol I applies to international armed conflicts.⁴⁰ Although there are conflicting opinions within the ICC, there is strong evidence for the view that an attack includes combat action that must occur during battle and cannot occur after the property or the person in question is under the control of the adversary.⁴¹ Rules of treaty interpretation laid down in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) have customary status, and have been used by the Court for the purposes of interpretation of the Statute.⁴² This Part uses the interpretative tools within Articles 31 and 32 to support the said interpretation of “attack.”

a. *Textual Approach*

The ordinary meaning of a treaty’s terms can be ascertained by reading the terms in the context of the entire text.⁴³ Article 8 includes two types of crimes—conduct crimes and result crimes, with corresponding mental elements.⁴⁴ The first penalizes the conduct that the perpetrator undertakes and does not require any particular result (such as damage or destruction) for it to be considered a crime.⁴⁵ The perpetrator must possess *dolus directus* of the first degree.⁴⁶ These include crimes in Articles 8(2)(b)(i) to 8(2)(b)(iii) where the perpetrator is

³⁹ *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 65 (Feb. 8, 2010).

⁴⁰ *Id.*

⁴¹ William Schabas, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, 49 CASE W. RES. J. INT’L L. 75, 77–84 (2017).

⁴² Case Concerning the Arbitral Award of 31 July 1989, (Guinea Bissau v. Senegal) Judgement, 1991 I.C.J. Rep. 53, ¶ 48 (Nov. 12).

⁴³ MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 427 (2009).

⁴⁴ KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME I: FOUNDATIONS AND GENERAL PART 272 (2013).

⁴⁵ KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT SOURCES AND COMMENTARY 215 (2004).

⁴⁶ *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 93.

culpable for intentionally directed attacks,⁴⁷ and Articles 8(2)(b)(vii) to 8(2)(b)(viii) where the perpetrator is responsible for merely *employing* weapons of a certain kind.⁴⁸ The second type, the result crimes, would not punish the perpetrator for conduct unless specific repercussions have arisen.⁴⁹ These crimes would require *dolus directus* of the first or second degree.⁵⁰ The specific results are unusually enumerated, ranging from *inter alia* destruction of the adversary's property,⁵¹ deportation and forcible transfer of population,⁵² pillage,⁵³ rape,⁵⁴ to outrages upon personal dignity.⁵⁵ There is a clear difference in circumstance, intent, and conduct involved in (1) attacking an undefended town, village, or building that is not a military objective, and (2) destruction of the enemy's property.⁵⁶ Thus, the crime of "attacking" is different from mere "destruction"—a conclusion that also holds true for crimes against cultural property.

b. Teleological Approach

This approach involves testing the validity of an interpretation against its consonance with the object and purpose of the treaty.⁵⁷ The Rome Statute aims to end impunity for crimes that shock the conscience of the world community, while striving to protect the defendant's rights by espousing the principle of *nullum crimen sine lege*.⁵⁸ Constricting the interpretation of the term "attack" to merely combat action would not transgress the object and purpose of the treaty. If cultural property is damaged, either during occupation, or outside of battle, the crime would still be subsumed within the crimes of destruction of property of the enemy or pillage. This interpretation would serve the dual rule of combating impunity, while also preserving the defendant's rights to *lex praevia*, *lex certa*, *lex stricta*, and *lex scripta*.⁵⁹

⁴⁷ AMBOS, *supra* note 44, at 242.

⁴⁸ *Id.* at 263.

⁴⁹ *Id.* at 242.

⁵⁰ *Id.* at 275.

⁵¹ Rome Statute, *supra* note 27, art. 8(2)(b)(xiii).

⁵² *Id.* (viii).

⁵³ *Id.* (xvi).

⁵⁴ *Id.* (xxii).

⁵⁵ *Id.* (xxi).

⁵⁶ *Id.* (v), (xiii).

⁵⁷ OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 545 (2012).

⁵⁸ See generally Amnesty Int'l, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes* (2002).

⁵⁹ A person may only be punished if the charge refers to conduct that was criminalized by a clear and certain (*lex certa*) written law (*lex scripta*), which applies at the time of its commission (*lex praevia*) and is not applied or extended by analogy (*lex stricta*). See generally AMBOS, *supra* note 44, at 90.

c. Subsequent Practice

Subsequent practice under Article 31(2)(b) includes the interpretation and application of a constitutive treaty by organs authorized to do exactly that.⁶⁰ Subsequent practice has revealed conflicting jurisprudential strands in the ICC about the meaning of “attack.”⁶¹ Primary divergence exists between the *Al Mahdi* Chamber on the one hand, and the *Ntaganda* and *Katanga* Pre-Trial Chambers on the other.⁶² The Pre-Trial Chamber in the *Katanga* case noted that Article 8(2)(b)(i) was part of a series of war crimes referred to as the “conduct of hostilities war crimes” because the crime necessarily had to occur during the conduct of hostilities to fulfil the element of “attack.”⁶³ Therefore, if a party is subjected to any crime after it is within the hands of an adversary, it will not be a crime that includes “attack” as an element. A similar view was reiterated in the *Ntaganda* Pre-Trial Chamber, where the court observed that an attack must be a method of warfare closely connected to hostilities, i.e., the conduct must occur during hostilities.⁶⁴ Indeed, for the confirmation of the charge of Article 8(2)(e)(iv) in the *Ntaganda* case, the application of such a requirement is implicit.⁶⁵

The seemingly contradictory view espoused by the Trial Chamber in the *Al Mahdi* decision was that the Statute does not mandate that attacks occur only during hostilities and, therefore, the court must refrain from reading any such distinction within it.⁶⁶ Furthermore, the Court based its decision on two refutable reasons. First, the Chamber said that the *Ntaganda* and *Katanga* cases pertained to attacks against civilians—not property—and, therefore, those decisions would not be relevant in this instance.⁶⁷ Second, the Chamber reasoned that Article 8(2)(e)(iv) was based on Articles 27 and 56 of the Hague Regulations, which encompassed attacks during and outside the conduct of hostilities.⁶⁸ However, as noted in scholarly opinion, the Court was speaking about a series of war crimes linked to “battlefield attacks,” and Article 8(2)(e)(iv) was a

⁶⁰ DORR & SCHMALENBACH, *supra* note 57, at 537.

⁶¹ *See generally* Prosecutor v. Katanga, Case No. IIC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute (Mar. 7, 2014); Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgement and Sentence (Sept. 27, 2016).

⁶² *Id.*

⁶³ Prosecutor v. Katanga and Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 267 (Sept. 30, 2008).

⁶⁴ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶¶ 46, 47 (Jun. 9, 2014).

⁶⁵ *Id.* ¶¶ 69–71.

⁶⁶ Al Mahdi, Judgement and Sentence, ¶ 15.

⁶⁷ *Id.* ¶ 16.

⁶⁸ *Id.* ¶ 14.

species of that.⁶⁹ Furthermore, the drafting history of Article 8(2)(b)(ix) reveals that this version of the Article was deliberately chosen to specifically reflect Article 27 of the Hague Regulations of 1907. There is no mention of Article 56, an Article that protects cultural property from seizure or destruction during occupation.

In the *Al Mahdi* case, although Al Mahdi was ultimately convicted, the crimes were committed in Timbuktu, when the city was securely under the control of the rebel group Ansar-Al-Dine. This lends support to the opinion that Article 56, and not Article 27, is more appropriate for the crime Al Mahdi committed in rebel-occupied Mali, and a sufficient reason for him to have not been convicted under Article 8(2)(e)(iv).⁷⁰ Moreover, the Trial Chamber for the *Ntaganda* case contemplated the meaning of an “attack” under Article 8(2)(e)(iv). The Chamber noted that neither the attack on a church which had taken place “sometime after the assault, and therefore not during the actual conduct of hostilities,” and the pillaging of a hospital, met the definition of an “attack” under Article 8(2)(e)(iv).⁷¹ However, the shelling of another hospital did fall within the ambit of this element.⁷² Thus, the Chamber did seem to ratify the meaning of “attack” as followed in the Pre-Trial decisions of the *Ntaganda* and *Katanga* cases.⁷³

It is, however, pertinent to note, that in an ambiguous footnote, the Chamber conditions its interpretation of “attack” under Article 8(2)(e)(iv) by distinguishing between cultural objects possessing and not possessing special status.⁷⁴ The relevant footnote 3147 reads as under “In respect of the war crime of attacking protected objects, the Chamber’s findings do not relate to the interpretation of an ‘attack’ under Article 8(2)(e)(iv) when cultural objects enjoying a special status are the object of the attack. It notes that the protection of such objects under IHL is based on different underlying rules.”⁷⁵

It is unclear if this can be considered a positive affirmation of the departures in jurisprudence made in the *Al-Mahdi* judgment. Quite possibly, the Chamber has provided an interpretation of the Statute that preserves the dictum in *Al Mahdi*. Accordingly, structures which have a special status can be protected from both attacks during hostilities and destructive assaults when the object is

⁶⁹ Schabas, *supra* note 41, at 83.

⁷⁰ *Id.*

⁷¹ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgement, ¶¶ 1141, 1142 (July, 8 2019).

⁷² *Id.* ¶ 1140

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* ¶ 1136 (footnote 3147).

under the control of the adversary. Any of the other enumerated objects in the provision which are devoid of special status, including cultural objects of mere local importance, can be protected under this provision only during attacks that occur during hostilities.

d. Other Rules of International Law Regulating the Relations Between the Parties

The Rome Statute was formulated in the backdrop of the Hague Regulations and the Additional Protocols to the Geneva Conventions of 1949. Both sets of treaties make the distinction between crimes committed within and outside of the battle context. The Hague Regulations (1907) make this distinction in Articles 27 and 56. Additional Protocol I uses three main terms with respect to property: attacks, acts of hostility, and destruction. Article 49 of Additional Protocol I alludes to attacks in the sense of what occurs during battle. It does not include demolitions, destruction, or violent acts that might be carried out by a belligerent occupant in the occupied territory.⁷⁶ The 1954 Hague Convention and its Second Protocol also use the terms “act of hostility” and “attack” at different places. Attacks have been interpreted in the ICTY as acts of violence relating to “a specific military operation limited in time and place.”⁷⁷ Thus, an “attack” is necessarily distinct from “destruction” and must occur during active hostilities—not during occupation.

2. The Crime Must be Committed “Intentionally” and be Directed at the Protected Object

The mental element of this crime has escaped the throes of controversy. As previously mentioned, the crime of attacks on cultural property, being a conduct crime, requires *dolus directus* of the first degree.⁷⁸ In other words, the perpetrator must have intended to engage in the conduct constituting the attack and must have intended to direct the attack at the cultural property with the concrete intention of bringing about destructive or damaging effects.⁷⁹ This requirement, that the protected object should be the object of the attack, is essential. Illustratively, in the *Ntaganda* Judgment, the Chamber excluded from

⁷⁶ MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 330 (2013).

⁷⁷ Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, ¶ 52 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

⁷⁸ See DORMANN, *supra* note 45, at 131.

⁷⁹ *Id.*

Article 8(2)(e)(iv) events where the attack seemed to be directed at the patients inside of a hospital and not the hospital itself.⁸⁰

3. *The Attack Must Be Carried Out Against “Cultural Property”*

The provisions explicitly list what constitutes “cultural property.”⁸¹ That the material scope of this provision is quite wide, is evident. Between the initial version in 1997 and the final Article adopted in 2000, the scope of property was expanded to extend to “buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.”⁸² The inclusion of education was among the final amendments made to the provision.⁸³ There are, however, other features of this element that are important to note:

a. *Tangible Construction by Man*

Articles 8(2)(e)(iv) and 8(2)(b)(ix) protect buildings, historic monuments, and places. The deliberate wording of these provisions raises an important question—would any cultural space, devoid of man-made structures qualify for protection by these Articles, or would an attack necessarily have to be directed against some human construction? To answer this question, it is important to consider that the predecessor to Articles 8(2)(b)(ix) and 8(2)(e)(iv) was the Article 3(d) of the ICTY Statute. The ICTY provision required some sort of resulting damage to the object in order to punish the offender, while the ICC provision merely focuses on the act of attacking.⁸⁴ Therefore, ICTY jurisprudence is of limited guidance. However, the indictments under this Article, such as the *Strugar*,⁸⁵ *Blaskic*,⁸⁶ and *Brdjanin*⁸⁷ indictments and cases, have focused on structures, objects, buildings, or sites that have been damaged. Chambers in the ICTY have noted the destruction of religious edifices, schools,

⁸⁰ Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgement ¶ 1143.

⁸¹ *See id.*

⁸² Decisions taken by the Preparatory Committee at its Session Held 1 to 12 December 1997, A/AC.249/1997/L.9/Rev.1, 6 (Dec. 18, 1997) 6.

⁸³ *See generally id.*

⁸⁴ Al Mahdi, Judgment and Sentence, at 16.

⁸⁵ Prosecutor v. Strugar, Case No. IT-01-42-PT, Third Amended Indictment, 4, 42 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003).

⁸⁶ Prosecutor v. Blaskić, Case No. IT-95-14, Amended Indictment, 5 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 15, 1996).

⁸⁷ Prosecutor v. Brdjanin, Case No. IT-99-36-T, Sixth Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 9, 2003).

churches and mosques,⁸⁸ and historical monuments, observing even the damage of walls.⁸⁹

Thus, while “institutions” might indeed have a broader connotation than buildings—Articles 8(2)(e)(iv) and 8(2)(b)(ix) still appear to only subsume man-made structures. The logical conclusion to draw from a plain reading of the statute, while considering the jurisprudence of the ICC, is that an attack must be launched against some sort of building, structure, or tangible object created by humans or a place that has a structural contribution by man. In the Pre-Trial Chamber decisions in the *Al Mahdi* and *Ntaganda* cases, the Court noted that protected buildings and/or structures were targeted,⁹⁰ buildings and objects were attacked through pillage, and damage was inflicted on infrastructure.⁹¹ The *Al Mahdi* Trial Chamber specifically referred to the fact that buildings and/or monuments were attacked.⁹² While the 1972 World Heritage Convention predated the Rome Statute, it appears that Articles 8(2)(e)(iv) and 8(2)(b)(ix) do not envision protecting natural heritage with cultural value, only cultural heritage with some sort of man-made addition. This is evidenced by the fact that the Rome Statute has a different provision for protection of the environment in Article 8(2)(b)(iv). The protection of “property” of the adversary from destruction by Article 8(2)(e)(xii) would indicate that in a non-international armed conflict, this Article is broadly construed to include harm to the environment.⁹³ Because Articles 8(2)(e)(iv) and 8(2)(b)(ix) explicitly use the word “buildings,” a natural formation of religious significance, hallowed grounds, or a revered forest would probably not fall within the ambit of these charges unless some sort of man-made structure is appended or constructed within it.

⁸⁸ Prosecutor v. Blaskić, Case No. IT-95-14-T, Judgement, ¶ 419 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

⁸⁹ Prosecutor v. Jokić, Case No. IT-01-42/1-S, Sentencing Judgement, ¶ 53 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

⁹⁰ Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ¶ 34 (Mar. 24, 2016).

⁹¹ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶¶ 69–71.

⁹² Al Mahdi, Judgement and Sentence, ¶ 37.

⁹³ Daniëlla Dam-de Jong, *International Law and Resource Plunder: The Protection of Natural Resources during Armed Conflict*, 19 Y.B. INT’L ENV’T L. 27, 46 (2009).

b. Civilian-Use Determinant of Cultural Value and the Intangible Component

There are primarily two ways to approach the protection of cultural property—the “purpose or civilian-use test” and the “cultural value test.”⁹⁴ The former focuses on the purpose of the property, which is also endorsed by the Rome Statue. Buildings must be *dedicated* to religion, education, charitable purposes, science or art, or must be hospitals or places where the wounded and sick are collected to receive protection.⁹⁵ The necessity of a prevailing purpose is implicit in all these contexts, although, generally, historical monuments appear to be the exception. Case law from the ICTY reaffirms that the property need only be important to the communities it was part of and need not meet the higher thresholds of “heritage” in international law.⁹⁶ “Hospitals or places where the wounded and sick are collected” indicates that the source of protection exists due to the presence of protected persons or objects within these areas.⁹⁷ The Ntaganda Trial Chamber Judgment is illustrative of this point. In making a determination of whether the Sayo health center qualifies for protection under article 8(2)(e)(iv), the Chamber notes “Because persons seeking treatment were present at the Say health center, the Chamber finds that the health center was in use as a medical facility at the time of the attack.”⁹⁸ Immunity from attack would be suspended or lost as soon as such persons or objects are removed.

The issue with a purely civilian-use approach is that it renders a limiting element to the property, conscribing its protection to the duration for which it has a purpose. This would grant impunity to regimes, or armed groups, which destroy buildings and structures after declaring they no longer have a religious value. This would also make hospitals, schools, or cultural institutions susceptible to attacks, as they are abandoned on the fear or threat of battle. The cultural value approach, on the other hand, would require that the properties form a valuable part of the heritage of mankind. “Cultural and spiritual heritage of peoples” refers to objects with an importance that transcends the borders of countries, and which possess a uniqueness “due to their relation to the history and culture of people.”⁹⁹ However, the cultural value approach sets a very high

⁹⁴ Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 PENN ST. INT’L L. REV. 857, 866 (2005); Michaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EURO. J. INT’L L. 203, 204 (2011).

⁹⁵ See Rome Statute, *supra* note 27, arts. 8(2)(b)(ix), (e)(iv).

⁹⁶ See Blaskić, Judgment, ¶¶ 419–423.

⁹⁷ See *Hague Regulations, 1907*, *supra* note 11, art. 27.

⁹⁸ See Ntaganda, Judgment ¶ 1147

⁹⁹ CLAUDE PILLOUD, ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE

threshold for qualification as cultural property because very often this protection is contingent on the passage of time.¹⁰⁰ This would depart from established jurisprudence and defy the wording of the provision, which clearly confers protection on any cultural property that is important to any community. The ICTY has protected heritage, ranging from property that is hundreds of years old as seen in the *Strugar* case, and property destroyed only shortly after it was built as seen with the Donji Ahmici Mosque in the *Blaskic* judgment.¹⁰¹

The Preparatory Committee did initially consider a cultural value approach for the Rome Statute, but eventually discarded it.¹⁰² From this, one may infer that the drafters did intend to adopt a much lower threshold, closely resembling the civilian-use approach. In the *Al Mahdi* Judgment, the Court observed that the destroyed mausoleums were places of prayer and pilgrimage.¹⁰³ The Chamber noted that the buildings did not just have religious value, but also symbolic and emotional value, and the buildings qualified as religious because of the part they played in cultural life in Timbuktu.¹⁰⁴ The victims of the crime did not just include the inhabitants of Timbuktu, but also the international community.¹⁰⁵ The Prosecutor observed that visiting the mausoleums was an expression of faith and that both locals and foreigners visit the sites to pray.¹⁰⁶ Furthermore, she explained that “to protect cultural property is to protect our culture, our history, our identity.”¹⁰⁷ The Court adopted an approach that clearly endorses the civilian-use rationale of the statute, but also supported it with a value-based approach.¹⁰⁸ The structures in Mali were protected for their intrinsic historical character, the roles they played in the practices and lives of the people, and the attached emotional worth.¹⁰⁹ This is part of an emerging trend in international law to identify the values or rights underpinning international crimes.¹¹⁰

GENEVA CONVENTIONS OF 12 AUGUST 1949 1469 (1987).

¹⁰⁰ See UNESCO, FIGHTING THE ILLICIT TRAFFICKING OF CULTURAL PROPERTY (2018).

¹⁰¹ *Blaskic* Judgment ¶ 422.

¹⁰² M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 90 (2005).

¹⁰³ *Al Mahdi*, Judgment and Sentence, ¶ 34.

¹⁰⁴ *Id.* ¶ 80.

¹⁰⁵ *Id.* ¶¶ 46, 79.

¹⁰⁶ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Mr. Ahmad Al-Faqi Al Mahdi, International Criminal Court (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See generally UNESCO, INVESTING IN CULTURAL DIVERSITY AND INTERCULTURAL DIALOGUE (2009).

¹¹⁰ Ciara Laverty, *What lies beneath? The turn to values in international criminal legal discourse*, EJIL: TALK! (Apr. 23, 2018), <https://www.ejiltalk.org/tag/forcible-transfer/>.

In the *Ongwen* case, the Prosecutor explained that “the value protected by the criminalization of force pregnancy...is primarily reproductive autonomy.”¹¹¹ Similarly, in the Prosecutor’s request to the ICC in the Myanmar Situation, the Prosecutor argued that deportation and forcible transfer are separate crimes due to the different values protected within each—a conclusion supported by the object and purpose of the Rome Statute.¹¹² This kind of approach resolves the problems associated with a strict and plain application of the “purpose test.” Articles 8(2)(e)(iv) and 8(2)(b)(ix) implicitly encapsulate protection of intangible cultural heritage—both the practices and rituals of the people and the spiritual, emotional, or other values they ascribe to those structures. The meaning of “attack” itself would indicate that it can only be incidental and not explicit protection of cultural values because an act of violence, even if motivated by ideological hatred, must be directed at something tangible. Additionally, because Articles 8(2)(e)(iv) and 8(2)(b)(ix) only protect immovable cultural property, the destruction of movable implements that facilitate protected practices will not fall under the scope of these Articles.

c. *Temporal Element*

Based on the apparently limiting temporal aspect of the civilian-use approach, one must determine the temporal element within the crime. In examining charges and evidence with respect to attacks or destruction of cultural property, the ICTY and the ICC have focused on the status of the property *at the time of the attack*.¹¹³ The property must not be a military objective at the time the attack is launched, and it must also clearly be recognized as an institution dedicated to one of the enumerated purposes in the relevant statute.¹¹⁴ If the object is devoid of cultural significance when attacked, it would not fulfil the material element of dedication to a purpose. One may logically conclude that if a structure was part of a tradition where the intrinsic religiosity ebbed to nothingness and the structure was firmly slated for no future use, then it would only garner a more ordinary level of protection under another general provision. However, if a property—periodically demolished and rebuilt as part of a tradition—is destroyed in war before its scheduled religious demolition, this

¹¹¹ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen, (Dec. 6, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen>.

¹¹² ICC-RoC46(3)-01/18-1, Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, (Apr. 9, 2018).

¹¹³ Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ¶ 36.

¹¹⁴ Blaskić, Judgment ¶ 185.

would still hurt the religious sentiments of the people, thus destroying tangible, immovable property that is intrinsic and purposeful to cultural practices.¹¹⁵ This would constitute a war crime.¹¹⁶ Even in the case that the property was such that it only had religious value when rituals were performed within, if the property was supposed to be part of some future ritual, its designation for cultural use and its role in cultural practices would confer protection under the value-based approach.¹¹⁷ With regard to the temporal element, the Trial Chamber in the *Ntaganda* case also examined the function of the attacked objects at the time of the assaults.¹¹⁸ Because patients were situated in an attacked health center at the time of the attack, and there was no evidence to indicate that the center had become a military objective, the Chamber concluded that the health center was a protected object within the scope of Article 8(2)(e)(iv).¹¹⁹

CONCLUSION: THE POTENTIAL IN PROGRESSIVE INTERPRETATION

Article 22 of the Rome Statute encapsulates the principle of legality, thus limiting the liability of individuals only to those crimes that are clearly proscribed under the statute.¹²⁰ It also emphasizes the rule of strict construction, limiting the ability to analogize.¹²¹ This does not however preclude the Court from progressively clarifying the contours of an offense.¹²² Moreover, although fairly limited, the Court may employ analogies to fill interpretative gaps in statutory offenses. This would save vaguely-worded provisions from being deemed void, and rendering them operational in consonance with their intended objective. The evolution of cultural property definitions and protections over the last few decades have recognized the need for preservation, compelling respect and igniting discussions on protection, particularly during armed conflict. The Article 8 provisions in the Rome Statute have been infrequently invoked in the brief history of the Court. Ahmed Al-Mahdi's and Bosco Ntaganda's charging under Article 8(2)(e)(iv) perhaps mark the potential for an emphatic shift towards cultural rights protection.

¹¹⁵ See generally Mia Swart, *Explainer: What is a war crime?*, AL JAZEERA (Oct. 23, 2019), <https://www.aljazeera.com/news/2019/10/23/explainer-what-is-a-war-crime>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Ntaganda*, Judgment ¶1146.

¹¹⁹ *Ntaganda*, Judgment ¶1147.

¹²⁰ See generally Talita de Souza Dias, *The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad hoc Declarations: An Appraisal of the Existing Solutions to an Under-discussed Problem*, 16 J. INT'L CRIM. JUST. 65 (2018).

¹²¹ *Id.*

¹²² *Id.*

The Preparatory Committee deliberately employed different words of varying import for Article 8 provisions, and the language of the statute must be adhered to. Articles 8(2)(b)(ix) and 8(2)(e)(iv) only protect tangible structures from targeted acts of violence during battle or as part of military oriented operations. Cultural structures are protected for the utility they offer to civilian populations, whether for religious, artistic, scientific, educational, historical, charitable, or medical purposes.

Criminalization of intentional war time disruptions to intangible manifestations of cultural traditions is not a norm under customary international law. However, progressive judicial interpretation offers a way for the Court to clarify the extent to which intangible values—traditions, rituals, or festivals—might be protected under Articles 8(2)(b)(ix) and 8(2)(e)(iv), either incidentally or indirectly. Cultural value is conferred on property through a variety of factors, including but not limited to, the intangible value of buildings, the place they occupy in the community, and the purpose they hold for current or future use.

The scheme of the statute necessarily implies limitations in interpretation of these provisions, but it does not obliterate or militate against the objective of ending impunity for crimes. For any offense under international law that is not envisioned under Articles 8(2)(b)(ix) and 8(2)(e)(iv), the statute offers alternative provisions under Article 8 itself.¹²³ Acts that do not fit within the contours of any enumerated offense, or crimes not included within the statute either intentionally or unintentionally, fall under Article 22(3) of the statute.¹²⁴ Human rights mechanisms, special tribunals, and national forums may still prosecute persons for such crimes.

The *Ntaganda* Trial Chamber lucidly demarcated the bounds of Article 8(2)(e)(iv) in a manner more consistent with the jurisprudential derivations of the provision. However, the ambiguous footnote 3147 could potentially bridge the differences in interpretations between the *Ntaganda* and *Al-Mahdi* cases.¹²⁵ This would allow the meaning of “attack” to be broader only when the relevant provisions are applied to cultural objects with a special status. The next Chamber to contemplate Articles 8(2)(b)(ix) or 8(2)(e)(iv) should consider dispelling all doubts and decisively putting an end to all debate.

¹²³ See Rome Statute, *supra* note 27, arts. 8(2)(b)(ix), (e)(iv).

¹²⁴ *Id.*

¹²⁵ *Id.*