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Making crimes mean: a normative analysis of the acts that constitute international crimes

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CHAPTER 2. ATTACKS ON CULTURAL PROPERTY

In international criminal law, crimes against buildings or property are those that depart most explicitly from the paradigm of physical security or bodily integrity harms that are commonly identified as providing the core normative basis for international criminalisation.¹ The nature of the buildings and property protected in international criminal law, particularly within the category of war crimes, is varied. Some of these crimes, such as the prohibitions on directing attacks at civilian objects, humanitarian assistance or peacekeeping installations or at hospitals and medical facilities, may be linked at a normative level to the core concepts of the protection of the life and physical integrity of the human person, in that they function directly to spare civilian lives.²

The link between the criminalisation of acts targeting other types of property and this normative basis is less evident. For instance, the war crimes of appropriation or seizing of property and pillage expand the protection of different types of property beyond those linked with medical, humanitarian or civilian protection functions, to encompass a more general protection for the property of the adversary during situations of armed conflict. For this reason, some moral philosophical accounts of international criminal law question the criminalisation of acts of this nature on the grounds that they do not 'seem as important'³ as attacks on persons. Others go further, to explicitly oppose the inclusion of these war crimes in the Rome Statute. According to this view, such acts are insufficiently grave to be criminalised under international law since they do not involve violations of physical security rights.⁴

The normative basis of the criminalisation of attacks on buildings dedicated to culture, as a specific category within broader protections for property under international criminal law, is similarly contested.⁵ The response to the *Al Mahdi* case at the ICC, which involved the first charges for attacks on cultural property at the Court, is illustrative of this contestation. Civil society actors expressed concerns at the limited scope of the trial, in which *Al Mahdi* was prosecuted and convicted on the sole charge

¹ Larry May, *Crimes Against Humanity: A Normative Account* (2005 Cambridge University Press), 21; Massimo Renzo, 'Crimes Against Humanity and the Limits of International Law', (2012) 31(4) *Law and Philosophy*, 453; Kirsten Fisher, *Moral Accountability and International Criminal Law – Holding Agents of Atrocity Accountable to the World*, (Routledge 2013), 41-42.

² Micaela Frulli, 'The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency', (2011) 22(1) *European Journal of International Law*, 207.

³ Larry May, *War Crimes and Just War* (Cambridge University Press 2007), 20.

⁴ Fisher (n 1), 41-42.

⁵ The term 'buildings dedicated to culture' or 'cultural property' are used in this chapter as a catch-all for the categories of buildings attacks on which are criminalised in the ICTY and Rome Statute, namely buildings dedicated to religion, education, art, science, charitable purposes, historic monuments and works of art and science.

of intentionally directing attacks against religious or historic buildings in Timbuktu, for excluding crimes involving violence against persons. Interviews among residents of Timbuktu similarly suggest a generally negative response to the focus on the destruction of cultural property over 'more serious crimes' that have taken place during the conflict in Mali.⁶

While not directly contesting the normative justification for conducting a prosecution for the destruction of cultural property per se, these responses nevertheless reflect a sense of unease with the perception that the destruction of a building could be placed on the same moral footing as crimes that involve violence against people. This contestation over the normative validity of protecting or prioritising property in situations where human life is at risk is not new, and has long historical roots in debates over the legal doctrine governing the protection of cultural property in armed conflict.⁷ At the heart of these debates, and how they have manifested in international criminal law, lies the question of what justifies the criminalisation of attacks on cultural property in the same normative universe as large-scale violence to life and person?

This chapter examines how this question has been navigated in the doctrine and through the practice of international criminal law. The chapter first sketches the legal-historical roots of the protection of cultural property in armed conflict, outlining its dual normative roots in the emergence of the doctrine of necessity in the law of war alongside wider ideas about the importance of the arts, history and culture that emerged in Europe during the Enlightenment. The chapter goes on to trace the legal developments in international humanitarian law as well as in specialised treaty regimes that provide the legal basis for the contemporary criminalisation of attacks on or destruction of cultural property during armed conflict. It identifies a degree of fluctuation between a civilian-use versus a cultural-value based rationale for the protection of cultural property during armed conflict invoked by these norms, which subsequently manifests in the definitions of this crime applied at the ICTY and the ICC.

Analysing the normative themes constructed around this crime in the case law of the ICTY and the ICC, the chapter nevertheless goes on to demonstrate how the cultural value rationale for the protection of cultural property has overwhelmingly dominated the normative discourse around the crime in practice. The chapter identifies a number of different conceptions of how the nature of cultural value is constructed in these cases in both the legal decisions as well as during the course of proceedings, which

⁶ See Oumar Ba, 'Contested Meanings: Timbuktu and the prosecution of destruction of cultural heritage as war crimes', (2020) 63(4) *African Studies Review*, 743-762.

⁷ John Henry Merryman and Albert E. Elsen, *Law, Ethics and the Visual Arts* (Kluwer Law International 2002), 1-111.

draw variously on the wider theoretical traditions of internationalist, object-centric, functionalist and anthropocentric approaches to cultural property. While these cases as a whole in this way offer a multifaceted account of the value of cultural property, and therefore of the justification for the criminalisation of its destruction, the chapter also identifies a pronounced shift towards a more emphatically anthropocentric, people-oriented conception of cultural value in the *Al Mahdi* case at the ICC.

1. Historical-normative roots in international law

The international legal regime governing the protection of cultural property during armed conflict has its normative roots in early writing on the law of nations during the 16th and 17th centuries and the attempts to articulate norms regulating the plunder and destruction of property.⁸ At this point in its development, contemporary notions of just war permitted the use of any violence necessary to advance the cause of a war whose end was considered just. In principle, the destruction of any of the enemy's property could therefore be considered permissible.⁹ While permitting necessary violence, the dual nature of this doctrine of necessity nevertheless also therefore proscribed actions unnecessary for the advancement of the cause of a just war, such as the killing of civilians or the destruction of their property.¹⁰ At this time, objects or property with cultural significance could therefore be considered to enjoy some degree of protection during war to the extent that their destruction did not contribute to the military strength or advantage of the enemy.

While objects of cultural value were from this perspective not regarded as a category distinct from other types of property, by the 17th century, Hugo Grotius, and a number of other scholars, were alluding in a limited fashion to protections for some specific types of property that would fall within a modern understanding of 'cultural' property. Grotius, for instance, argued that 'those things which, if destroyed, do not weaken the enemy, nor bring gain to the one who destroys them' such as 'colonnades, statutes, and the like', namely 'things of artistic value', ought not to be destroyed.¹¹ By the mid-18th century Emmer de Vattel, in his treatise on the law of nations, made explicit that:

For whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength, - such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is

⁸ Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict*, (Cambridge University Press 2009), 5.

⁹ *Ibid.*, 6.

¹⁰ *Ibid.*, 5-6.

¹¹ Hugo Grotius, *De Jure Belli ac Pacis* as cited in O'Keefe (n 8), 6.

declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste...¹²

From an historical perspective, the normative roots of the protection of cultural property during armed conflict in this way lie in the general doctrine of necessity, requiring that only violence or destruction necessary for harming the enemy's ability to wage war be permitted, while acts unnecessary for achieving this aim were proscribed. At the same time, this early scholarship on the law of nations already attributed additional normative significance to a particular class of objects and property; those that 'do honour to human society.'¹³ In this way, protections for cultural property during armed conflict can be understood to have emerged from a combined normative basis, rooted both in the protection of 'civilian' property (i.e. property that did not contribute to the enemy's military strength) as a general category, as well as in the understanding of cultural property as something distinct.

Wayne Sandholtz has outlined how the confluence of two sets of emerging trends in European society underpinned the development of this approach to cultural property. He identifies the attempts to humanise and rationalise war by limiting its use to that which is necessary for victory, combined with the wider cultural transformations of the Renaissance and the Enlightenment, in which European elites came to confer upon art 'an almost sacred status that separated works of art from other kinds of property, like horses and shoes'¹⁴, as the catalysing normative developments that lie at the historical root of the modern legal regime governing the protection of cultural property during armed conflict.

The cultural transformations that gave rise to this veneration of art and culture originated during the Renaissance, which saw the emergence of a new humanism, a nostalgia for classical antiquity and the rapid expansion of interest in literature, architecture and the fine arts.¹⁵ A new sense of historicity, brought about by the rejection of the medieval notion of a universal, religious history, reinforced the interest in the study of ancient monuments and works of art,¹⁶ while the emergence of humanism, with its focus on the accomplishments of individual human beings, engendered a transformation in the concept of art. The medieval artisan tradition, in which painting and sculpture were viewed as crafts or trades, was replaced by the emergence of the concept of the work of art in its aesthetic dimension, attached to notions of innate beauty and understood in terms of having 'qualities surpassing those embodied in the works of ordinary craftsmanship, a unique character, marking the

¹² Emer de Vattel, *The Law of Nations, Book 3* (Liberty Fund Inc. 2008), para 168 at 571.

¹³ *Ibid.*

¹⁴ Wayne Sandholtz, *Prohibiting Plunder: How Norms Change* (Oxford University Press 2007), 32.

¹⁵ Jukka Jokilehto, *A History of Architectural Conservation* (Butterworth-Heinemann 2002), 15.

¹⁶ *Ibid.*

individual genius of its creator.¹⁷ Acquiring and restoring antiquities, works of art and collections became fashionable among the wealthy and educated European elite, whose shared experience of the 'grand tour' of Europe, which shaped their tastes and ideas through exposure to the cultural legacy of classical antiquity, reinforced the cosmopolitan ties among them and contributed to an understanding of the arts and sciences as something of a transnational common good.¹⁸ Roger O'Keefe identifies the roots of later internationalist approaches to cultural property in this cultural moment. He explains that:

the vision of a transnational commonwealth of the learned became the vision of a transnational commonwealth of what they were learned in: artworks, architecture and antiquities — that is, the actual paintings and sculptures, grand buildings and monuments, ruins and relics — themselves came to be viewed as a universal metaphysical estate whose wellbeing was a common human concern.¹⁹

The valorisation of culture, history and the arts expanded during the Enlightenment, as divine values came to be increasingly contested and the faith in human-directed progress through science and reason produced profound changes in the concepts of art, history, heritage and human beings' relationship to nature and the universe.²⁰ History came to be understood as a 'collective, social experience, recognizing that cultures of different ages and regions could have their own style and guiding spirit.'²¹ With growing knowledge of this diversity of customs and values emerged an appreciation of cultural pluralism and the recognition that different nations had different cultures and attitudes.²² This new approach to history and culture transformed how art, architecture and historic buildings were understood and led to consideration of works of art and historic buildings 'as unique, and worthy of conservation as an expression of a particular culture and a reflection of national identity.'²³

The change in the understanding of history that took place during the Enlightenment in Europe, in which the past became 'intellectualised and valorised'²⁴, was central in the emergence of the concept of the historic monument in particular. Where

¹⁷ Stanisław Edward Nahlik, 'Protection of Cultural Property' in Henry Dunant Institute (ed), *International Dimensions of Humanitarian Law* (Brill Nijhoff 1988), 203. See also Jokilehto (n 15), 15.

¹⁸ Jokilehto (n 15), 16. See also Sandholtz (n 14), 39; O'Keefe (n 8), 8.

¹⁹ O'Keefe (n 8), 9.

²⁰ Jokilehto (n 15), 17.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Miles Glendinning, *The Conservation Movement: A History of Architectural Preservation Antiquity to Modernity* (Routledge 2013), 46.

previously past, present and future, sacred and secular were understood as interwoven, the new understanding of history and the growing separation of the sacred from the secular provided the conditions for the emergence of the concept of the historic monument as ‘something unambiguously secular and tied to a strong sense of historical progress and authenticity, especially under the authority of the nation-state.’²⁵ Similarly, the centrality of individualism for Enlightenment thought and the displacement of God and religion as the centre of the universe by man’s mastery over nature through science and creativity further elevated the status of art and artists. Art came to be revered ‘not just because collecting it was a sign of wealth, power, and taste, but because art was seen as the most transcendent product of human genius and creativity. [...] The arts performed, for Enlightenment thinkers, some of the roles previously associated with faith and devotion, in elevating and improving the spirit.’²⁶ It is this reverence for art and cultural treasures, characteristic of the Enlightenment, that is reflected in Emer de Vattel’s appeal for the sparing during war of ‘those edifices which do honour to human society [...] - such as temples, tombs, public buildings, and all works of remarkable beauty.’²⁷

Against this wider societal context, the French Revolution and the Napoleonic wars marked a pivotal moment in attitudes to the protection of monuments and art during peace as well as during war.²⁸ During the French Revolution, buildings and monuments that represented religious or aristocratic power, as symbols of past oppression, became targets for destruction.²⁹ Replacing the absolutist state and its legitimacy based on divine right, secular notions such as national identity and class solidarity came to be venerated, with secular monuments representing the past achievements of the people who constituted the new nation taking on an ‘almost sacred character, as a stabilising force that could offset the iconoclastic excesses of the revolution.’³⁰ The ensuing process of nationalising cultural assets gave rise to the emerging notion of relics and monuments as constituting a shared national ‘heritage’ that could anchor a nation’s identity and future in its past.³¹

During the wars that followed, French armies across Europe systematically confiscated and appropriated collections of artworks from their enemies on a vast scale, prompting a continent-wide debate on the protection and restitution of looted cultural treasures.³² From a normative perspective, Wayne Sandholtz has explained how the outcry engendered by this systematic looting sprang from the particular

²⁵ *Ibid.*, 47.

²⁶ Sandholtz (n 14), 36.

²⁷ de Vattel (n 12), para 168 at 571.

²⁸ O’Keefe (n 8), 13.

²⁹ Jokilehto (n 15), 18.

³⁰ Glendinning (n 24), 66.

³¹ *Ibid.*, 67.

³² Sandholtz (n 14), 49.

exalted position that art and culture had come to enjoy in society by the late 18th century. He argues that:

Only in the context of this veneration of art and artists, developing since the Renaissance, is it possible to understand the meaning of wartime plunder both for those who engaged in it and for those who suffered it during the wars of the French Revolution and Empire. For neither group was art a simple possession, like cattle. Depriving a people of its great art was tantamount to cutting it out of participation in the highest expression of culture and (in the language of the time) civilization. In the language of rights, so characteristic of the Enlightenment, people were entitled not just to their property but to their share of humanity's artistic patrimony.³³

The subsequent debates, and the insistence among several of the victorious states on the return of plundered art 'crystallized the sense that such looting was illegitimate.'³⁴ The 1814 Congress of Vienna included provisions on the return of stolen art, invoking for the first time in this respect the notion of a 'common heritage of mankind.'³⁵ While consensus remained incomplete on the question of a prohibition on the looting of cultural objects, the debates engendered by the Napoleonic wars and their aftermath nevertheless laid the groundwork for an emerging norm prohibiting the plunder of art and cultural objects during war.³⁶

During the early 19th century, the consolidating form of the nation-state further reinforced the social and political status of historic monuments and works of art as anchors for burgeoning notions of national identity and shared national past. This also prompted the establishment of numerous national bodies concerned with the preservation of historic monuments and works of art across Europe and more widely.³⁷ In this context, the idea of a national cultural heritage came to be increasingly significant 'in the definition of identities, belonging, and boundaries.'³⁸

It is this normative environment, with its veneration of the arts, science, culture and heritage, that ultimately gave rise to the inclusion of specific legal protections for certain categories of cultural property during armed conflict in the first codification of

³³ *Ibid.*, 36.

³⁴ *Ibid.*, 49, 71.

³⁵ Dacia Viejo-Rose and Marie Louise Stig Sørensen, 'Cultural Heritage and Armed Conflict: New Questions for an Old Relationship' in Emma Waterton and Steve Watson (ed), *The Palgrave Handbook of Contemporary Heritage Research* (Palgrave Macmillan 2015), 283.

³⁶ Sandholtz (n 14), 69.

³⁷ O'Keefe (n 8), 16-17.

³⁸ Marie Louise Stig Sørensen and Dacia Viejo-Rose, 'Introduction: The Impact of Conflict on Cultural Heritage: A Biographical Lens' in Marie Louise Stig Sørensen and Dacia Viejo-Rose (ed), *War and Cultural Heritage: Biographies of Place* (Cambridge University Press 2015), 4.

rules governing the conduct of belligerents in war. Under the heading ‘protection of persons, and especially of women, of religion, the arts and sciences’³⁹, the rules contained in the 1863 Lieber Code regulating the conduct of belligerent parties occupying enemy territory provided that ‘the property belonging to churches, to hospitals, or other establishment of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character is not to be considered public property’⁴⁰, and may not therefore be seized or appropriated.⁴¹

The Lieber Code further required that ‘classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury.’⁴² While it was permitted for the occupying party to seize and remove such objects if this was possible without causing damage, the Code nevertheless required that ‘the ultimate ownership [of these objects] is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.’⁴³

Amidst the flurry of efforts to codify rules to regulate the conduct of war during the late 19th and early 20th centuries, the next significant developments in the codification of rules protecting forms of cultural property were the 1874 Draft International Regulations on the Laws and Customs of War (‘the Brussels Declaration’), the first intergovernmental attempt to codify the laws of war, and the 1882 manual produced by the *Institut de droit international* (‘the Oxford Manual’), which contained similar prohibitions to the Lieber Code on the unnecessary destruction of objects of cultural value.⁴⁴ In addition to provisions similar to those reflected in the Lieber Code, both also contained the new requirement that in sieges or bombardments ‘all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.’⁴⁵

³⁹ Section II, Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863.

⁴⁰ *Ibid.*, Article 34.

⁴¹ *Ibid.*, Article 31.

⁴² *Ibid.*, Article 35.

⁴³ *Ibid.*, Article 36.

⁴⁴ While the Lieber Code permitted the seizure or removal of objects of cultural value by an occupying party on condition that were not sold or given away, the Brussels Declaration and Oxford Manual did not permit such seizure or removal. See O’Keefe (n 8), 22.

⁴⁵ Article 17, Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874. See O’Keefe (n 8), 19-20. See also John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’, (1986) 80(4) *American Journal of International Law*, 834.

The Brussels Declaration laid the basis for the subsequent codification of the 1899 and 1907 Hague Conventions concerning the laws and customs of war on land.⁴⁶ Along with a general prohibition on destruction or seizure of enemy property beyond the exigencies of military necessity,⁴⁷ these treaties codified the requirement originally articulated in the Brussels Declaration on sparing buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected during sieges and bombardments.⁴⁸ They also prohibited seizing, destroying or wilfully damaging institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science during belligerent occupation.⁴⁹

Reflecting its combined normative roots in the doctrine of necessity alongside the conception of cultural property as normatively particular and distinct, Francesco Francioni has highlighted how the legal framework governing the protection of cultural property during armed conflict at this stage in its development nevertheless remained somewhat normatively incoherent. He argues that protection was now afforded 'in a fragmented manner to certain property identified empirically [...] which [were] deemed worthy of protection as non-protected sites, as private or public property, and bundle[d] with those destined to a humanitarian function, such as hospitals.'⁵⁰ In this way, while these provisions protected specifically enumerated forms of cultural property, these were nevertheless not treated as normatively distinct from the much broader humanitarian concerns of limiting unnecessary use of force or protecting the sick and wounded.⁵¹ Francioni therefore suggests that, at this point, 'what is still missing [...] is a normative definition of what can be considered cultural heritage.'⁵²

Following this first codification of rules regulating the conduct of war, the subsequent experience of World War I, and the extensive destruction of cultural property that took place, catalysed greater engagement with the particular normative significance of cultural property in international law.⁵³ The damage inflicted during the course of the war to cities such as Louvain in Belgium and Kalisz in Poland, and the shelling of

⁴⁶ Francesco Francioni, 'The Evolving Framework for the Protection of Cultural Heritage in International Law' in Silvia Borelli and Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law* (Brill-Nijhoff 2012), 8.

⁴⁷ Article 23(g), 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.

⁴⁸ *Ibid.*, Article 27.

⁴⁹ *Ibid.*, Article 56.

⁵⁰ Francioni (n 46), 8.

⁵¹ Frulli (n 2), 207.

⁵² Francioni (n 46), 8.

⁵³ O'Keefe (n 8), 40.

monuments such as Reims Cathedral,⁵⁴ provoked a heated public debate and propaganda campaigns on both sides, coming to serve a symbolic role as ‘an instrument of national and international mobilization.’⁵⁵ This in turn contributed to a number of legal developments,⁵⁶ including the inclusion of the crime of ‘wanton destruction of religious, charitable, educational and historic buildings and monuments’ in a list of war crimes drafted by the Commission on Responsibilities of the 1919 Preliminary Peace Conference of Paris. While no trials ultimately took place, this represented the first attempt to codify a criminal prohibition at the international level applicable specifically to the destruction of objects and property of cultural significance.⁵⁷

The interwar period saw a number of further developments in the codification of norms governing the protection of cultural property in armed conflict. In 1935, the Treaty on the Protection of Artistic and Scientific Institutions and Monuments (‘the Roerich Pact’) was signed by the United States and Latin American nations, representing the first international convention devoted specifically to the protection of cultural property.⁵⁸ The Pact is applicable to historic monuments, museums, scientific, artistic, educational and cultural institutions during times of peace as well as war.⁵⁹ It contains a number of protections for such buildings, including an affirmation of their neutrality, a general obligation to respect and protect them,⁶⁰ along with concomitant specific obligations such as a system of flags for identifying protected buildings.⁶¹ Importantly, Article 5 of the Pact states that monuments, museums and institutions only cease to enjoy protection if they are used for military purpose, in this way excluding a wider military necessity justification for the withdrawal of protection.⁶²

From a normative perspective, perhaps the most significant development reflected in the Roerich Pact is the very fact that it was dedicated specifically and exclusively to the protection of buildings of historical, cultural and artistic significance.⁶³ Thus, while similar to the Hague Regulations and Convention of 1899 and 1907 in how it remained

⁵⁴ Serge Brammertz et al., ‘Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY’, (2016) 14 *Journal of International Criminal Justice*, 1147.

⁵⁵ Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution* (Reaktion Books 1997), 42.

⁵⁶ See O’Keefe (n 8), 40-43.

⁵⁷ O’Keefe (n 8), 343.

⁵⁸ Merryman (n 45), 835.

⁵⁹ Article 1, Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (‘the Roerich Pact’), Washington, 15 April 1935.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, Article 3.

⁶² O’Keefe (n 8), 52.

⁶³ Sandholtz (n 14), 103.

‘very general about the definition of the terms cultural property’,⁶⁴ it also marked a departure from the provisions in these conventions, which grouped protection for different types of cultural property together with protection for buildings with purely humanitarian purposes. The creation of a specialized convention devoted exclusively to the protection of cultural property, along with its rejection of the exception of military necessity in the context of cultural property protection, in this way embodied an emerging articulation in legal terms of cultural property as something normatively distinct from property with purely humanitarian or civilian roles, and therefore worthy of protection ‘for itself, because of its intrinsic value and importance to humanity.’⁶⁵

Attempts by the League of Nations to codify a similar treaty were ultimately overtaken by the beginning of World War II.⁶⁶ The Second World War saw the deliberate and systematic destruction and plunder of galleries, museums, libraries and historic sites by the Nazis in Poland and the Soviet Union, the theft of private collections owned by Jews throughout Europe, and the destruction of thousands of libraries in China by Japanese forces.⁶⁷ At Nuremberg, attacks against cultural property were nevertheless not addressed directly but were captured through more general charges of plunder of public or private property, wanton destruction of cities, towns or villages, devastation not justified by military necessity, or persecution.⁶⁸ For this reason, cultural property was addressed in a somewhat incoherent fashion in the Nuremberg judgment, and was ‘squeezed in between other types of property, such as raw materials or agricultural stock including cows, pigs, poultry and agricultural machines of all kinds.’⁶⁹ In addition, the destruction of immovable forms of cultural property was strikingly absent from the Nuremberg judgment, with only some cursory references made to the burning and demolishing of synagogues, the destruction of museums and the plunder of art from museums, libraries and private collections.⁷⁰

⁶⁴ Friedrich T. Schipper and Erich Frank, ‘A Concise Legal History of the Protection of Cultural Property in the Event of Armed Conflict and a Comparative Analysis of the 1935 Roerich Pact and the 1954 Hague Convention in the Context of the Law of War’, (2013) 9(1) *Archaeologies: Journal of the World Archaeological Congress*, 17.

⁶⁵ Frulli (n 2), 205.

⁶⁶ Merryman (n 45), 835.

⁶⁷ Brammertz et al. (n 54), 1148.

⁶⁸ O’Keefe (n 8), 88.

⁶⁹ Jadranka Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict*, (Martinus Nijhoff 2012), 51-52.

⁷⁰ *Ibid.*, 53. The plunder and looting of occupied states was addressed most explicitly in relation to the conviction of Alfred Rosenberg, who was found to have been ‘responsible for a system of organised plunder of both public and private property throughout the invaded countries of Europe. [...] he organised and directed the ‘Einsatzstab Rosenberg’, which plundered museums and libraries, confiscated art treasures and collections and pillaged private houses. [...] As of July 14th, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the

Despite the limited extent to which the destruction of cultural property as a normatively distinct act was addressed at Nuremberg, the events of the Second World War and the public condemnation they aroused are nevertheless seen to have played a significant role in bolstering political mobilisation around the need to protect cultural property as a category of property with specific status and value.⁷¹ While the codification of the 1949 Geneva Conventions, which contain protections for civilian property as a general category,⁷² did not yet reflect this evolution, following the establishment of UNESCO in 1946, work was resumed on codifying a specific multilateral convention devoted to ensuring protection for monuments and works of art during times of war.⁷³

In 1954, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted. The Convention contained a number of innovations from a legal perspective, including applicability to both movable and immovable property,⁷⁴ a system of identifying protected property through the creation of an emblem,⁷⁵ as well as inclusion of individual criminal responsibility for breaches of the convention.⁷⁶ At a conceptual level, the adoption of the 1954 Convention represented a significant consolidation of the view that cultural property required specific and distinct protection 'for the intrinsic value of culture and not as an indirect consequence of the protection of property rights or State sovereignty',⁷⁷ that had emerged in legal form at a regional level with the adoption of the Roerich Pact.

In this respect, the 1954 Convention also constituted a development in terms of how the nature of this intrinsic value of culture was conceptualised. The 1954 Convention has been described as 'a charter for cultural internationalism'⁷⁸ by virtue of its preamble, which affirms that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.'⁷⁹ While a cultural 'nationalist' approach to cultural value identifies cultural property to be the exclusive property of

Einsatzstab in the West [alone]. – *The Trial of German Major War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22 August 1946 to 1 October 1946), 496.

⁷¹ O'Keefe (n 8), 91.

⁷² Frulli (n 2), 207.

⁷³ O'Keefe (n 8), 92.

⁷⁴ Article 1, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954.

⁷⁵ *Ibid.*, Articles 6, 16 and 17.

⁷⁶ *Ibid.*, Article 28.

⁷⁷ Francioni (n 46), 9.

⁷⁸ Merryman (n 45), 837.

⁷⁹ Preamble, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954.

its nation of origin, which 'gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership'⁸⁰, the 'internationalist' ethos invoked by the 1954 Convention approaches cultural objects and property instead as 'components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.'⁸¹ Roger O'Keefe has noted that, while this type of internationalist cultural ethos was common by the mid-twentieth century, the preamble to the 1954 Convention constituted the first international convention to capture this conception of cultural property in legal terms.⁸² In doing so, the Convention brought to legal life the cosmopolitan notion of a 'global interest' in protecting and conserving the cultural property of all peoples, which, in turn, is understood to constitute 'the civilization of the world.'⁸³

In addition, the 1954 Convention offered the first definition of the term cultural property in an international convention, constituting a further development in how the nature of the cultural value of the property it seeks to protect was conceptualised. The 1954 Convention defines cultural property as 'movable or immovable property of great importance to the cultural heritage of every people', and goes on to provide a number of examples of such property.⁸⁴ This definition in this way incorporates an evaluative component, requiring that, in order for it to enjoy protection, the property must be considered of 'great importance to the cultural heritage of every people.'⁸⁵ In this sense, the category of immovable property protected by the 1954 Convention is narrower than that contained in the 1907 Hague Convention, which protects *all* 'buildings dedicated to religion, art, science, or charitable purposes, historic monuments'⁸⁶, regardless of whether they can be considered of particular significance or value. In doing so, the 1954 Convention invokes the idea that some forms of cultural property can be considered to be of higher value, and therefore of greater importance, than others.

Micaela Frulli has argued that this aspect of the 1954 Convention constitutes the moment at which two diverging approaches to the justification for protecting cultural property during armed conflict emerged in the international legal framework.⁸⁷ The

⁸⁰ Merryman (n 45), 832. For a philosophical account of the claims involved in invoking international or national value see Erich Hatala Matthes, 'Impersonal Value, Universal Value, and the Scope of Cultural Heritage' (2015) 125(4) *Ethics*, 999-1027.

⁸¹ Merryman (n 45), 831.

⁸² O'Keefe (n 8), 94-95.

⁸³ Francioni (n 46), 9.

⁸⁴ Article 1, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954.

⁸⁵ *Ibid.*, Article 1(a).

⁸⁶ Article 27, 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.

⁸⁷ Frulli (n 2), 204.

approach reflected in the 1954 Convention, with its explicit invocation of a hierarchy among forms of cultural property, can be understood as a 'cultural value' approach, which Frulli describes as the idea that certain types of property are worthy of protection because of their 'intrinsic value and importance to humanity above and beyond [their] everyday use by civilians.'⁸⁸ By contrast, Frulli understands the 1907 Hague Convention to reflect the more traditional 'civilian use' approach to evaluating the normative significance of cultural property, which locates the need to protect it in relation to the broader need to protect civilians and their property during armed conflict.⁸⁹ This shift towards a more emphatically cultural value approach in the 1954 Convention is further reinforced through the reference to property of great importance to the cultural heritage every 'people', as opposed to the heritage of nations or states. The term 'cultural heritage of peoples' instead invoked for the first time a conception of cultural value in social terms, understood to reflect the idea that 'as an anthropological matter, 'cultural' property [is 'cultural'] by virtue of social context - that is, by virtue of the meaning ascribed to it by a society.'⁹⁰

While the adoption of the 1954 Hague Convention constituted perhaps the most significant evolution at a conceptual level in how the protection of cultural property during armed conflict was justified, the international legal regime governing the protection of cultural property during armed conflict has continued to develop over time. The adoption of the 1977 Additional Protocols to the Geneva Conventions consolidated the place of protections for cultural property in the general treaties of international humanitarian law, and broadly emulated the scope of protections contained in the 1954 Hague Convention.⁹¹ Both Additional Protocols contain general protections for civilian property, with the explicit protections for cultural property contained in Article 53 of Additional Protocol I and Article 16 of Additional Protocol II considered *lex specialis* to these broader protections.⁹² The language of the 1977 Additional Protocols refers to the prohibition on committing any acts of hostility directed against 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.'⁹³ Both articles are applicable 'without prejudice' to the 1954 Hague Convention, making clear that the nature of the

⁸⁸ *Ibid.*, 205.

⁸⁹ *Ibid.*

⁹⁰ O'Keefe (n 8), 95.

⁹¹ Roger O'Keefe, 'Protection of Cultural Property' in ed. Andrew Clapham and Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014), 496.

⁹² *Ibid.*, 497.

⁹³ Article 53, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Article 16, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

property protected would be expected to equate to the evaluative threshold of 'cultural property' as defined in Article 1 of the 1954 Convention.⁹⁴

This brief outline of the historical development of the legal regime governing the protection of cultural property during armed conflict has sought to trace its dual normative roots through early norms on military necessity combined with the fundamental social, political and cultural changes that took place in the 18th and 19th centuries, which resulted in art, culture, history and science coming to enjoy a particular venerated position in Western society. This dual rationale for the protection of cultural property during armed conflict continued to shape the development of the international legal regime during the 20th century, and underpins the contemporary criminalisation and prosecution of the targeting and destruction of cultural property under international criminal law.

2. Definitions of attacks on cultural property in international criminal law

Following the development of rules providing for individual criminal responsibility for attacking or destroying cultural property during armed conflict in the specific treaty regimes and in international humanitarian law more widely, international prosecutions for such acts first materialised with the establishment of the ICTY. As part of the process of ethnic cleansing that took place during the conflict in Yugoslavia, religious and cultural property identified with particular ethnic and religious groups was systematically and deliberately attacked and destroyed. Secular monuments and institutions, most notoriously the Old Town of Dubrovnik, the National Library in Sarajevo, and the Old Bridge in the town of Mostar, were also targeted because of how they 'symbolized or contained material proofs of Bosnia's historic pluralist identity.'⁹⁵ The concerted attacks on cultural heritage that took place during the breakup of the former Yugoslavia provoked renewed attention to the destruction of cultural property in armed conflict, galvanizing significant activity in the field of cultural property protection more broadly,⁹⁶ and resulting in the inclusion of the crime in the statute of the ICTY.

⁹⁴ O'Keefe (n 8), 209, 211-214.

⁹⁵ Helen Walasek, 'Destruction of the Cultural Heritage in Bosnia-Herzegovina: An Overview' in Helen Walasek (ed), *Bosnia and the Destruction of Cultural Heritage* (Ashgate 2015), 23. See also András Riedlmayer, 'From the Ashes: The Past and Future of Bosnia's Cultural Heritage' in ed. Maya Schatzmiller, *Islam & Bosnia: Conflict Resolution and Foreign Policy in Multi-Ethnic States* (McGill Queen's Press 2002), 99.

⁹⁶ Helen Walasek, 'Introduction' in Helen Walasek (ed), *Bosnia and the Destruction of Cultural Heritage* (Ashgate 2015), 15-16.

a. *ICTY Statute*

Article 3(d) of the ICTY Statute provided the Tribunal with the power to prosecute the war crime of ‘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.’ Despite the scope of Article 3(d) not being limited to immovable cultural property, the Tribunal has nevertheless focused on immovable property in its cases.⁹⁷ The language of Article 3(d) has its roots in Article 27 of the 1907 Hague Regulations.⁹⁸ In what Micaela Frulli has described as ‘a little step forward’⁹⁹ in advancing the cultural value rationale for the protection of cultural property during armed conflict, Article 3(d) of the Statute nevertheless differs from the 1907 Regulations in that it is specific to certain forms of cultural property, recognising them as distinct from hospitals or places where the sick and wounded are collected.¹⁰⁰

At the same time, Frulli also suggests that the extent to which Article 3(d) can be understood to invoke a cultural value approach is circumscribed by the absence of an evaluative element similar to that contained in the 1954 Hague Convention requiring that the property be of ‘great importance to the cultural heritage of every people’¹⁰¹ in order to enjoy protection. In her view, Article 3(d) ‘reflects no differentiation among different elements of property’¹⁰² meaning therefore that ‘there is no graduation of gravity and, to give a concrete example, attacks against a small mosque have fallen under the very same provision (Art. 3(d)) as the shelling of the old town of Dubrovnik.’¹⁰³ While Frulli concludes that the ICTY Statute definition therefore ‘only marginally takes into consideration the cultural value of the property to be protected’¹⁰⁴, the absence of an evaluative element can also be interpreted in another way; not as a dilution of the cultural value rationale for protecting cultural property but instead as an invocation of a more relativistic conception of cultural value than the hierarchical, universalist tone of the 1954 Convention, which ‘condition[s] protection of these sites on a threshold of special significance or importance to humanity as a whole.’¹⁰⁵

⁹⁷ Petrovic (n 69), 54.

⁹⁸ Brammertz et al. (n 54), 1152.

⁹⁹ Frulli (n 2), 207.

¹⁰⁰ *Ibid.*

¹⁰¹ Article 1(a), Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954.

¹⁰² Frulli (n 2), 207.

¹⁰³ *Ibid.*, 207, footnote 13.

¹⁰⁴ *Ibid.*, 207.

¹⁰⁵ Paige Casaly, ‘Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law’, (2016) 14 *Journal of International Criminal Justice*, 1205.

A relativist conception of cultural value, which is captured in some of the more recent conventions such as the UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, departs instead from the position that the importance of cultural heritage is established 'relative to a certain community or population to whose the identity the cultural site is vital.'¹⁰⁶ In adopting a 'more localized, culturally based perspective'¹⁰⁷ to the value of cultural heritage, a relativist approach to cultural value reflects the notion that 'the scope of value can be highly variable depending on both the extent of individuals who have reason to value something and the kinds of reasons they have.'¹⁰⁸ On this view, while the small mosque in Frulli's example and the Old Town of Dubrovnik may be valuable in different ways to different people for different reasons, Article 3(d) has the scope to capture the cultural value that can be attached to both. In this sense, rather than watering down the extent to which Article 3(d) can be understood to reflect a cultural value rationale for the protection of cultural property and the criminalisation of its destruction, the absence of an evaluative dimension in the ICTY Statute instead invokes a different, wider, conception of what is understood to be culturally valuable.

b. Rome Statute

In a departure from the precedent set by the ICTY Statute, the Rome Statute's provisions on the war crime of destruction of cultural property more closely mirrors the language of the 1907 Hague Convention, with Articles 8(2)(b)(ix) and 8(2)(e)(iv) criminalising 'intentionally 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 both international and non-international armed conflict. While, similar to the ICTY Statute, the definition excludes an evaluative dimension to the nature of the property protected, the reversion to the formulation contained in the 1907 Hague Convention, to include protection for hospitals and places where the sick and wounded are collected alongside cultural property, has drawn criticism for 'equating cultural property with other types of protected civilian property [which] constitutes an unnecessary homologation of that which is distinct.'¹⁰⁹ From a normative perspective, hospitals and similar medical facilities are understood to be protected in this respect due to the presence of civilians and the humanitarian services that they

¹⁰⁶ *Ibid.*, 1200.

¹⁰⁷ *Ibid.*, 1201.

¹⁰⁸ Matthes (n 80), 1003.

¹⁰⁹ Andrea Carcano, 'The Criminalization and Prosecution of Attacks Against Cultural Property' in Fausto Pocar, Marco Pedrazzi and Micaela Frulli (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (2013 Edward Elgar), 87.

offer, as opposed to the inherent value of the objects themselves.¹¹⁰ By lumping them together with forms of cultural property, the Rome Statute's formulation of the crime draws it conceptually back in the direction of the more humanitarian-oriented, civilian-use-based rationale for the protection of cultural property reflected in the 1907 Convention.¹¹¹

This is further reinforced by how the Rome Statute's definition of the crime is limited only to attacks on buildings or historic monuments.¹¹² In contrast to the ICTY Statute, which included 'works of art and science'¹¹³ in the list of protected objects, the Rome Statute definition excludes movable objects from the scope of the crime. At a conceptual level, excluding movable cultural property from its scope has a similar effect to lumping together hospitals and medical facilities with forms of cultural property; it implies that the cultural value of the buildings protected is not the primary rationale for the criminalisation of their destruction. If the cultural value of the property or object to be protected were the primary normative basis for the crime, movable cultural property could also be expected to fall within its scope, as it did at the ICTY. In this sense, the exclusion of moveable objects of cultural value from the scope of the crime in the Rome Statute invokes a normative conception of it that prioritises its humanitarian rather than its cultural dimensions.

By the same token, the Rome Statute's criminalisation of 'directing attacks'¹¹⁴ against protected buildings, as opposed to the ICTY Statute's criminalisation of 'seizure of, destruction or wilful damage done to'¹¹⁵ protected buildings and objects, arguably also reduces the extent to which this formulation of the crime reflects a conception of the cultural dimensions of cultural property as worthy of protection in their own right. The term attack in the context of international humanitarian law has traditionally been interpreted by reference to Article 49(1) of Additional Protocol I¹¹⁶ to refer to 'an act of violence against the adversary, whether in offense or in defence [...] It refers to any *combat action*.'¹¹⁷ The ICRC Commentary on the Rome Statute similarly notes with respect to Article 8(2)(b)(ix) that 'the concept of attack as defined in this provision

¹¹⁰ Yaron Gottlieb, 'Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC', (2005) 23(4) *Penn State International Law Review*, 865-866.

¹¹¹ Frulli (n 2), 211. See also Gottlieb (n 110), 865.

¹¹² Roberta Arnold and Stefan Wehrenberg, '9. Paragraph 2(b)(ix): Intentionally directing attacks against protected buildings' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016), 419.

¹¹³ Article 3(d), ICTY Statute.

¹¹⁴ Knut Dörmann, 'Intentionally directing attacks against civilians not taking direct part in hostilities' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Beck/Hart 2016), 355.

¹¹⁵ Article 3(d), ICTY Statute.

¹¹⁶ Arnold and Wehrenberg (n 112), 419.

¹¹⁷ Dörmann (n 114), 355. Emphasis added.

refers to the use of armed force to carry out a military operation during the course of an armed conflict.’¹¹⁸

The criminalisation of ‘attacks’ on protected buildings is therefore more limited than the criminalisation of their seizure, destruction or damage, since attack relates to the conduct of military operations, while ‘destruction or damage’ does not specify the form through which the harm to the protected objects is required to take place. In the same way that excluding moveable cultural property from its scope dilutes the extent to which a cultural value rationale for the protection of cultural property can be understood to underlie this crime, restricting its scope to damage to cultural property inflicted specifically during the conduct of hostilities, as opposed to its seizure, destruction or damage during armed conflict through any means, similarly limits the extent to which the Rome Statute definition invokes a conception of the crime as centred upon the cultural value of these buildings. The requirement that an ‘attack’ take place, traditionally understood as the use of armed force during the conduct of hostilities, instead implies a rationale behind the criminalisation of this act as primarily normatively rooted in the protection of civilian objects, and therefore in reducing harm to civilians during the conduct of hostilities. Excluding destruction or damage to cultural property that does not take place in the context of an ‘attack’ implies that, without the risk of harm to civilians entailed by directing attacks at such buildings due to their civilian character, their cultural value does not enjoy protection in its own right.

In the *Al Mahdi* case, in which mausoleums in Timbuktu were demolished after having come under the control of the armed group Ansar Dine, the ICC has nevertheless rejected the traditional interpretation of ‘attack’ outlined here, precisely on the basis that doing so would fail to recognise that such buildings are protected at all times during armed conflict because of their important cultural value. The Trial Chamber argued that:

...the element of ‘direct[ing] an attack’ encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group. The Statute makes no such distinction. This reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute. Indeed, international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.¹¹⁹

¹¹⁸ Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2009), 216.

¹¹⁹ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, ICC, Judgment and Sentence, 27 September 2016, para 15 [hereafter *Al Mahdi Judgment and Sentence*].

This indicates a shift to a more cultural-value oriented interpretation of the Rome Statute definition of the crime than the traditional approach to the interpretation of attack outlined here implies, and will be discussed in greater detail in the analysis of the case law below.

c. ECCC

Lastly, in contrast to the provisions contained in the ICTY and ICC Statutes, Article 7 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) provides the court with ‘the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict’, thereby incorporating the evaluative dimension of the 1954 Convention into its definition of the crime of destruction of cultural property. Problems have nevertheless been identified with this approach due to the 1954 Convention providing for sanctions for its violation without stipulating which breaches entail criminal responsibility, nor providing elements of a crime.¹²⁰ No charges for this crime have been pursued at the ECCC.¹²¹

3. Normative themes in the case law

This section analyses the case law on destruction or damage to cultural property at the ICTY and the sole case involving such a charge at the ICC to date, focussing on how the different chambers articulated their understanding of the crime from a normative or conceptual perspective. The analysis identifies four significant normative themes that emerged in the case law of the ICTY and were subsequently expanded on in the *Al Mahdi* case at the ICC. These four themes relate to constructing cultural property as a normatively distinct category; cultural internationalism; object-centrism; and functionalism or relationship to people. Taken as a whole, the case law invokes a multifaceted account of the normative dimensions of the criminalisation of destruction of cultural property, which combines elements of these various normative themes.

a. Cultural property as a normatively distinct category

The first notable theme that emerges in the case law is an emphasis on the distinction between general protection for civilian property and the protection enjoyed by

¹²⁰ Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law With a Case Study on the Khmer Rouge’s Destruction of Cambodia’s Heritage* (Martinus Nijhoff 2014), 200.

¹²¹ Nina H.B. Jørgensen, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (Edward Elgar 2018), 258.

cultural property as a distinct category, consolidating the shift away from a civilian use conception of the crime by making explicit its particular and culture-related normative foundations. For instance, in the *Jokić* case at the ICTY, the Trial Chamber noted that ‘Miodrag Jokić is convicted of six war crimes, all of which have been found to be extremely serious in terms of the protected interests violated: life and integrity of the victims; protection of civilian objects; protection of cultural property.’¹²² At a very basic level, by distinguishing between the protected interests underlying the criminalisation of the destruction of civilian objects and the destruction of cultural property, the Trial Chamber points to an understanding of the criminalisation of these acts as resting on distinct normative foundations.

In the context of its analysis of the element of ‘direct[ing] an attack’ at a protected object, discussed above, the Trial Chamber in the *Al Mahdi* case at the ICC reinforced this view, stating that the criminalisation of attacks on cultural property in the Rome Statute ‘reflects the special status of religious, cultural, historical and similar objects.’¹²³ The Chamber went on to emphasise that ‘cultural objects in non-international armed conflicts are protected as such, not generically as civilian objects.’¹²⁴ In doing so, the Trial Chambers in *Jokić* and *Al Mahdi* reinforced the developments in the conceptualisation of cultural property as a specific, normatively distinct category that initially emerged in international law with the adoption of the 1954 Hague Convention.

The Trial Chamber in *Kordić and Čerkez* expanded on this normative distinction between protection for civilian versus cultural property in its discussion of the conditions under which attacks on educational institutions would constitute a crime under Article 3(d) of the ICTY Statute. In its analysis of whether institutions dedicated to education enjoy special protection under international law, the Trial Chamber sought to reconcile the provisions of the statute with the protections afforded to ‘movable or immovable property of great importance to the cultural heritage of every people’ in the 1954 Hague Convention with those afforded to ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’ in the Additional Protocols to the Geneva Conventions.¹²⁵ The Trial Chamber ultimately concluded that ‘educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of learning, arts, and sciences, with their valuable

¹²² *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, ICTY, Sentencing Judgment, 18 March 2004, para 113 [hereafter *Jokić Sentencing Judgment*].

¹²³ *Al Mahdi Judgment and Sentence* (n 119), para 15.

¹²⁴ *Ibid.*, para 16.

¹²⁵ Article 53, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Article 16, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

collections of books and works of arts and science.’¹²⁶ Based on this reasoning, the Trial Chamber went on to note that ‘this offence overlaps to a certain extent with the offence of unlawful attacks on civilian objects except that the object of this offence is more specific: the cultural heritage of a certain population.’¹²⁷

The Appeals Chamber ultimately overturned this reasoning as applied specifically to institutions dedicated to education by arguing that the protection accorded to a special category of objects by the 1954 Convention and the Additional Protocols is based on the principle of according protection to ‘objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people’¹²⁸, concluding therefore that it ‘cannot see how all educational buildings fulfil these criteria.’¹²⁹ Despite the reversal of the Trial Chamber’s reasoning on the basis of this more hierarchical conception of cultural value, in identifying the object of the offence as the cultural *heritage* of a certain population, as opposed to the physical existence of a particular type of building, the Trial Chamber’s initial decision nevertheless developed the normative conception of the crime beyond its material dimensions and its nature as civilian property, to incorporate protection also for the broader concept of heritage. The concept of heritage has been understood to express a ‘form of inheritance to be kept in safekeeping and handed down to future generations’¹³⁰, which is linked to ‘group identity and [...] is both a symbol of the cultural identity of a self-identified group, be it a nation or a people, and an essential element in the construction of that group’s identity.’¹³¹ The notion of cultural heritage is understood in this sense as wider than the narrower category of cultural property in terms of how it refers to ‘less of an objective, physical existence than the range of associations which accompany an object or monument and which provide the sense of being part of a group’,¹³² capturing in turn ‘experience, identity, intangibility, memory and remembering, performance, place, and even dissonance.’¹³³

¹²⁶ *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-T, ICTY, Trial Judgment, 26 February 2001, para 360 [hereafter Kordić and Čerkez Trial Judgment].

¹²⁷ *Ibid.*, para 361.

¹²⁸ *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, ICTY, Appeal Judgment, 17 December 2004, para 91.

¹²⁹ *Ibid.*, para 92.

¹³⁰ Janet Blake, ‘On defining the cultural heritage’, (2000) 49(1) *International and Comparative Law Quarterly*, 83-84.

¹³¹ *Ibid.*, 84.

¹³² *Ibid.*

¹³³ Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019), 56. On the distinction between the concepts of cultural property and cultural heritage see also Lyndel V. Prott and Patrick J. O’Keefe, ‘“Cultural Heritage” or “Cultural Property”’, (1992) 1(2) *International Journal of Cultural Property*, 307-320; Malio Frigo, ‘Cultural property v. cultural heritage: A “battle of concepts” in international law?’, (2004) 86(854) *International Review of the Red Cross*, 367-378.

The Trial Chamber in *Hadžihasanović and Kubura* at the ICTY offered a similar, more intangible conception of the value of religious property specifically. The charges in this case related to the vandalism of the interior of the Guča Gora monastery belonging to the Croatian community in Bosnia. The Trial Chamber quoted the testimony of witnesses who described the damage to the interior of the monastery in the following terms:

Books had been thrown on the floor, there were inscriptions written in Arabic and part of the organ was broken. [...] The wooden confessional and a number of steles had been destroyed and everything else was covered in excrement. There were inscriptions on the walls and an attempt had been made to obliterate and hack away the frescoes. [...] Numerous objects had disappeared, several paintings had been damaged, benches had been smashed, and inscriptions and indecent photographs covered the walls and doors. [...] the organ and the statue of St Francis of Assisi in the monastery courtyard had been damaged.¹³⁴

In its analysis of the seriousness of this damage to the monastery for the purposes of determining the gravity threshold of Article 3(d) of the ICTY Statute, the Trial Chamber explicitly distinguished between the material and the intangible dimensions of religious buildings. It argued that ‘while civilian property is afforded general protection under customary international law, special attention is paid to certain property, namely religious buildings, owing to their spiritual value. [...] The Chamber considers that the seriousness of the crime of destruction of or damage to institutions dedicated to religion must [...] take much greater account of the spiritual value of the damaged or destroyed property than the material extent of the damage or destruction.’¹³⁵ On this basis, the Trial Chamber concluded that the extent of the damage to the monastery, which it described as an act of ‘desecration’, while ultimately not found to be attributable to forces under the control of the defendant, was sufficient to constitute a crime under Article 3(d) of the ICTY Statute.¹³⁶

This episode exposes precisely the significance of identifying the normative basis of the criminalisation of destruction of cultural property in its intangible qualities, since, in this case, it resulted in the chamber assessing the damage, and therefore the gravity threshold for the crime, from the perspective of its spiritual, as opposed to its material, impact. In other words, by adopting a spiritual value approach to assessing the damage to the monastery, and therefore to the threshold for finding that a crime had

¹³⁴ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47-T, ICTY, Trial Judgment, 15 March 2006, para 2003-2004.

¹³⁵ *Ibid.*, para 63.

¹³⁶ *Ibid.*, para 2005.

occurred, the chamber suggested that it is the spiritual, intangible quality to the building that is protected through criminalisation, rather than simply its physical, material existence.

b. Cultural internationalism

The second thematic thread that runs through much of the case law involving charges of attacks on cultural property is an internationalist conception of the value of cultural property. The internationalist approach to cultural value, first captured in international legal form in the 1954 Hague Convention, approaches cultural objects and property from the cosmopolitan perspective of being 'components of a common human culture, whatever their places of origin or present location,'¹³⁷ which 'belong to all of us as a form of rightful inheritance.'¹³⁸ This normative conception of cultural property manifests itself primarily through formalist appeals to the internationally protected status of the property, or otherwise in language that closely mirrors that contained in the 1954 Hague Convention.

In the *Strugar* case at the ICTY, for instance, the Trial Chamber directly adopted the language of the 1954 Hague Convention in its analysis of the seriousness of the offence of damage to cultural property, asserting that 'such property is, by definition, of "great importance to the cultural heritage of every people".'¹³⁹ The Chamber went on to observe that that 'the Old Town of Dubrovnik in its entirety was entered onto the World Heritage List in 1979'¹⁴⁰ explaining that 'the properties inscribed on the World Heritage List include those which "because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science."¹⁴¹

In *Jokić*, the Trial Chamber further developed this internationalist account of the specific normative basis of the criminalisation of destruction of cultural property. The Trial Chamber described the Old Town of Dubrovnik as 'an especially important part of the world cultural heritage'¹⁴² and asserted that the 'the shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.'¹⁴³ It went on to assert that this crime 'represents a violation of values especially protected by the international

¹³⁷ Merryman (n 45), 831.

¹³⁸ Sarah K. Harding, 'Value, Obligation and Cultural Heritage', (1999) 31(2) *Arizona State Law Journal*, 302.

¹³⁹ *Prosecutor v. Pavle Strugar*, IT-01-42-T, ICTY, Trial Judgment, 31 January 2005, para 232 [hereafter *Strugar Trial Judgment*].

¹⁴⁰ *Ibid.*, para 327.

¹⁴¹ *Ibid.*

¹⁴² *Jokić Sentencing Judgment* (n 122), para 51.

¹⁴³ *Ibid.*

community'¹⁴⁴, referring to the preamble to the UNESCO World Heritage Convention, which provides that 'the deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.'¹⁴⁵

The same theme emerged in the context of acts of destruction of cultural property charged as the crime against humanity of persecution, which was often charged in conjunction with the war crime of destruction or damage to cultural property at the ICTY.¹⁴⁶ Persecution was defined in the jurisprudence of the ICTY as '[t]he gross or blatant denial, on discriminatory grounds, of a fundamental right, laid out in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5'¹⁴⁷ of the ICTY Statute. On this basis, the Trial Chamber in *Kordić and Čerkez* argued that the destruction of religious buildings 'when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.'¹⁴⁸ This conception of how attacks on cultural property can be understood to cause injury to all of humanity departs from the more formalist emphasis on internationally protected status as a proxy for cultural value, to offer an account of cultural value as rooted in the cosmopolitan notion of the value of human diversity; injury is caused to humanity in terms of the loss of a unique religious culture and its cultural objects.

An internationalist conception of the value of cultural property was similarly emphasized in the *Al Mahdi* case at the ICC. The Trial Chamber noted 'the particular importance of international cultural heritage'¹⁴⁹, explaining in the Reparations Order that 'cultural heritage is considered internationally important regardless of its location and origin.'¹⁵⁰ It went on to stress that 'the destruction of cultural heritage erases part of the heritage of all mankind'¹⁵¹ which 'carries a message of terror and helplessness; it destroyed part of humanity's shared memory and collective consciousness; and renders humanity unable to transmit its values and knowledge to future generations.'¹⁵² The internationalist conception of cultural value was similarly reinforced through a formalist emphasis on the UNESCO status of the mausoleums

¹⁴⁴ *Ibid.*, para 46.

¹⁴⁵ *Ibid.*, para 49.

¹⁴⁶ Brammertz et al. (n 54), 1157.

¹⁴⁷ *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-T, ICTY, Trial Judgment, 14 January 2000, para 621.

¹⁴⁸ *Kordić and Čerkez* Trial Judgment (n 126), para 207.

¹⁴⁹ *Al Mahdi* Judgment and Sentence (n 119), para 17.

¹⁵⁰ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, ICC, Reparations Order, 17 August 2017, para 15 [hereafter *Al Mahdi* Reparations Order].

¹⁵¹ *Ibid.*, para 53.

¹⁵² *Ibid.*, para 22.

destroyed by the armed group Ansar Dine, with the Trial Chamber reiterating that ‘all these [attacked] buildings had the status of protected UNESCO World Heritage sites’¹⁵³, that ‘UNESCO’s designation of these buildings reflects their special importance to international cultural heritage’¹⁵⁴ since ‘inscription on the World Heritage List requires [...] that the object or site at stake has an exceptional quality that transcends national borders.’¹⁵⁵

The Trial Chamber in *Al Mahdi* also developed on the notion first expressed in the *Jokić* case at the ICTY, that destruction of cultural property ‘represents a violation of values especially protected by the international community’¹⁵⁶, referring to the Constitution of UNESCO in this respect, which states that ‘the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil.’¹⁵⁷ The Trial Chamber declared that ‘attacking these mausoleums and mosques was clearly an affront to these values’¹⁵⁸, underscoring this understanding of the destruction of the mausoleums as an attack specifically directed at international values by noting that the defendant himself stated as much during an attack on one of the mosques. The Trial Chamber quoted *Al Mahdi* as having said ‘it’s probably one of the oldest mosques 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 [...] they think that this is heritage. Does ‘heritage’ include worshipping cows and trees?’¹⁵⁹

The Chamber went on to incorporate this internationalist conception of cultural value into its account of the gravity of the crime. It argued that the ‘attack [on the mausoleums] appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful inhabitants of Timbuktu, but also people throughout Mali and the international community’¹⁶⁰ meaning that ‘the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.’¹⁶¹ The implication of a graduated degree of seriousness attaching to attacks on cultural property depending on whether they are understood to affect the international community, in addition to local and national communities, was made explicit in the Reparations Order in the *Al Mahdi* case, where the Chamber stressed that ‘world cultural heritage is a most

¹⁵³ *Al Mahdi* Judgment and Sentence (n 119), para 39.

¹⁵⁴ *Ibid.*, para 46.

¹⁵⁵ *Al Mahdi* Reparations Order (n 150), para 20.

¹⁵⁶ *Jokić* Sentencing Judgment (n 122), para 46.

¹⁵⁷ *Al Mahdi* Judgment and Sentence (n 119), para 46.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, para 80.

¹⁶¹ *Ibid.*

important category. Greater emphasis vested in an object by the international community reflects a higher cultural significance and a higher degree of international attention and concern.¹⁶²

The Chamber's analysis in this way constructs international status as a proxy for cultural value, with international recognition understood to be reflective of a higher degree of cultural significance, and therefore of greater gravity attributed to the crime. From a practical perspective, this invocation of international status as a proxy for cultural significance has been criticised as being inaccurate because of how the listing process for UNESCO world heritage sites is 'notoriously politicised and biased towards particular forms of heritage [and] by no means a perfect mirror of the most important cultural sites across the globe.'¹⁶³ In this respect, from a conceptual perspective, the notion that international recognition reflects a higher level of cultural value has been problematised precisely because of how the very concept of international value rests on Eurocentric underpinnings, which manifest in the forms of heritage that are therefore recognised as valuable. In this sense, appealing to international value as a marker of cultural significance has been problematised for how it 'may ultimately just be an appeal to another form of tribalism, where universal value is code for "important to Western civilization".'¹⁶⁴ The concepts of world cultural heritage, universal value or the common heritage of mankind have also been subjected to foundational critiques for having facilitated the looting and removal of cultural objects from colonies to museums in the West by emphasising universal over local or national value and ownership.¹⁶⁵ In this sense, internationalist approaches to cultural value, with the associated notion that anyone has the right to a cultural object, have not manifested in shared custody of such objects, but have instead created a one-sided dynamic, which, as noted by Prott:

looks far more like cultural imperialism, based as it seems to be on the activities of those from wealthy countries with each other and with poorer states whose cultural resources are flowing in one direction, without an equal exchange. It is an observable fact that far more is flowing in the direction of wealthy countries than the reverse; it is far from an exchange and, indeed, looks rather more like exploitation.¹⁶⁶

¹⁶² Al Mahdi Reparations Order (n 150), para 17.

¹⁶³ Sophie Starrenburg, 'Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v Ahmad Al Faqi Al Mahdi', *EJIL: Talk!*, 25 August 2017 [available at: <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-faqi-al-mahdi/> - accessed 11 February 2022].

¹⁶⁴ Erich Hatala Matthes, "'Saving Lives or Saving Stones?'" The Ethics of Cultural Heritage Protection in War' (2018) 32(1), *Public Affairs Quarterly*, 77.

¹⁶⁵ *Ibid.*

¹⁶⁶ Lyndel V. Prott, 'The International Movement of Cultural Objects', (2005) 12(2) *International Journal of Cultural Property*, 228.

In this sense, the Trial Chamber's invocation in the *Al Mahdi* case of internationally recognised status as reflective of a higher degree of cultural value reproduced and imported some of the partial and problematic dimensions of the notions of international or universal cultural value into its account of the gravity of this crime.

Beyond formalist appeals to world heritage status or purely abstract accounts of 'international' value, the *Al Mahdi* case nevertheless also pointed in the direction of a more tangible relationship between the local value of cultural heritage and its international or global value in highlighting its identity-constituting role for particular communities and groups. Emulating the cosmopolitan narrative of the value of human diversity that was constructed around acts of destruction of religious property charged as persecution in *Kordić and Čerkez* at the ICTY, the Trial Chamber in *Al Mahdi* emphasised that 'cultural property also allows a group to distinguish and identify itself before the world community.'¹⁶⁷ In emphasising its identity-constituting value for a particular group in the group's relationship to the world community, as opposed to a conception of an inherent universal value attached to cultural heritage that is distinct from and unconnected to its value for the community in which it exists, the *Al Mahdi* case at the same time invoked in a limited form a somewhat more granular and bottom-up perspective to the internationalist conception of the value of cultural heritage.¹⁶⁸

The internationalist flavour of the narrative constructed around the crime of attacking religious and historic buildings in the *Al Mahdi* case ultimately manifested itself in material terms in how the Trial Chamber analysed the nature of victimhood for the purposes of awarding reparations. In the Reparations Order, the Chamber determined that the destruction of the mausoleums harmed the inhabitants of Timbuktu as direct victims of the crime, but also caused suffering to the wider population of Mali and the international community.¹⁶⁹ In addition to its decision to award both collective and individual reparations to the inhabitants of Timbuktu directly affected by the destruction of the mausoleums, in a 'symbolic gesture'¹⁷⁰, the Chamber also awarded one euro in reparations to the Malian State and a further euro to UNESCO as the representative of the international community in this case,¹⁷¹ making material the internationalist conception of the value of cultural property that has characterised the history and the case law on this crime.

¹⁶⁷ *Al Mahdi* Reparations Order (n 150), para 16.

¹⁶⁸ For an analysis of different ways of understanding this relationship between personal and impersonal value in the context of cultural heritage see Matthes (n 80), 999-1027.

¹⁶⁹ *Al Mahdi* Reparations Order (n 150), para 53.

¹⁷⁰ *Ibid.*, para 106.

¹⁷¹ *Ibid.*, para 104-107.

c. Object-centrism

Elements of an object-centric approach to the value and significance of cultural property are also discernible in the case law of the ICTY and the ICC. An object-centric or intrinsic value approach derives the value of a cultural object or property from its 'immutable characteristics related to [its] fabric or history.'¹⁷² For this reason, the more established object-centric approach to cultural heritage is often presented in a dichotomous relationship to the development a more functionalist approach, discussed in the next section.¹⁷³ In contrast to a functionalist approach, where the 'human element' of cultural property protection is central, object-centrism focuses on the primacy of the object, which is seen to 'have a value in [its] own right that exists independently of people.'¹⁷⁴ An object-centric approach therefore identifies the cultural value of an object in its own intrinsic significance, or in its artistic, aesthetic or historic importance.¹⁷⁵ Consequently, the principal concern for an object-centric approach is the integrity of the object.¹⁷⁶ From this perspective, the most important principles are preservation - 'protecting the object and its context from impairment'¹⁷⁷ - and knowledge - 'historical, scientific, cultural and aesthetic truth that the object and its context can provide.'¹⁷⁸ In this way, an object-centric approach 'prioritizes the cultural object and views its protection as a value in its own right.'¹⁷⁹

This approach to the intrinsic value of certain types of cultural property is apparent in the jurisprudence of the ICTY, often running in tandem with a more functional conception of the value of such property, addressed in the next section. For some of the less high-profile cultural and religious buildings, damage to which was charged in various cases, an object-centric conception of their inherent value emerges primarily through a particular emphasis on their significant age. For instance, in the *Karadžić* and *Mladić* cases, in addition to noting its status as a UNESCO protected site, the Trial Chambers stressed that the Aladža mosque, which was blown up, dated from 1555.¹⁸⁰ In its discussion of the destruction of 'over 100 mosques, 2 mektebs and 7 Catholic

¹⁷² Sophia Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value: Value-Based Analyses of the World Heritage and Intangible Cultural Heritage Conventions* (Alta Mira Press 2013), 13.

¹⁷³ See for instance Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction', (2011) 22(1), *European Journal of International Law*, 17.

¹⁷⁴ Markus M. Müller, 'Cultural Heritage Protection: Legitimacy, Property, and Functionalism', (1998) 7(2) *International Journal of Cultural Property*, 397.

¹⁷⁵ Petrovic (n 69), 22.

¹⁷⁶ Müller (n 174), 396.

¹⁷⁷ Merryman (n 45), 64.

¹⁷⁸ Merryman (n 45), 64.

¹⁷⁹ Tolina Loulanski, 'Revising the Concept of Cultural Heritage: The Argument for a Functional Approach', (2006) 13 *International Journal of Cultural Property*, 215.

¹⁸⁰ *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, ICTY, Trial Judgment – Volume I, 24 March 2016, para 925; *Prosecutor v. Ratko Mladić*, IT-09-92-T, ICTY, Trial Judgment – Volume I, 22 November 2017, para 693.

churches', the Trial Chamber in *Plavšić* stressed that 'some of these monuments [...] dated from the Middle Ages. They were, quite obviously, culturally, historically and regionally significant sites.'¹⁸¹ Similarly, in *Prlić et al.*, the Trial Chamber noted that the 'Ćejvan Ćehaja Mosque, dating from 1552, was razed to the ground by artillery projectiles, and the [...] Roznamedžija Ibrahim Efendija Mosque, dating from 1620, was destroyed by artillery fire or shelling.'¹⁸²

The inherent value of the more high-profile buildings and monuments that were damaged is addressed in more expansive terms, highlighting their age as well as their historical and artistic significance. For instance, the Trial Judgment in *Prlić et al.* emphasised the inherent value and historical significance of the Old Bridge in Mostar, noting the 'exceptional character of this monument – built by architect Hairudin and almost 500 years old.'¹⁸³ The Trial Chambers in *Jokić* and *Strugar* laid similar emphasis on the historical and architectural dimensions of the Old Town of Dubrovnik. In *Jokić*, the Trial Chamber noted that the Old Town was 'an outstanding architectural ensemble illustrating a significant stage in human history'¹⁸⁴ while in *Strugar*, the Trial Chamber described the Old Town in the following terms:

The Old Town of Dubrovnik is endowed with an exceptional architectural heritage, including palaces, churches and public buildings. The city first rose to prominence as a significant trading centre in the 13th century, and the oldest buildings in the Old Town date from this period. The fortifications of the Old Town, begun in the 12th century and completed in the mid-17th century, are widely regarded as some of the finest examples of city fortifications in Europe.¹⁸⁵

The *Jokić* decision reinforces this object-centric conception of the cultural value of Dubrovnik in its analysis of the possibility of restoring destroyed residential buildings located in the Old Town. The Trial Chamber noted that 'restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic material will have been destroyed, thus affecting the inherent value of the buildings.'¹⁸⁶ In doing so, the Trial Chamber appealed to the notion of authenticity, in this case, the material authenticity of the Old Town, as central to its cultural value. The concept of authenticity is a key principle in the field of heritage conservation. In general terms it

¹⁸¹ *Prosecutor v. Biljana Plavšić*, IT-00-39&40/1-S, ICTY, Sentencing Judgment, 27 February 2003, para 44.

¹⁸² *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-T, ICTY, Trial Judgment – Volume II, 29 May 2013, para 1373 [hereafter *Prlić et al. Trial Judgment Volume II*].

¹⁸³ *Ibid.*, para 1282.

¹⁸⁴ *Jokić* Sentencing Judgment (n 122), para 51.

¹⁸⁵ *Strugar* Trial Judgment (n 139), para 21.

¹⁸⁶ *Jokić* Sentencing Judgment (n 122), para 52.

refers to the 'integrity or 'true' nature of objects defined in relation to their origins, fabric and the intentions of their makers. An authentic historical object or building is thus one that is true to its origins in terms of its date, material, form, authorship, workmanship and, in many cases, its primary context and use.'¹⁸⁷ Identification of value in the historically authentic material from which the buildings in the Old Town are constructed is in this sense paradigmatic of an object-centric conception of cultural value, which emphasises the integrity of the object itself and therefore its 'unique, irreplaceable character.'¹⁸⁸

The object-centric conception of cultural value was significantly less prominent in the *Al Mahdi* case at the ICC, but nevertheless emerged in the Reparations Order in which the chamber endorsed the reasoning in *Jokić* with respect to this question of authenticity. Echoing this object-centric conception of uniqueness and irreplaceability, in the Reparations Order, the Chamber in *Al Mahdi* similarly stressed that the inherent value of cultural property is affected by the process of restoration, since the element of authenticity is lost, concluding that 'the inherently irreplaceable nature of historical buildings cannot be remedied by reconstruction.'¹⁸⁹

d. Functionalism

The final, and perhaps most prominent, normative theme that appears in the case law of the ICTY and ICC relates to a more functionalist or anthropocentric approach to the value of cultural property, which captures what Janine Natalya Clark has termed the 'human element'¹⁹⁰ of cultural property destruction. This type of approach to understanding the significance and value of cultural property departs from the position that 'cultural heritage does not exist independently of humans; not only its substance but also its (assigned) meaning is made by people.'¹⁹¹ A functionalist approach to the cultural significance of buildings or objects therefore emphasises their function in society; objects or property are seen to hold cultural significance or value to the extent that they are attributed with meaning by people, often in relation to identity-creation and communication.¹⁹² On this view, 'buildings, sites and objects are not seen as having intrinsic qualities or values but these values are imposed on the

¹⁸⁷ Siân Jones, 'Negotiating Authentic Objects and Authentic Selves: Beyond the Deconstruction of Authenticity', (2010) 15(2) *Journal of Material Culture*, 184.

¹⁸⁸ John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics, and the Visual Arts* (Kluwer Law International 2007), xxvii.

¹⁸⁹ *Al Mahdi* Reparations Order (n 150), para 129.

¹⁹⁰ Janine Natalya Clark, 'The Destruction of Cultural Heritage in Armed Conflict: The 'Human Element' and the Jurisprudence of the ICTY', (2018) 18 *International Criminal Law Review*, 36-66.

¹⁹¹ Müller (n 174), 399.

¹⁹² Loulanski (n 179), 207-233; Petrovic (n 69), 21.

fabric of sites by actors situated in time and space.’¹⁹³ The evaluation of the cultural value or significance of cultural property is therefore an extrinsic process in the sense that ‘values are in our minds and not inherent to objects.’¹⁹⁴ This conception of value is fundamentally relativist; it recognises that the meaning and significance attached to cultural property is contingent upon the people, communities, and cultures that attribute value to it.¹⁹⁵

From this perspective, Tolina Loulanski has argued that ‘protection of cultural heritage becomes meaningless if it cares only for objects instead of human beings, because “preservation [of cultural property] is sought, not for the sake of the objects, but for the sake of the people for whom they have a meaningful life.”’¹⁹⁶ In her analysis of the wider shift towards a more functionalist approach to heritage conservation, which better reflects this ‘human element’ of its value, she has therefore identified a shift in conceptual focus in three directions, including first, a shift in focus from monuments to people, second, a shift from objects to functions and third, a shift from preservation for its own sake to purposeful preservation, sustainable use, and development.¹⁹⁷

This conception of cultural value, which centralises the connection between people and cultural property, the social functions it serves, and therefore the human impact of its destruction on individuals and communities, emerges as a prominent normative thread in three distinct forms in the case law of the ICTY and ICC. The first theme relates to the actual functions of cultural property in the sense of its everyday use by the people whose heritage it represents. The second relates to the social meaning attributed to cultural property because of its relationship to the community in which it exists, while the fourth highlights the affective, emotional relationship between individuals and objects of cultural property.

i. Functions

Consistent with Loulanski’s identification of a shift in conceptual focus from objects to functions as characteristic of the more functional approach to the value of cultural heritage,¹⁹⁸ analysis of the attack on Dubrovnik in the *Jokić* and *Strugar* cases at the ICTY highlighted the continued everyday use of the protected Old Town as part of the city. Perhaps most emblematic of this approach is the *Jokić* Trial Chamber’s

¹⁹³ Johan Brosché, Mattias Legnér, Joakim Kreutz and Akram Ijla, ‘Heritage under attack: motives for targeting cultural property during armed conflict’, (2017) 23(3) *International Journal of Heritage Studies*, 250.

¹⁹⁴ Labadi (n 172), 15.

¹⁹⁵ *Ibid.*

¹⁹⁶ Loulanski (n 179), 216.

¹⁹⁷ *Ibid.*, 207.

¹⁹⁸ *Ibid.*

description of the Old Town of Dubrovnik as ‘a “living city”’ noting that ‘the existence of its population was intimately intertwined with its ancient heritage.’¹⁹⁹ In *Strugar*, the Trial Chamber similarly stressed that:

One of the unique feature of the Old Town is that it has remained a living city. In fact, in 1991, the Old Town had an estimated population of between 7,000 and 8,000 residents. Within its city walls, the Old Town is fairly densely populated. Its palaces, which would previously have housed not more than a single noble family, have been divided up into flats and line the narrow streets of the Old Town.’²⁰⁰

In contrast to the more object-centric dimensions to the analysis of the Old Town outlined in the previous section, the *Jokić* and *Strugar* Trial Chamber’s emphasis on the Old Town as a place where people to continue to live suggests that its cultural value and significance as a heritage site is also tied up with the presence of the population that makes its life there. In this sense, the description of Dubrovnik as a ‘living city’ embodies the idea that, when it comes to cultural property, ‘what is to be protected is the relationship between these sites, objects, and artefacts and human beings.’²⁰¹

This emphasis on functional and everyday use is particularly pronounced in the *Al Mahdi* case at the ICC. The Trial Chamber emphasised in detailed and concrete terms the uses of the sites for the communities in Timbuktu, noting that the mausoleums and mosques of Timbuktu ‘are an integral part of the religious life of its inhabitants. [...] These mausoleums are frequently visited by the residents – they are places of prayer and, for some, places of pilgrimage.’²⁰² The Chamber noted that the Alpha Moya Mausoleum is ‘visited in order to pray and make offerings’²⁰³, that the two mausoleums adjoining the Djingareyber Mosque are ‘especially visited on Mondays and Fridays and for important religious celebrations’²⁰⁴ and described the Sheikh Mouhamed El Mikki Mausoleum as ‘a place of spiritual retreat and reflection.’²⁰⁵ The Chamber also made note of how ‘the people of Timbuktu were collectively ensuring the mausoleums remained in good condition in the course of symbolic maintenance events involving the entire community – women and elderly and young people.’²⁰⁶ In this way, the Chamber pointed to the everyday uses of the sites by the community,

¹⁹⁹ *Jokić* Sentencing Judgment (n 122), para 51.

²⁰⁰ *Strugar* Trial Judgment (n 139), para 21.

²⁰¹ Lucas Lixinski, ‘A Third Way of Thinking About Cultural Property’, (2019) 44(2) *Brooklyn Journal of International Law*, 582.

²⁰² *Al Mahdi* Judgment and Sentence (n 119), para 34.

²⁰³ *Ibid.*, para 38.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, para 78.

their role in bringing the community together in shared practices and, in doing so, invoked a conception of their cultural value as rooted in how their functions and uses constituted 'their role in the cultural life in Timbuktu.'²⁰⁷

ii. *Social meaning*

Similarly in line with Loulanski's identification of a shift in focus from objects to people, the case law reflects a growing level of engagement with the social meaning attached to cultural property. This has partly emerged in general terms through an emphasis on the symbolic dimensions of cultural sites, speaking to a less tangible element of the relationship between cultural property and people that moves beyond the more utilitarian account of its actual use in everyday life. At the ICTY, the emphasis on the symbolic dimensions of cultural property was most pronounced with respect to the destruction of the Old Bridge in Mostar. The Trial and Appeals Chambers in *Prlić et al.* went to significant lengths to highlight the symbolic value of the bridge, emphasising the 'importance of the bridge both for the inhabitants of the town of Mostar to which it gave its name and for the BiH and the Balkan region. The Old Bridge [...] symbolised the link between the communities, despite their religious differences.'²⁰⁸ An emphasis on the symbolic nature of sites of cultural heritage is also pronounced in the *Al Mahdi* case. The Trial Chamber referred to the 'purpose and symbolism'²⁰⁹ of cultural property and emphasised that the buildings 'were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu.'²¹⁰ The Chamber expanded on this by also noting that 'Timbuktu was an emblematic city with a mythical dimension [...] it played a crucial role in the expansion of Islam in the region. Timbuktu is at the heart of Mali's cultural heritage.'²¹¹ In emphasising the symbolic dimensions of cultural property these decisions invoke a conception of their cultural value as not only inherent or intrinsic, but rather, through the emphasis on the social meaning attached to them, as rooted in a conception of cultural value as a 'human construction [...] not only because it is made by men and women but also because it is defined by them.'²¹²

Linked to, and in some ways explanatory of, the symbolic role of cultural property in its relationship to a group or community, many decisions also invoke more complex conceptions of the social meaning and function of cultural property in terms of its role in constructing and representing the identities of communities and groups. Thus, at a basic level, the Trial Chamber in *Mladić* at the ICTY concluded that attacks on Muslim and Catholic sacred sites 'had a severe impact on the people who valued the property

²⁰⁷ *Ibid.*, para 46.

²⁰⁸ *Prlić et al.* Trial Judgment Volume II (n 182), para 1282.

²⁰⁹ *Al Mahdi* Reparations Order (n 150), para 522.

²¹⁰ *Ibid.*, para 78 – 79.

²¹¹ *Ibid.*, para 78.

²¹² Müller (n 174), 398.

and amounted to an attack on the religious identity of Muslims and Roman Catholics'²¹³, while the Trial Chamber in *Kordić and Čerkez* famously argued with respect to charges of persecution that the destruction of religious buildings, 'when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people.'²¹⁴

The Trial Chamber in *Stanišić and Župljanin* expanded on this account of the social meaning attached to cultural property, moving beyond the role of religious buildings as straightforwardly symbolising a particular religious identity, to allude briefly to the role of religious and cultural property in constituting a group's history and memory. The Chamber in *Stanišić and Župljanin* noted that 'wanton destruction and damage of religious and cultural property [was] carried out in a concerted effort to eliminate the historical moorings of the Bosnian Muslims and Bosnian Croats.'²¹⁵ Similarly, the Appeals Chamber in *Brdanin* quoted expert witness testimony on the motivation driving the systematic destruction of places of worship, which implicitly invoked a more complex account of how religious property may be tied up with a group's identity in terms of how it represents its system of beliefs as well as its history:

When asked what he thought the reason was for why this campaign was pursued, Witness Kaiser speculated that it was to send a message: "one part of the message is 'we don't respect you, we don't respect your system of belief, we don't respect your culture or psychology.' Another one is 'we don't want you.' But there's the other message that is sort of towards society [...] which is annihilation, bulldozing a monument, it's like saying 'they weren't there' basically. Or even if you left a cemetery, 'well, they were there but you left nothing of value.'²¹⁶

The *Al Mahdi* case at the ICC significantly developed on some of the ideas alluded to here with respect to the social processes that give meaning to cultural heritage. Emphasising the historical significance of the attacked buildings in noting that they 'reflected part of Timbuktu's history and its role in the expansion of Islam,'²¹⁷ the Trial Chamber in *Al Mahdi* displayed a particular sensitivity to the constitutive relationship between cultural heritage and the history, memory and identity of communities. The Trial Chamber explained that 'cultural heritage is important not only in itself, but also in relation to its human dimension. Cultural property also allows a group to

²¹³ *Prosecutor v. Ratko Mladić*, IT-09-92-T, ICTY, Trial Judgment – Volume III, 22 November 2017, para 3408.

²¹⁴ *Kordić and Čerkez* Trial Judgment (n 126), para 207.

²¹⁵ *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-T, ICTY, Trial Judgment – Volume II, 27 March 2013, para 527.

²¹⁶ *Prosecutor v. Radoslav Brđanin*, IT-99-36-A, ICTY, Appeal Judgment, 3 April 2007, para 338, footnote 693.

²¹⁷ *Al Mahdi* Judgment and Sentence (n 119), para 78. See also para 60.

distinguish and identify itself before the world community.’²¹⁸ It therefore concluded that ‘the attack against the Protected Buildings not only destroyed and damaged physical structures. Its impact ‘rippled out into the community and diminished the link and identity the local community had’ with such valuable cultural heritage.’²¹⁹ Expanding on this account of the social processes that bind communities to their cultural heritage, the Trial Chamber went on to explain that:

...cultural heritage plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future. UNESCO states that ‘the loss of heritage during times of conflict can deprive a community of its identity and memory, as well as the physical testimony of the past. Those destroying cultural heritage seek to disrupt the social fabric of societies.’ Cultural heritage is to be understood as encompassing the resources enabling cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations.²²⁰

Explicitly adopting the view that cultural property is valuable for its human dimension and highlighting the social implications of its destruction as an attack on more than ‘physical structures’²²¹, but on the social fabric of a community, this decision marks a pronounced shift towards a social, functionalist conception of cultural value. In doing so, it unambiguously invokes a normative conception of the crime of attacking cultural property as being rooted in the value of the social processes of identity formation, memory preservation and community definition and bonding, to which cultural heritage is understood to contribute.

This conception of the value and significance of the mausoleums in social terms is underscored by how the Trial Chamber went to lengths to explain the specific myths and beliefs that surround them and make them meaningful for the population of Timbuktu, exemplifying a social constructivist conception of cultural value that embodies the notion that ‘our world is socially constructed, and so are the meanings and functions that are assigned to objects.’²²² The Trial Chamber explained that the mausoleums ‘were of great importance to the people of Timbuktu [...] They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu.’²²³ The Chamber further stressed that ‘the Protected Buildings were widely perceived in Timbuktu as being the protectors of the community from outside harm. The attack on the Protected Buildings not only

²¹⁸ Al Mahdi Reparations Order (n 150), para 16.

²¹⁹ *Ibid.*, para 19.

²²⁰ *Ibid.*, para 14-15.

²²¹ *Ibid.*, para 19.

²²² Müller (n 174), 398.

²²³ Al Mahdi Judgment and Sentence (n 119), para 78.

destroyed cherished monuments, but also shattered the community's collective faith that they were protected.'²²⁴ This conception of the value of the sites as derived from how they are perceived by people and the role that they attributed to them is particularly pronounced in the discussion of the door of the Sidi Yahia Mosque. In its analysis of the destruction of the door, the Trial Chamber highlighted how 'legend had it that this door had not been opened for 500 years and that opening it would lead to the Last Judgment.'²²⁵ The Chamber went on to recount statements made by the defendant while the destruction of the door was taking place, which similarly emphasise the significance of the myths attached to it. The Chamber quoted Al Mahdi as saying:

We heard about a door in the ancient mosque of Sidi Yahya. If it is opened, the Day of Resurrection will begin. [...] Over time, a myth took hold, claiming that the Day of Resurrection would begin if the door were opened. We fear that these myths will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that this is the truth. So we decided to open it.²²⁶

In highlighting how the destruction of the door was given a very specific meaning because of the myth attached to it, this analysis centralises the extrinsic, social meaning of the door in its account of its cultural value. In this sense, the Trial Chamber's emphasis on the community's belief in the protective role of the mausoleums, the particular myths attached to the door of the Sidi Yahia Mosque, and the impact of the destruction of these objects on the community, directly invokes a conception of the normative dimensions of the protection of cultural property and the criminalisation of its destruction as 'not for the sake of the objects, but for the sake of the people for whom they have a meaningful life.'²²⁷

iii. *Emotions*

Some of the ICTY case law and the *Al Mahdi* case at the ICC does in this way construct an account of the value and significance of cultural property that makes some appeals to its social role, with the *Al Mahdi* case representing a significant development in the extent to which the social, human dimensions of cultural property are given expression in a judgment. The final normative thread identified within this functionalist theme takes place at an individual, more granular level by articulating the emotional, affective dimensions of cultural property in its relationship to the

²²⁴ Al Mahdi Reparations Order (n 150), para 86.

²²⁵ Al Mahdi Judgment and Sentence (n 119), para 38(viii).

²²⁶ *Ibid.*

²²⁷ Loulanski (n 179), 216.

feelings of the people 'that live in, with or around'²²⁸ it, identified here not as abstract members of a community or group with a shared identity and culture, but as individuals whose relationship with a particular site of cultural heritage operates at the level of their personal thoughts and emotions.

The emotional dimension of the relationship between people and cultural heritage is developed primarily in the *Al Mahdi* case at the ICC. Noting that 'most cultural property and cultural heritage are unique and of sentimental value'²²⁹ and that 'people feel strongly about their heritage'²³⁰, the Trial Chamber emphasised in general terms that 'the mausoleums [...] were of great importance to the people of Timbuktu, who admired them and were attached to them. [...] The mausoleums were among the most cherished buildings of the city.'²³¹ It stressed that the sites were not only religious buildings but also had an 'emotional value for the inhabitants of Timbuktu.'²³² The Chamber went on to recount the testimony of a witness who had explained that 'destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu [...] the population of Mali [...] considered Timbuktu as a source of pride.'²³³

This recognition of the human value of cultural property from the perspective of feelings and emotions is further expanded in the Reparations Order through the Chamber's analysis of the harm inflicted on the population of Timbuktu by the destruction of the mausoleums.²³⁴ In its analysis of the 'emotional distress and harm suffered across the Timbuktu community'²³⁵, the Chamber quoted extensively from victim applicants' testimonies, selecting testimonies that speak directly to the individual emotional impact of the destruction of the sites:

'I was completely emotionally devastated by the destruction of the mausoleums'.

'I was a victim of the destruction of the mausoleum, upset and shaken in my body and to the depths of my being.'

'I have never suffered so deeply in my life [...] Mentally, I was devastated. I felt humiliated by the destruction. I am still suffering [...] I am still affected mentally.'

'I was so shocked and hurt on the day of the destruction that I could have died.'
'[M]y faith shattered and my belief unsettled.'

²²⁸ Lixinski (n 201), 564.

²²⁹ *Al Mahdi* Reparations Order (n 150), para 22.

²³⁰ *Ibid.*, para 18.

²³¹ *Al Mahdi* Judgment and Sentence (n 119), para 78.

²³² *Ibid.*, para 79.

²³³ *Ibid.*, para 80.

²³⁴ *Al Mahdi* Reparations Order (n 150), para 85.

²³⁵ *Ibid.*, para 86.

'I lost everything with the destruction – my childhood, my belief and my attachment.'

[...]

'The whole city suffered on the day the mausoleums were destroyed. I wept and many others wept, because we were in great pain. The saints are all important to us. They are ancestors of all of us. [...]

'I cried a lot on the day of the destruction. My family, my friends and all the people of Timbuktu suffered. We will never forget. [...] When the mausoleums were destroyed, we were shattered as well. The pain is still there today. [...]

'The destruction of the sacred shrines of my ancestors caused me suffering [...] I suffered, as did the other members of my family.'²³⁶

In emphasising the individual emotional suffering experienced by the residents of Timbuktu as a result of the destruction of the mausoleum, its impact on their memories of childhood, their spiritual beliefs and their connection to their ancestors, the Reparations Order humanized and personalized the social value of cultural property down to its most granular, individual dimensions. Doing so constructs an account of the social dimensions of the normative basis of the criminalisation of attacks on cultural property in somewhat more concrete, human terms, which moves beyond more abstract appeals to symbolism, identity, history and memory, to offer a bottom up perspective on the 'human element' of the crime.

Taken together, the decisions of the ICTY and the *Al Mahdi* case at the ICC in this way construct a multifaceted conception of the normative dimensions of the criminalisation of attacks on cultural property that builds significantly on the more basic conceptual distinction between a civilian use vs. cultural value approach seen to underlie the definitions of these crimes in the ICTY and Rome Statutes. The decisions invoke conceptions of the value of cultural property that draw on a number of different theoretical approaches that are complex and multidimensional, epitomizing the notion that 'the scope of value can be highly variable depending on both the extent of individuals who have reason to value something and the kinds of reasons they have.'²³⁷

4. Narratives of cultural value during trial proceedings

The narratives constructed around attacks on cultural property during the course of trial proceedings provide the basis for the primary themes that are reflected in more limited form in the case law. Thus, the object-centric approach identified in the case law, with its emphasis on the intrinsic value of the material dimensions of cultural property, particularly with respect to the age of an object, also features heavily during

²³⁶ *Ibid.*, para 85.

²³⁷ Matthes (n 80), 1003.

trial proceedings.²³⁸ For instance, the Aladža mosque in Foča was described as ‘a pearl amongst the cultural heritage in this part of Europe. [...] It is 450 years old’²³⁹ while the ‘value and the antiquity’²⁴⁰ of a Dubrovnik palace was emphasised as a ‘a priceless object, 200 years old.’²⁴¹ In *Blaskić*, a mosque was described as ‘arguably the finest building in whole area. The reason is that this stonework here is extremely, extremely fine, a very carefully crafted building. There is almost no other building that you can actually see such stonework in the whole.’²⁴²

The symbolic dimensions of cultural property are also repeatedly highlighted during proceedings, with the Stari Most being described as ‘a symbol of Mostar’²⁴³, ‘a symbol more than anything else’²⁴⁴, ‘a symbol of the town [which] will remain a symbol forever’²⁴⁵ and even as ‘the soul of Mostar [...] which is a part and name of symbol [sic] of this town.’²⁴⁶ The Old Town of Dubrovnik was characterised as ‘the showcase of Croatia. [...] Croatian culture originates from that town. It is a jewel in the Republic of Croatia. And throughout the world, when you speak of Croatia, other cities are much less well known, but everybody knows of Dubrovnik.’²⁴⁷ Symbolism also featured centrally in the trial discourse of the *Al Mahdi* case at the ICC, with the mausoleums in Timbuktu being described as ‘the contemporary living symbol of the

²³⁸ *Prosecutor v. Ratko Mladić and Radovan Karadžić*, IT-95-18-R61 & IT-95-5-R61, ICTY, Transcript 2 July 1996, 450-452, 441-443, Transcript 8 July 1996, 895 [hereafter Mladić and Karadžić Transcript Date]; *Prosecutor v. Pavle Strugar*, IT-01-42-T, ICTY, Transcript 16 December 2003, 277-285, Transcript 8 December 2004, 8634-8635 [hereafter Strugar Transcript Date]; *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-T, ICTY, Transcript 4 December 2006, 11054, 11056, Transcript 22 May 2006, 2240, Transcript 24 May 2006, 2420 [hereafter Prlić et al. Transcript Date]; *Prosecutor v. Slobodan Milošević*, IT-02-54, ICTY, Transcript 15 February 2002, 373, Transcript 7 March 2002, 1661, Transcript 9 April 2002, 2674, Transcript 10 April 2002, 2699, Transcript 11 March 2003, 17687, Transcript 8 July 2003, 23801, 23803, Transcript 27 October 2005, 45916 [hereafter Milošević Transcript Date]; *Prosecutor v. Momčilo Krajišnik*, IT-00-39, ICTY, Transcript 4 February 2004, 380, Transcript 31 October 2005, 17949 [hereafter Krajišnik Transcript Date]; *Prosecutor v. Radovan Karadžić*, IT-95-5/18, ICTY, Transcript 9 December 2011, 22591 [hereafter Karadžić Transcript Date]; *Prosecutor v. Tihomir Blaškić*, IT-95-14, ICTY, Transcript 21 April 1998, 7558, Transcript 17 July 1998, 10613 [hereafter Blaškić Transcript Date]; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, IT-01-47, ICTY, Transcript 17 December 2003, 1125.

²³⁹ *Prosecutor v. Biljana Plavšić*, IT-00-39 & 40/1, ICTY, Transcript 16 December 2002, 400 [hereafter Plavšić Transcript Date].

²⁴⁰ Strugar Transcript 24 February 2004 (n 238), 3084.

²⁴¹ *Ibid.*, 3100.

²⁴² Blaškić Transcript 16 July 1998 (n 238), 10601.

²⁴³ Prlić et al. Transcript 17 May 2007 (n 238), 18725.

²⁴⁴ Prlić et al. Transcript 5 May 2009 (n 238), 39565.

²⁴⁵ Prlić et al. Transcript 4 May 2006 (n 238), 1281.

²⁴⁶ Prlić et al. Transcript 20 May 2009 (n 238), 4043.

²⁴⁷ Strugar Transcript 3 May 2004 (n 238), 5802.

city'²⁴⁸, a 'religious and symbolic [...] focal point [...] symbols of these men'²⁴⁹, 'symbols that are the substrate of the identity and culture of a nation, namely Mali'²⁵⁰ as well as 'a great symbol of the identity of a people [...] Timbuktu for Africa is like the tour Eiffel for France and the pyramids in Egypt.'²⁵¹

The extent to which the OTP in the *Al Mahdi* case constructed an emphatically social constructivist account of the cultural value of the mausoleums in Timbuktu is also underscored by the record of proceedings, which reveal a detailed recounting of the legends and beliefs attached to the mausoleums. For instance, the OTP explained how:

Timbuktu is an ancient city, a legendary city which has many mausoleums. And according to the local population, it is – it offers a protective bulwark to the city against dangers. The name of the city comes from a legend which is linked to the specific location of the city between the desert and the Niger river. According to oral tradition, a Touareg woman called Bouctou had the task of guarding over a well where caravans of traders would stop to water their animals, having crossed in the desert from the Maghreb and moving towards Yemen.²⁵²

Saint Bahaber Babadié was, according to oral tradition, a virtuous man, respected by all, who was notably famed for his talents as a conciliator. It is said that he took from the rich to give to the poorest and that is why his descendants carry on the tradition. They collect donations in particular during the celebration of Maouloud. According to local belief, the white sand of the mausoleum heals most illnesses.²⁵³

Now, this mausoleum dates back to the 19th century and is dedicated to the saint of the same name, who was a renowned teacher, writer and law specialist. [...] According to oral tradition [...] this saint was known to carry out miracles and to predict the future. For this reason the local population go to this mausoleum when they face a dilemma or an important decision.²⁵⁴

The Trial Chamber ultimately reflected this approach in its analysis of the door of the Sidi Yahia mosque, which was described during proceedings as 'an ancient wooden door which was steeped in meaning for the people of Timbuktu. It was said that if

²⁴⁸ *Prosecutor v. Ahmad al-Faqi al-Mahdi*, ICC-01/12-01/15, ICC, Transcript 22 August 2016, 19 [hereafter Al Mahdi Transcript Date].

²⁴⁹ Al Mahdi Transcript 23 August 2016 (n 248), 44.

²⁵⁰ Al Mahdi Transcript 24 August 2016 (n 248), 21.

²⁵¹ *Ibid.*, 25. See similarly 16.

²⁵² Al Mahdi Transcript 1 March 2016 (n 248), 23.

²⁵³ *Ibid.*, 30.

²⁵⁴ *Ibid.*, 27.

the door was opened, crises would break out, war, droughts.’²⁵⁵ This extrinsic, social constructivist approach to cultural value, which centralised the particular beliefs and cultural practices of the inhabitants of Timbuktu, was even made explicit during a presentation of photographs of the site during hearings, when the OTP called on the court to ‘imagine the practices and the rights of the population carried out at those mausoleums. I’d ask you to view these buildings through the eyes of the people of Timbuktu.’²⁵⁶

While in this way the broad contours of the normative discourse on cultural value constructed during the proceedings of these cases was subsequently captured in decisions, some of the narratives that emerged during proceedings nevertheless also advance a thicker and more developed account of cultural value, in particular with respect to its social, human dimensions.

a. International public opinion

For instance, while the characteristic emphasis on internationalist conceptions of cultural value is present throughout the proceedings addressing the destruction of secular heritage,²⁵⁷ usually in the form of references to the UNESCO-protected status of some sites or to appeals to the notion of the common heritage of humanity,²⁵⁸ the internationalist narrative that emerged during proceedings at both the ICTY and the ICC also constructed a more tangible, human dimension to the internationalist character of cultural value in how it stressed the international renown of the cultural sites and the response to their destruction from the perspective of international public opinion. In *Milosević*, for example, Dubrovnik was described as ‘one of the great cities, a pearl, and I suspect the best known, worldwide city from the former Yugoslavia’²⁵⁹ while a witness explained that ‘throughout the world, when you speak of Croatia [...] everybody knows of Dubrovnik. On the day when Dubrovnik was attacked [...] I got telephone calls from Italy, from London, protests were made from everywhere, from all over the world over that attack.’²⁶⁰

²⁵⁵ *Ibid.*, 29.

²⁵⁶ *Ibid.*, 24.

²⁵⁷ Strugar Transcript 23 April 2008 (n 238), 171; Strugar Transcript 8 September 2004 (n 238), 8619; Strugar Transcript 20 January 2004 (n 238), 1001; Milošević Transcript 8 October 2002 (n 238), 11201; Milošević Transcript 23 October 2003 (n 238), 28038; Prlić et al. Transcript 3 November 2009 (n 238), 46463.

²⁵⁸ See for instance Strugar Transcript 31 March 2004 (n 238), 4315; Strugar Transcript 25 October 2001 (n 238), 18; Strugar Transcript 28 January 2004 (n 238), 1461; Strugar Transcript 4 February 2004 (n 238), 1839-1840; Prlić et al. Transcript 20 May 2009 (n 238), 40432; Milošević Transcript 29 October 2001 (n 238), 31.

²⁵⁹ Milošević Transcript 16 September 2003 (n 238), 26720. See similarly Strugar Transcript 18 December 2003 (n 238), 363; Strugar Transcript 13 January 2004 (n 238), 573.

²⁶⁰ Strugar Transcript 3 May 2004 (n 238), 5802.

Similarly, in the *Al Mahdi* case, along with more general references to the international value of the destroyed mausoleums,²⁶¹ the OTP went to lengths to highlight the responses of other states in condemning the destruction, noting that ‘the attack [...] rightfully raised a chorus of protests and outrage nationally, regionally and internationally.’²⁶² This was further reinforced through drawing parallels with other well-known instances of heritage destruction, such as the Buddhas of Bamyān and the ancient city of Palmyra, and emphasising their effect on international public opinion:

For the public that are interested in world heritage [...] World Heritage sites are very, very well-known and people recognize them as part of modern culture. So when a site is destroyed [...] [it] raise[s] huge reactions from the public opinion, from institutions, cultural institutions around the world, the big museums and so on, when a site is destroyed deliberately, I think the entire community that believes that heritage is a fundamental component of cultural, modern cultural life, it’s suffering. So it is really a wound that is sometimes very hard to heal.²⁶³

These accounts of the international response to the destruction of cultural heritage imply a more tangible and sociological element to the notion of international cultural value, beyond the formalist emphasis on legal status or the abstract notion that ‘humanity as a whole [is] affected by [the] loss’²⁶⁴ of cultural heritage, by pointing to the effects of the destruction in provoking an actual response from actors outside the community or state directly affected. This narrative appears to seek to substantiate the more abstract account of the ‘international’ value of cultural property by suggesting that its value in these terms is evidenced by the responses and condemnation of actual people, outside of the state in which the object or site is situated, to its destruction.

b. Remodelling the landscape

While the judgments that address the destruction of cultural property at the ICTY, in particular the destruction of houses of worship, reflect a recognition of its symbolic nature as tied up with the identity of religious and ethnic groups, the narratives that emerged during trial proceedings contribute an additional dimension to this theme, offering an expanded conception of their value and significance from a social and cultural perspective. These narratives highlight the communicative or meaningful dimensions of the targeting of such property by offering a conception of its role as a

²⁶¹ See for instance *Al Mahdi* Transcript 1 March 2016 (n 248), 16, 17, 21; *Al Mahdi* Transcript 23 August 2016 (n 248), 49-50; *Al Mahdi* Transcript 24 August 2016 (n 248), 9, 23, 28; *Al Mahdi* Transcript 17 August 2017 (n 248), 4-5.

²⁶² *Al Mahdi* Transcript 1 March 2016 (n 248), 16.

²⁶³ *Al Mahdi* Transcript 23 August 2016 (n 248), 59-61.

²⁶⁴ *Al Mahdi* Transcript 1 March 2016 (n 248), 16.

physical and visual anchor for a community's history and identity. This takes place through discussions of the motivations behind the targeting of religious property, which situate its destruction within the wider account of ethnic cleansing and intentional displacement. Firstly, the link between religious groups, their property and cultural or ethnic identity was highlighted, with one witness noting, for instance, that 'in Bosnia-Herzegovina cultural and ethnic identity historically has been tied up with the religious choices of one's ancestors and that, therefore, a religious monument tends to have an association with a particular cultural and ethnic group.'²⁶⁵ Similarly, another witness observed that 'it's no secret that in those areas religious property is very important to preserving identity.'²⁶⁶

The motivations behind the destruction of religious property was then outlined in these terms. For instance, a witness described how 'there is a belief among the Serbs that if there are no mosques, there are no Muslims. And by destroying the mosques, the Muslims will lose a motive to return to their villages.'²⁶⁷ Similarly, the police chief of Prijedor is recounted as having said that 'with their mosques it's not enough to break the minarets. You've got to shake the foundation. That way they [...] will leave and never come back. They cannot rebuild.'²⁶⁸ Highlighting the communicative dimension of targeting religious buildings on this basis, witnesses explained that 'the fact that the church was targeted and why it was targeted [was] to send a message to the Croats living there that there was no reason to return'²⁶⁹ and that 'destruction or damaging of a minaret is clearly a sign to a population. [...] This is a signal. Hitting a minaret is also one way of chasing, chasing the people.'²⁷⁰

Interwoven with this understanding of the motivation behind the targeting of houses of worship and the message this was intended to communicate is a sub-narrative that constructs the relationship between religious property and ethnic or religious identity not only in abstract, symbolic terms, but also more tangibly as a physical and visual anchor for a group's history and memory. It was, for instance, asserted by one witness that 'the targeting of a minaret, certainly does have a symbolic significance to it. It is trying to change this Bosnian town, to eliminate the memory.'²⁷¹ Another witness explained that 'Mosques were destroyed. Houses and buildings, which through their architecture reminded the people of the traditions - the architectural traditions of the

²⁶⁵ Milošević Transcript 3 July 2003 (n 238), 23837.

²⁶⁶ Prlić et al. Transcript 21 July 2008 (n 238), 31100.

²⁶⁷ Krajišnik Transcript 29 June 2005 (n 238), 15431.

²⁶⁸ Karadžić Transcript 9 December 2011 (n 238), 22617.

²⁶⁹ *Prosecutor v. Milan Martić*, IT-95-11, ICTY, Transcript 26 June 2006, 5912 [hereafter Martić Transcript Date].

²⁷⁰ Mladić and Karadžić Transcript 2 July 1996 (n 238) 463.

²⁷¹ *Ibid.* 481.

area, they were destroyed completely. [...] Everything that in any way was reminiscent of the past, this was destroyed.²⁷²

The visual dimensions of the existence of religious buildings featured particularly prominently in this understanding of the targeting of the physical traces of the presence of particular groups. The following expert witness testimony in *Mladić* is emblematic of this narrative, emphasising the importance of the visual for the symbolic role of religious buildings in signifying the presence of a particular community:

Q. Based on your studies and your work, can you tell us about the role of houses of worship in Bosnian Muslim and Bosnian Croat cultures?

A. Okay. Houses of worship in neighbourhoods and villages were often the centres of religious life and, to some extent, also of cultural and social life and they symbolised the visible presence of a community in a given place. So Mahala quarter of a city or a village would be immediately recognisable as a place where Muslims or Croats lived by the presence of a minaret or a church steeple. Many of these neighbourhoods and villages had a mixed population, and in that case you would see each groups' prominent religious monument visible in the landscape. In the late 20th century especially in urban areas the majority of the population was not particularly religiously observant. They might go to a mosque or a church mainly for the big transition of life events such as weddings or funerals. Nevertheless, the presence of these constituted the sign that this community to which they belonged had history in that place and belonged there.²⁷³

In similar terms, mosques were described as the 'clearest visual evidence of [the non-Serb community's] existence'²⁷⁴, minarets as 'just like a church steeple in the landscape, it announces the presence of a community, in this case a Muslim community, in a particular location'²⁷⁵ or as:

...a very characteristic sight in a Bosnian town. It is on the horizon. You can see the town sometimes for long ways away because of the minaret. The minaret means that this is a town which is inhabited by Muslims. It is a sign of the presence of Muslims.²⁷⁶

²⁷² Plavšić Transcript 16 December 2002 (n 239), 399.

²⁷³ *Prosecutor v. Ratko Mladić*, IT-09-92, ICTY, Transcript 16 October 2013, 17890 [hereafter *Mladić Transcript Date*].

²⁷⁴ *Mladić* Transcript 18 March 2014 (n 273), 20817.

²⁷⁵ *Karadžić* Transcript 8 December 2011 (n 238), 22535.

²⁷⁶ *Mladić and Karadžić* Transcript 2 July 1996 (n 238), 444.

The motivation behind the targeting was therefore also framed in visual terms, with a witness in *Blaskić* explaining, for instance, that 'where there are no minarets, it seems to say that there are no Muslims. [...] this is remodelling the landscape to make it correspond to what the ethnic or national components of the landscape, in fact, are.'²⁷⁷ A witness in *Blaskić* put together these elements of constituting a physical, visual anchor as a marker not only of a group's presence but also its history and memory, stating that:

If you destroy this mosque, you are doing several different things. One of them is that you are sort of removing the memory - it's been there since the end of the 16th century, you are removing the Muslims, not from just the present landscape or the future landscape, you are removing them from the past. In this case, you are even going back further. You are going to damage the perception of the past that everybody has had. If it goes far enough, you are taking the Muslims completely out of a chronology, not just out of space. You're saying that the Muslims were never there.²⁷⁸

The same idea was reflected in *Karadžić*, where a witness explained that '[t]he way of eliminating [a people] also involved a destruction of their heritage. In other words, you are eliminating a sacral building and in this way you are eliminating the memory of having lived together. [...] I mean, you have a kind of radical change in the physical environment in which people are living. This means that you are talking about the removal of the signposts of collective and individual life.'²⁷⁹ In *Mladić*, this was described as "'memory-cide" [...] aiming at eradicating memory."²⁸⁰ This narrative of remodelling history and memory through eliminating the visual traces of a group in the landscape in this way implicitly consolidates the centrality of religious buildings for constituting group identity, history and memory in this context, implying a more developed and expansive account of the human, social value of such buildings, and the implications of their loss, than that offered by the case law of the ICTY.

c. *Individuals & cultural property*

The discourse around destruction of cultural property during trial proceedings at the ICTY also contributed an additional more personalised, individual conception of the human dimension of cultural value, which was later also captured in the Reparations Order in the *Al Mahdi* case, in highlighting the relationship between cultural property and the memories, identities and emotions of individuals. For instance, the testimonies of some witnesses at the ICTY reveal the human relationship between

²⁷⁷ Blaškić Transcript 16 July 1998 (n 238), 10632.

²⁷⁸ *Ibid.*, 10633-10634.

²⁷⁹ Mladić and Karadžić Transcript 2 July 1996 (n 238), 457.

²⁸⁰ Mladić and Karadžić Transcript 11 July 1996 (n 238), 955.

religious property and individuals by reference to their personal memories of buildings which were subsequently destroyed:

Q. [...] you said that you were emotionally attached to the Catholic church in Dalj. Can you explain that?

A. I grew up in my childhood in that neighbourhood close to that church. That's where we played. And on some saint's day, we had the custom of going to the Catholic church, just like the Catholic church - Catholic people went to our church on some holidays, so I was emotionally attached to it because of my childhood memories.²⁸¹

Q. Was there a mosque in your village? I'm sorry. Was there a mosque in your village?

A. The mosque was no longer standing. The minaret was destroyed. And I wanted to go up there because I remember as a little kid I used to go up there. And I wanted to go steps and my mom told me - somebody mentioned, "Don't go. Might be mines or something up there." So I didn't want to actually - I wanted to go, but I didn't want - they didn't let me to go. But minaret was totally destroyed.²⁸²

The same narrative is present with respect to secular heritage. Witness testimonies on the destruction of these buildings speak to an account of cultural value that also incorporates the role that buildings and monuments may play in individuals' lives at a personal, affective level. For instance, in *Blaskić* an expert witness provided the following testimony:

Q. Dr. Kaiser, why is this important? Why you as a representative of UNESCO, why is this issue concerning the sacral and cultural monuments and the safeguarding of those monuments an important issue?

A. It's important for reasons that are sort of second nature to people, but often sometimes harder to spell out. People are attached to their environment, first of all. Secondly, they are attached to specific objects in their own environment. If you take a building like Vijećnica, the national university library in Sarajevo, people are not attached to it because they know the name of the architect or they admire it aesthetically. They are attached to it because they had rendezvoused with their girlfriends in front of. Maybe they spent many good hours reading books in it. It's a landmark. It's something that is part of their lives. Maybe as time goes on, they start to know a little bit more about it and what it represents, what it signifies, in terms of the history of the town or the

²⁸¹ *Prosecutor v. Goran Hadžić*, IT-04-75-T, ICTY, Transcript 16 September 2014, 11563 [hereafter Hadžić Transcript Date].

²⁸² Krajišnik Transcript 20 October 2004 (n 238), 7247-7248.

history of their district. So in an unconscious way, people are very attached to their environment and the buildings in their environment.²⁸³

This outline of the relationship between people and cultural property on an ordinary, everyday level was reinforced through testimonies that reflect how cultural property featured in particular in the inner lives and identities of some individuals. With respect to the destruction of the Old Bridge in Mostar, in *Prlić et al.* a witness argued that 'the Old Bridge in Mostar was a part of every man and woman in Mostar. It was a part of me.'²⁸⁴ In *Strugar*, a witness testified directly to the role of the Old Town of Dubrovnik in constituting his personal identity:

Q. Have you ever lived in the Old Town of Dubrovnik?

A. Yes. That is my town. I'm actually a child of that town.

Q. How would you describe your familiarity with the Old Town and the buildings and objects within it?

A. I am very familiar with it. I had accumulated all of that from a material and spiritual point of view, and it actually formed my personality, living in the Old Town. I was always very proud of that. I am very proud of that. And I shall always be very proud of that.²⁸⁵

Lastly, resonating with the later attention to the emotional impact of the destruction of the mausoleums on individual inhabitants of Timbuktu in the Reparations Order in the *Al Mahdi* case, the affective dimensions of people's relationship to cultural property, in particular the emotional impact of its destruction at an individual level, while absent from the decisions of the ICTY, was nevertheless pronounced in the narratives of the trial proceedings on secular heritage. For instance, the burning down of the national library in Sarajevo was described as having caused a 'great shock'²⁸⁶ to its citizens. The destruction of the Old Bridge in Mostar was often described in similar terms as having caused 'a great deal of shock, regret and shame'²⁸⁷, as having affected the 'morale'²⁸⁸ of the population of Mostar, with inhabitants of the town described as being 'very shocked and very upset.'²⁸⁹ The bridge was also described as being 'in the hearts and memories of the citizens'²⁹⁰ and its destruction as having had a 'traumatic effect'²⁹¹ on them. Similarly, it was noted that 'the devastation of the bridge was matched by that of emotions with senior civil leaders reduced to tears. [...] this had a

²⁸³ Blaškić Transcript 17 July 1998 (n 238), 10585-10586.

²⁸⁴ Prlić et al. Transcript 13 January 2010 (n 238), 43317.

²⁸⁵ Strugar Transcript 4 May 2004 (n 238), 5818.

²⁸⁶ Mladić and Karadžić Transcript 1 July 1996 (n 238), 336.

²⁸⁷ Mladić Transcript 18 December 2002 (n 273), 14565.

²⁸⁸ Prlić et al. Transcript 3 November 2009 (n 238), 46463.

²⁸⁹ Prlić et al. Transcript 15 May 2006 (n 238), 2106.

²⁹⁰ Prlić et al. Transcript 20 May 2009 (n 238), 40432.

²⁹¹ Prlić et al. Transcript 22 February 2007 (n 238), 14606.

significant and deep emotional – it elicited a deep emotional reaction from many people.²⁹²

The same type of sentimental narrative, emphasising the populations' affective relationship to the Old Town, is evident with respect to the attack on Dubrovnik. One witness rejected the defence's suggestion that inhabitants may have been drawing fire on to the city by stating that 'the people of Dubrovnik loved their town too much to allow themselves to fire a single shot at their own town. [...] for the men of Dubrovnik, the town of Dubrovnik is sacred.'²⁹³ The impact of the attack on Dubrovnik on individuals was then described in these personal and emotional terms. With respect to the destruction of an historic palace, a witness noted his 'very deep feelings about this building'²⁹⁴ stating that 'in a way my own soul is there, so this involved such hurt, such humiliation. I cannot understand until the present day why all of this happened.'²⁹⁵ A witness testified that when they returned to the Old Town following the attack, 'I saw a lot of people coming into the downtown area, silent, mute with tears in their eyes. It's a sight that I will never forget.'²⁹⁶ Another described the scene as 'a disaster to look at. There were people standing outside. An elderly man was crying, sitting there on the floor. He had perhaps devoted most of life to the reconstruction and preservation of that building, and the yet [sic] whole thing disappeared into thin air in a matter of minutes.'²⁹⁷ These accounts of the place of sites of cultural heritage in the lives, identities and memories of individuals, and the emotional impact their destruction therefore had, contribute an additional personalised and granular dimension to the account of cultural value understood in more human terms, which is absent from the case law of the ICTY.

d. Social and religious practices

This expanded account of the connection between people and religious buildings is further reinforced in the discourse of the proceedings at the ICTY through discussion of the concrete social and cultural practices that bind people to cultural and religious property at a social and community level. This was highlighted by a witness in *Mladić*, for example, who identified the symbolic role of religious buildings not only in terms of how they straightforwardly represent a particular set of religious practices, but also in terms of the wider social role that houses of worship played in communities. The witness explained that 'the message destroying mosques sent to Bosnian Muslim communities was that the people who worshipped there, who grew up there, who got

²⁹² Prlić et al. Transcript 22 May 2007 (n 238), 18900. See similarly 18894.

²⁹³ Milošević Transcript 18 December 2002 (n 238), 14565.

²⁹⁴ Strugar Transcript 24 February 2004 (n 238), 3087.

²⁹⁵ *Ibid.*, 3102.

²⁹⁶ Strugar Transcript 4 May 2004 (n 238), 5826. See similarly Strugar Transcript 21 January 2004 (n 465), 1039.

²⁹⁷ Strugar Transcript 23 February 2003 (n 238), 2952.

married there, who celebrated their children there, who mourned their dead there, they and their communities were no longer welcome.'²⁹⁸

This witness's account points to a more mundane dimension to the value of religious property, as distinct from the 'spiritual' value identified by the Trial Chamber in the *Hadžihasanović and Kubura* case, in terms of its role in the everyday life of the community. This narrative captures a number of different aspects of the everyday-use-value of religious buildings and their place in the social and religious practices of the community. First, the obvious importance of a religious building for the purpose of holding religious services, and therefore the disruption caused to the community's religious customs and traditions by its destruction is highlighted. For instance, in *Prlić et al.* the damage caused by an attack on a Catholic church was described in the following terms:

An explosive device was launched at the local Catholic church in Jablanica causing some material damage. However, the greater damage was the fact that it caused concern among people in Jablanica, especially the Catholics, especially when they found out that the Christmas mass would not be celebrated. For any Catholic the Christmas mass and Christmas itself is one of the most important religious festivities that they mark every year.²⁹⁹

The impact of the destruction of churches was articulated in similar terms in *Martić*, where a witness testified that 'churches were destroyed, which effectively deprived them of a place - to gather and pray, and indeed, I suppose to gather as a community. So it was literally breaking down the community.'³⁰⁰ Here, the role of a house of worship was identified both from the perspective of its role in religious practices, as a place to pray and worship, but also from the more prosaic perspective of how it functioned as a meeting place for the community. This social role of houses of worship as a place of meeting and socialising was particularly pronounced in the testimony of witnesses in the *Blaskić* and *Hadžić* cases in relation to mosques and churches respectively:

...to give you an example of how important a mosque is in the local life [...] people will go from a whole series of little villages around the town, they will go to the mosque which has the minaret. They will go do their devotions there; they will meet their friends there; they will exchange a lot of news there. So this is another way of pointing out how important the mosque is for the community's life on, sort of, a wider level.'³⁰¹

²⁹⁸ Mladić Transcript 6 December 2016 (n 273), 44448.

²⁹⁹ Prlić et al. Transcript 13 October 2008 (n 238), 33025.

³⁰⁰ Martić Transcript 26 May 2006 (n 269), 4616.

³⁰¹ Blaškić Transcript 16 July 1998 (n 238), 10591.

Taking down the churches and the houses was [...] literally breaking down the sense of community. Church was a place where people went where there was very often social engagement by old folk who may not meet from one end of the week to the other, so there was - just apart from a religious element, there was a community side to it as well. So it was destabilising the whole community approach.³⁰²

The testimony of a witness in *Blaskić* tied together these social and spiritual dimensions to the value of religious buildings, invoking a particularly profound conception of the role of religious property and the implications of its destruction in this specific cultural context, which is worth quoting at length:

We live in secularised societies. We don't always, immediately responsible [sic], to the simple messages that is in a lot of the sacral heritage. But there are societies and there are populations in any society which are extremely attached to certain types of buildings. They are a symbol of their past. A church contains often a cemetery. A cemetery contains the graves of our ancestors. A church also were most important parts of your life have gone through. You may have been married in the church. You may be buried in the church. The church points upwards. Religious buildings, sacral buildings are very, very important for the cycle of life. When you have the society groups in the society for whom those things are really important, then if you touch the church, if you touch the mosque, then you are touching something very, very important to those people. As we are talking here basically about sacral buildings, I think that's basically my answer. This is an intangible thing, but an extremely important thing.

[...] I think the destruction of a mosque is different than the destruction of a Bosnian Muslim's house. The mosque or the church or whatever, it represents an order to the world. What happens to you, everybody knows that you're mortal. Your life is a series of accidents. But the mosque, the church, it represents an order. When you destroy that, you are sort of tempering, threatening the order of existence. I think that one reacts in that sense. It has often been said to me, during the war, and not just about churches, but about other major cultural buildings, that we get used to being killed. We know that human life is no more tangible or tougher than the life of a butterfly, but when we see these other buildings being destroyed, then the world starts to crumble around us. And I think it's more so, in the case of sacral buildings.³⁰³

³⁰² Hadžić Transcript 20 June 2013 (n 281), 6133. See similarly Milošević Transcript 8 July 2003 (n 238), 23885-23886.

³⁰³ Blaškić Transcript 16 July 1998 (n 238), 10586-10588.

In this way, the discourse around the destruction of religious property during the course of trial proceedings at the ICTY invokes a much more emphatically people-oriented account of the cultural value of religious buildings than the more generalised appeals to the concepts of symbolism and identity reflected in the ICTY case law. By addressing the role of houses of worship in this region in local, contextualised terms, the discourse of the trial proceedings constructed an account of the value of religious property as profoundly linked to the social fabric of the religious communities in question, with its destruction therefore constituting not only an attack on a symbol of a particular religious or ethnic identity, but also representing a threat to the 'order of existence'³⁰⁴ for these communities.

While the themes identified in the decisions of the *Al Mahdi* case at the ICC reflect this type of social, human-oriented conception of cultural value much more strongly than the decisions of the ICTY, the narratives that emerged during the proceedings of this case nevertheless also offer a richer and more granular account of the nature of the social processes that contribute to the emphatically functionalist, anthropocentric conception of cultural value constructed in this case. Many of these narratives echo and expand upon some of the ideas reflected in the trial proceedings of the ICTY. For instance, the role of the mausoleums in the life of the community in Timbuktu was central to the discourse of the trial proceedings in the *Al Mahdi* case, with statements emphasising how the mausoleums were 'closely linked to the life of the inhabitants'³⁰⁵ and 'occupied a place at the very heart of their lives.'³⁰⁶ This notion was expanded upon through detailed descriptions of the important role of the buildings in the ongoing religious practices of the community. Thus, it was noted that:

This shows you that the mausoleums and mosques are not only linked to the past of Timbuktu but are very much an important part of the life of the people of Timbuktu today. In fact, the people of Timbuktu travel or visit these mausoleums very regularly to pray, to read verses of the Quran, to make offerings or to have spiritual retreats.³⁰⁷

The importance of the religious practices attached to the mausoleums was also emphasised from a spiritual perspective, and linked to what was described as the 'most intimate part of a human being'³⁰⁸:

The mausoleums and saints of Timbuktu play an important role in the daily lives of the city's inhabitants. The mausoleums are frequently visited by the city's residents, usually on Fridays. They are places of worship. The act of going

³⁰⁴ *Ibid.*, 10588.

³⁰⁵ *Al Mahdi* Transcript 1 March 2016 (n 248), 14.

³⁰⁶ *Ibid.*, 12.

³⁰⁷ *Ibid.*, 25.

³⁰⁸ *Ibid.*, 14.

to the mausoleums is perceived as a sign of faith and religious piety. Some even travel to them on pilgrimages. [...] It became impossible for the inhabitants of Timbuktu to devote themselves to their religious practices. These practices which were deeply rooted in their lives. These practices which signified the deepest and most intimate part of a human being: Faith. These practices were part of their shared life together.³⁰⁹

In addition to religious practices and their spiritual importance, the wider cultural practices attached to the maintenance of the mausoleums were recounted in detail and identified as playing a social role, contributing to strengthening the social fabric of the community in a similar manner to that identified with respect to houses of worship at the ICTY:

Additionally, the mausoleums played a key role in fostering the social cohesion that is so characteristic of Timbuktu. The mausoleums are related to families who take care of them and resort, when needed, to masons. These masons are considered to be living human treasures for their unique craftsmanship. And while they are the ones who maintain these buildings, the renovation of a mausoleum is a task in which the entire community joins and participates. Everyone helps the masons. At the level of neighbourhoods, materials are collected and meetings are held. It is an event that brings together and unites worshippers, different age groups and the community as a whole. These are not the only social functions linked to the mausoleums. The mausoleums which were destroyed also contributed greatly to what I would call "the workshop of peaceful coexistence."³¹⁰

These elements of the narrative around the value of the mausoleums, which emphasise their religious and spiritual role as well as the importance of the social functions of the cultural practices attached to them in bringing the community together, contribute to a discourse in which the mausoleums were constructed as being central to the identity of the population of Timbuktu. An expert witness outlined in sociological terms the social processes through which cultural heritage can be understood to contribute to the construction of a community's identity in this way:

If one were to talk about the social functions of Mali's cultural heritage, one would say that the cultural heritage, broadly speaking, is part of the education of the upcoming generations. It also contributes to providing social ethics and etiquette as well as educating the people on their history. Heritage, cultural heritage in one word is part of the socialisation of the people. So for each of the items of a people's cultural heritage you can always find a relation, a

³⁰⁹ *Ibid.* See similarly 25-28.

³¹⁰ Al Mahdi Transcript 22 August 2016 (n 248), 18.

relationship to the community, a link to ethics with a link to cultural identity as it emerges from within a people.³¹¹

From this perspective, the attacks on the mausoleums were therefore depicted as having been undertaken 'with the intent to destroy monuments and the specific symbols that are the substrate of the identity and culture of a nation'³¹² as well as being an attack on 'what structures men and women and constitutes the[ir] roots'³¹³, which 'impacted on their very sense of self and of life.'³¹⁴

e. 'Like beings without soul, history or memory'

In addition to the nature of the social processes that contribute to the place of a community's heritage in constituting its identity, in the *Al Mahdi* case the importance of the material dimensions of the mausoleums was also emphasised in this respect, in particular from the perspective of ensuring the continuity of the community's history and memory. For instance, cultural heritage in general was described as giving 'meaning as well as a sense of continuity and direction from the past to the future. Cultural heritage provides reference points.'³¹⁵ The mausoleums were therefore described as being 'an integral part of the memory of the country [...] they express part of the collective conscience of the people' because they 'are handed down generation to generation.'³¹⁶ From this perspective, the sites in Timbuktu were characterised as constituting a material anchor for the continuation of religious and cultural practices that have been passed down between generations, with their destruction therefore constituting a rupture in the continuity of the community's social memory:

The 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. [...] More so, to destroy the mausoleums is to erase this element of collective identity that the people of Timbuktu built through the ages. It means the annihilation of a civilisation's landmark and crucible which constitutes necessary archetypes in the social memory and helps build and inspire future generations.³¹⁷

³¹¹ Al Mahdi Transcript 23 August 2016 (n 248), 77.

³¹² Al Mahdi Transcript 24 August 2016 (n 248), 21.

³¹³ *Ibid.*, 54.

³¹⁴ Al Mahdi Transcript 1 March 2016 (n 248), 32.

³¹⁵ Al Mahdi Transcript 22 August 2016 (n 248), 21.

³¹⁶ Al Mahdi Transcript 1 March 2016 (n 248), 31.

³¹⁷ *Ibid.*, 51.

The importance of the material connection between the people and the buildings for the temporal continuity of the community's religious and cultural practices was particularly pronounced in the representative for victims' explanation of the meaning attributed to the keys to the mausoleums by their guardians. The representative for victims explained that:

The link between those who are alive and the saints is through the keys of the mausoleums who are handed over - which are handed over to their guardians, and that link is broken today. All the physical persons whom I today represent before you did indeed have a key, a symbolic key which is the link between the living and the spirits. This key is a relay, a link between one generation which leads on to another and all of that is linked to the existence of the mausoleums. Your Honours, we must understand that these keys represent a more or less palpable link between a physical person and the sacred monuments. A relationship with God may be represented symbolically by this key, the key whereby those who receive it have today become victims, so to speak, as they remain guardians of spiritual and ancestral values that have been handed down from generation to generation.³¹⁸

This notion of the preservation of cultural identity and memory through the palpable materiality of a cultural site or object was captured most succinctly in the OTP's statement that 'if heritage is destroyed we are like a traveller without any belongings, like beings without soul, history or memory.'³¹⁹ The impact of the destruction of the mausoleums on the population of Timbuktu was therefore also framed from the perspective of this loss of history and memory in physical terms. The inhabitants Timbuktu were said to have 'watch[ed] their history being destroyed, their memories being destroyed, their roots being destroyed'³²⁰ and 'the symbols of their identity, their history and their religious vision [...] reduced to dust.'³²¹

Taken together, history, memory and identity form the constituent parts of an overarching narrative during the proceedings of the *Al Mahdi* case that unequivocally centralised the extrinsic, social and human value of cultural property, captured most emphatically in the following statement by the OTP:

Last but certainly not least, the destroyed mausoleums played a crucial role in shaping the identity of the people of Timbuktu. [...] To destroy Timbuktu's mausoleums is therefore to erase an element of collective identity built through the ages. It is to eradicate a civilisation's landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes,

³¹⁸ *Al Mahdi* Transcript 24 August 2016 (n 248), 26.

³¹⁹ *Ibid.*, 6. *Al Mahdi* Transcript 1 March 2016 (n 248), 24.

³²⁰ *Al Mahdi* Transcript 24 August 2016 (n 248), 7.

³²¹ *Ibid.*, 16.

practices and structures. [...] Your Honours, culture is who we are. Our ancestors created paintings, sculptures, mosques, temples and other forms of cultural possessions all around us. They put their hearts and souls into the creation of such cultural heritage so that it represents the cultural identity of their times and is passed on for the benefit of future generations. Indeed, this cultural heritage shapes the spirit and identity of our own generation and of generations to come. With the passage of time, they become archetypes of social memory from which individuals shape their identity and grow. Make no mistake, for centuries, the mausoleums of Timbuktu have been an important foundational block on which the identity of the city's inhabitants has been built. That continues to be very much true today. To be born and raised in Timbuktu is to be inspired and shaped by the centuries-old mosques and mausoleums that personify this historic city's cultural foundation.'³²²

In this way, the discourse of the trial proceedings in *Al Mahdi* constructs a normative account of this crime, and the justification for its prosecution in this case, as rooted in its impact on the identity and memory of the people living in Timbuktu, on their social and religious practices and therefore on the social fabric of the community. While the decisions in the *Al Mahi* case reflect a similar turn towards a more people-focussed, anthropocentric account of cultural value, and therefore of the justification for criminalising attacks on cultural property during armed conflict, the trial proceedings reveal the extent to which the OTP vigorously pursued this conception of cultural value in this case.

f. Living buildings

This emphatically people-oriented conception of cultural value is given further force in a number of cases through the discursive construction of buildings and property as 'living' or 'alive'. While the *Al Mahdi* case reflects a pronounced shift towards emphasising this type of conception of cultural value, the metaphor of living cultural heritage also featured during proceedings at the ICTY. For instance, in the context of testimony addressing the functional uses houses of worship and their importance at the social heart of a community, a witness in *Blaskić* stated that 'there was no doubt about it that these mosques were alive and that they were important for the rural community. [...] There was a kind of vitality in the countryside, and this was proof of a kind of devotion, a devoutness, on the country population.'³²³ Similarly, in *Mladić*, in response to the question of whether a newly built mosque could be understood to constitute cultural heritage, an expert witness responded by explaining 'yes. [...] What makes it cultural heritage is its cultural uses and the fact that it expresses artistry, belief, and it plays a cultural role. Obviously not every mosque is of the same cultural

³²² Al Mahdi Transcript 22 August 2016 (n 248), 19-20.

³²³ Blaškić Transcript 16 July 1998 (n 238), 10590.

and historical value, but all religious monuments to one degree or another, mosques, churches, chapels, are part of cultural heritage. Culture is a living thing.³²⁴ This analysis provides a particularly clear example of an approach that identifies cultural value extrinsically, in its living connection with people, which characterised the discourse on the destruction in particular of religious property during the course of proceedings at the ICTY.

In addition, the 'living buildings' metaphor was particularly pronounced during proceedings at the ICTY in relation to the attack on the Old Town of Dubrovnik. The Old Town was frequently referred to as a 'live city'³²⁵ or a 'living city, not a museum.'³²⁶ This construction of the Old Town as a living city was stressed from a functional perspective, being described as 'quite unique in that as well as being a stunning ancient monument, it's lived in. It's a living structure as well.'³²⁷ More poetically, in *Strugar*, Dubrovnik was described as 'never anything less than a finely balanced result of the work both men's hand and his irrepressible spirit'³²⁸, while 'the streets with elegance and allure of Dubrovnik's Stradun, the city's main thoroughfare, are to be seldom seen anywhere. This mirror of stone lives on through humanity's touch through men's tread and its laughter.'³²⁹ In *Strugar*, during questioning on the subject of the criteria used when listing the Old Town of Dubrovnik as a World Heritage Site, a witness made explicit the importance of this living relationship between the site and its inhabitants from the perspective of evaluating its value:

Dubrovnik had to satisfy very high criteria and standards in the sense of being authentic and well-preserved in the sense of its artistic values and structural values, and I know, for example, that the fact that it was a living town, a live old town, was a very noteworthy factor, a point in its favour, and that throughout its existence it always catered to the needs of its inhabitants. And the relationship of those inhabitants and its citizens towards the cultural values was taken note of.³³⁰

While the narrative around the cultural value of the mausoleums in the *Al Mahdi* case did not use the same language to directly describe the structures as 'living' or 'alive', the OTP nevertheless constructed a normative discourse around the crime that embodied this notion. First, further elevating the emphasis on the human value of the

³²⁴ Mladić Transcript 16 October 2013 (n 273), 17943. See similarly Milošević Transcript 9 April 2002 (n 238), 2680.

³²⁵ Milošević Transcript 11 March 2003 (n 238), 17690.

³²⁶ *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, ICTY, Transcript 4 December 2003, 194. See similarly *Strugar* Transcript 4 June 2004 (n 238), 6988.

³²⁷ *Strugar* Transcript 13 January 2004 (n 238), 574.

³²⁸ *Strugar* Transcript 16 December 2003 (n 238), 277.

³²⁹ *Ibid.*, 278.

³³⁰ *Strugar* Transcript 5 February 2004 (n 238), 1880.

mausoleums in social, cultural and religious terms, a frequent narrative motif that emerged during proceedings constructed the buildings as representing the 'soul' of the community and the city. The OTP asserted that 'what happened here [...] struck a blow to the very soul of Timbuktu and its inhabitants'³³¹, and went on to quote the Minister of Culture of Mali describing the attack as 'an attack on the lifeblood of our souls.'³³² An inhabitant of Timbuktu was similarly noted to have described the destruction as 'an attack on what drives our soul',³³³ while the purpose of the attack was characterised as being intended 'to wipe out the people's soul and their roots.'³³⁴ In a more developed account of the motivation behind the destruction, a witness testified that:

...when it came to the destruction of the Timbuktu mausoleums, this was indeed a matter of an activity of war to psychologically kill the people of Timbuktu [...] And from a cultural and religious perspective it is known that it is one of the means that's used during war, that is, to harm the other person in regards to the persons' deepest inner self. [...] It consists of killing the enemy in that person's soul through such type of activity.'³³⁵

In a similar way to the notion of a living building or city, the construction of such a profound relationship between the mausoleums and a 'persons' deepest inner self'³³⁶, 'the very core of their being'³³⁷, such that the destruction of the buildings constituted an attack on the community's soul, invokes the idea of a living connection between people and buildings, supporting the idea articulated by the Prosecutor that 'what is at stake here is not just walls and stones'³³⁸, but rather the very soul of the community.

This was taken a step further in statements that personify the buildings themselves, investing them with living, human characteristics. For instance, the relationship between the inhabitants of Timbuktu and the mausoleums was described as involving 'a special link or tie, it's as if they can almost communicate or commune with the building'³³⁹, attributing some form of consciousness or sentience to the buildings in people's ability to communicate with them. Similarly reflecting a conception of sentient buildings, the representative for victims declared that 'I am the voice of the

³³¹ Al Mahdi Transcript 24 August 2016 (n 248), 7.

³³² Al Mahdi Transcript 1 March 2016 (n 248), 15-16.

³³³ Al Mahdi Transcript 22 August 2016 (n 248), 42.

³³⁴ Al Mahdi Transcript 24 August 2016 (n 248), 27.

³³⁵ Al Mahdi Transcript 23 August 2016 (n 248), 89-90.

³³⁶ *Ibid.*, 90.

³³⁷ Al Mahdi Transcript 24 August 2016 (n 248), 8.

³³⁸ Al Mahdi Transcript 1 March 2016 (n 248), 3.

³³⁹ Al Mahdi Transcript 23 August 2016 (n 248), 95.

monuments and mausoleums tolling here on behalf of these victims, tolling here that you may hear their cause.’³⁴⁰

The personification of the buildings not only as inextricably linked to the lives and souls of the inhabitants of Timbuktu, but as somehow living beings in their own right was particularly pronounced in the words of one inhabitant, which were quoted by the OTP. This witness stated that ‘Timbuktu is on the verge of losing her soul. Timbuktu is threatened by outrageous acts of vandalism; Timbuktu is being held under a sharpened blade ready for use in cold-blooded murder.’³⁴¹ The mausoleums were in this way personified not only through their construction as being the soul of the city, but the attack on them was characterised as ‘murder’, reflecting an understanding of their destruction as the killing of something human and alive. Indeed, the mosques and mausoleums were said explicitly at one point to ‘personify this historic city’s cultural foundation.’³⁴² This motif moves beyond an anthropocentric account of the crime of attacking cultural property from the perspective of ‘focus[sing] on the impact it has on persons’³⁴³ to one that discursively constructs the mausoleums as living beings in themselves and their destruction as an act of killing, a destruction of life in itself. In doing so, this narrative seems to somehow seek to discursively and normatively root the destruction of the buildings within the core life and physical security norms typically understood to constitute the normative core of international criminal law.

Building on this, the second dimension of this narrative takes on a more justificatory tone, where the OTP uses this anthropocentric conception of the mausoleums as representing the soul of the inhabitants of Timbuktu, being almost living things in their own right, as a means of situating the criminalisation of attacks on cultural property within the same normative framework as other international crimes. The more justificatory element of this narrative is captured in the following explanation by the Prosecutor during opening statements:

...the Rome Statute prohibits and punishes the most reprehensible criminal acts: Crimes of genocide, crimes against humanity and war crimes. These crimes can be perpetrated in various forms, but they all have one common denominator. They inflict irreparable damage to the human persons [sic] in his or her body, mind, soul and identity. The instant case concerns an international

³⁴⁰ Al Mahdi Transcript 24 August 2016 (n 248), 19.

³⁴¹ Al Mahdi Transcript 22 August 2016 (n 248), 19.

³⁴² *Ibid.*, 20.

³⁴³ Marina Lostal, ‘The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC’, (2017) 1(2) *Inter Gentes - The McGill Journal of International Law & Legal Pluralism*, 46.

crime prohibited by the Rome Statute, a crime which affects the soul and spirit of a people...³⁴⁴

This statement, with its emphasis on the notion that what unites international crimes that take different forms is the damage they cause to the body, mind, soul and identity of the human person, reflects an intention to place attacks on cultural property on the same normative footing as other international crimes by constructing an account of their value that is ultimately situated in the mind, soul and identity of the people who value them. Indeed, the OTP made explicit this understanding of the crime in arguing that ‘such an attack [...] falls into the category of crimes that destroy the roots of an entire people and profoundly and irremediably affects its social practices and structures. This is precisely why such acts constitute a crime under Article 8(2)(iv) of the Rome Statute.’³⁴⁵ In the context of a trial involving a sole charge of attacking buildings dedicated to religion and historic monuments, these statements in this way seem intended to employ an anthropocentric narrative of cultural value to elevate the crime from one that involves merely the destruction of material objects, to one that protects fundamental aspects of the human person in their mind, soul and identity.

5. Conclusion

Examining the changes in how the prohibition on the destruction of cultural property during armed conflict and its subsequent criminalisation have been conceptualised reveals that a significant degree of normative evolution has taken place both in how the fundamental justification for the protection of such property during armed conflict is conceptualised, but also in how the nature of a cultural value approach to this justification, i.e. what is considered to be culturally valuable about such property, is constructed. Much of this evolution reflects the dual normative roots of the prohibition in terms of its historical emergence as a result of a confluence of ideas about limiting the unnecessary use of force during war alongside the emergence of Renaissance and Enlightenment ideas that attached particular importance to art, history and culture. Prior to the emphatic turn towards an unambiguous cultural value approach to the criminalisation of the destruction of cultural property in the case law of the ICTY and in the *Al Mahdi* case at the ICC, the wider legal regime governing the protection of cultural property during armed conflict, the early criminal cases at the IMT Nuremberg and the definitions of the crime included in the statutes of the ICTY and the ICC reflect a degree of fluctuation between these two rationales. Some legal frameworks and cases addressed forms of cultural property generically alongside other types of property protected during armed conflict primarily for their civilian character or humanitarian functions while others, such as the 1954 Hague Convention and the *Strugar* and *Jokić* cases at the ICTY addressing the attack on the

³⁴⁴ *Al Mahdi* Transcript 1 March 2016 (n 248), 12.

³⁴⁵ *Ibid.*, 13.

Old Town of Dubrovnik, invoked a conception of cultural property as normatively distinct, and worthy of protection for its distinctly cultural value.

As greater attention to the cultural value of attacked or destroyed property came to be incorporated into the narratives of cases involving the destruction of religious and cultural property at the ICTY, different dimensions to how this cultural value could be understood also began to coalesce. While the case law of the ICTY constructed a relatively conventional object-centric and internationalist approach to cultural value with respect to the secular monuments of the Old Town of Dubrovnik and the Old Mostar Bridge, the case law on the destruction of houses of worship, in particular when charged as persecution, began to appeal to elements of a more functionalist and people-oriented conception of cultural value in invoking, in a limited form, links between religious buildings and the notions of symbolism, identity and an ethnic group's history and memory.

While the shift towards an explicitly anthropocentric, human-value conception of the crime was consolidated in the *Al Mahdi* case at the ICC, the narratives during proceedings at the ICTY around the destruction of religious buildings in particular also constructed a more expansive and localised account of their human value than the dominant themes captured in the ICTY case law, emphasising in particular the everyday, social roles of houses of worship in sustaining the social fabric of religious communities. This approach to cultural value was expanded significantly in the *Al Mahdi* case, where the decisions and, in particular, the narratives constructed by the OTP during the course of proceedings invoked various elements of an emphatically extrinsic, anthropocentric conception of cultural value, recounting in detail the myths and beliefs attributed to the mausoleums by the inhabitants of Timbuktu, the social and religious practices that surrounded the structures and their constitutive place in the identity and social fabric of the community. In constructing an account of the harm inflicted by the destruction of the structures in these terms, the OTP added an emphatically justificatory dimension to this narrative, explaining the inclusion of this crime in the same normative framework as the forms of violence against persons criminalised under international criminal law on the basis of the profound living connection it invoked between people and sites of cultural heritage.

Overall, while the anthropocentric narratives reflected in the decisions and proceedings of the *Al Mahdi* case consolidated and significantly expanded on this social, human conception of the value of cultural property, the *Al Mahdi* case nevertheless also reflects a degree of continuity in terms of the narratives of cultural value that had initially emerged primarily in the context of the destruction of houses of worship charged as persecution at the ICTY. Taken as a whole, this continuity between the narratives highlighting the social value of religious buildings at the ICTY and the emphatically anthropocentric account of the cultural value of the more prominent UNESCO-listed site advanced by the OTP in the *Al Mahdi* case also invokes

a less hierarchical conception of cultural value than more formalist appeals to internationally protected status or concepts such as the common heritage of mankind because of how it centralises 'the relationship between [...] sites, objects, and artefacts and human beings'³⁴⁶ as the shared characteristic that is worthy of protection through criminalisation.

At the same time, while a civilian-use rationale for the protection of cultural property does not ultimately appear in these cases, having been displaced by an increasingly functionalist and anthropocentric conception of a cultural value rationale for the protection of cultural property during armed conflict, the more traditional conceptions of cultural value have also not fallen away. The case law and proceedings of both the ICTY and the ICC ultimately construct a multifaceted account of their understanding of the normative dimensions of this crime, which incorporate elements of internationalism, object-centrism, and functionalism or anthropocentrism. In this sense, while the narratives surrounding the crime have shifted to engage more directly with the role of cultural heritage in the social fabric of communities, identities and the living, affective relationship between people and their heritage, these cases do not invoke a single, exclusive conception of the cultural value of the types of property protected by the criminalisation of attacks on cultural property during armed conflict. Rather, the complex patchwork of narratives constructed around the crime in these cases epitomises what Erich Hatala Matthes has termed 'the variable scope of value'³⁴⁷, which captures 'the wide scope of reasons for valuing cultural heritage'³⁴⁸ depending on an individual or actor's relationship to it.

³⁴⁶ Lixinski (n 201), 582.

³⁴⁷ Matthes (n 80), 1003.

³⁴⁸ *Ibid.*, 1027.