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Emma A. O'Connell

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**CRIMINAL LIABILITY FOR THE DESTRUCTION OF CULTURAL PROPERTY: THE
PROSECUTOR V. BOSCO NTAGANDA**

EMMA A. O'CONNELL

INTRODUCTION

The destruction of cultural property constitutes an inherent component of armed conflict dating back to ancient times. In response, attempts have been made throughout history to increase protection for cultural property against attack during hostilities. Although international law has continued developing to protect cultural heritage, the recent conflicts in the Middle East and North Africa have resulted in the devastating destruction of cultural monuments, sites, and objects. Marking a promising and timely development for the protection of cultural heritage in the international criminal context, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, recently before the International Criminal Court (ICC), represented the first prosecution before an international tribunal in which the destruction of cultural heritage was the sole basis for prosecution.¹ On September 27, 2016, Al Mahdi was convicted by the Trial Chamber of the war crime of directing an attack against buildings dedicated to religion and historic monuments which were not military objectives, pursuant to Article 8(2)(e)(iv) of the Rome Statute.² The case,

¹ Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (September 27, 2016) [hereinafter *Al Mahdi*, Judgment and Sentence].

² *Id.* ¶ 11.

which focused specifically on crimes against cultural heritage, sent a strong message—that the intentional targeting of cultural heritage is a serious crime, one that affects both the local and international communities.

Despite the ICC’s previous landmark decision, on July 8, 2019, the Trial Chamber acquitted a Congolese militia leader, Bosco Ntaganda, for the pillaging of a church located within Ituri, a northeastern province of the Democratic Republic of the Congo.³ In *The Prosecutor v. Bosco Ntaganda*, when tasked with interpreting Article 8(2)(e)(iv) of the Rome Statute again, the Court declined to hold Ntaganda criminally responsible for the war crime of intentionally attacking protected objects because the Chamber did not consider the pillaging of the church to constitute an “attack” within the meaning of Article 8(2)(e)(iv).⁴ The Trial Chamber based its legal analysis of the incident on the fact that it “took place sometime after the assault, and therefore not during the actual conduct of hostilities” which, in its view, was a necessary element of Article 8(2)(e)(iv).⁵ A majority of the Appeals Chamber affirmed this result on March 30, 2020.⁶

This Article criticizes the Trial Chamber’s decision in the *Ntaganda* case and argues that an Article 8(2)(e)(iv) “attack” should not be limited to actions

³ *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Judgment (July 8, 2019) [hereinafter *Ntaganda*, Judgment].

⁴ *Id.* ¶ 1142.

⁵ *Id.*

⁶ *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 A A2, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’ (Mar. 30, 2021) [hereinafter *Ntaganda*, Appellate Decision].

committed during the “conduct of hostilities.” Part I of this Article provides an overview of the existing international legal framework that aims to protect cultural heritage, including the most encompassing prohibitions regarding cultural property during armed conflict. Part II turns to the Rome Statute and the ICC’s role concerning the application of international law to cultural heritage protection. Part III of this Article then examines Article 8(2)(e)(iv) of the Rome Statute and its application to both the *Al Mahdi* and *Ntaganda* decisions, including the facts and procedural history of each case. As a result of this examination, Part IV contends that the term “attack” should be read more broadly to account for the conduct of hostilities and its aftermath. To restrict an Article 8(2)(e)(iv) “attack” only to actions committed during the “conduct of hostilities” limits the protections afforded by the provision and represents a significant step backwards for three main reasons.

First, by narrowing the applicability of the term “attack,” the Court creates a “window of opportunity” following active combat under which cultural and religious objects lose their protection, and those who destroy such objects become immune from prosecution. Second, in determining that the pillaging of the church did not constitute an “attack,” the Trial Chamber alluded to the possibility that the Court may consider certain types of cultural objects as being more worthy of protection than others, despite the Rome Statute failing to mention any “special status” of cultural property. Third, the Trial Chamber’s holding undermines the

Court's decision in *Al Mahdi* and creates a dangerous precedent moving forward. Part V of this Article concludes by asserting that an Article 8(2)(e)(iv) "attack" should not be confined to actions committed during the "conduct of hostilities" because to do so is not only inconsistent with international law and the Trial Chamber's holding in *Al Mahdi* but also creates a dangerous precedent that severely weakens the protections afforded to cultural property during armed conflict under the Rome Statute.

I. PROTECTING CULTURAL HERITAGE DURING ARMED CONFLICT

Every nation has its own unique cultural heritage comprised of both tangible property, such as historical and religious monuments, and intangible property, such as oral traditions and expressions.⁷ Cultural heritage strengthens national and cultural identity and frequently holds a universal significance by fostering an appreciation for cultural diversity and an understanding of our past.⁸ It has been said that "when cultural heritage is sacrificed, it is likely that many other aspects of life that mark us as human beings are also being sacrificed."⁹

War and other armed conflicts pose some of the greatest risks to cultural heritage. While damage and destruction of cultural property during armed conflict

⁷ Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 Penn St. Int'l L. Rev. 857, 857-858 (2005).

⁸ Erika J. Techera, *Protection of Cultural Heritage in Times of Armed Conflict: The International Legal Framework Revisited*, 4 MACQUARIE J. INT'L & COMP. ENVTL. L. 1 (2007)

⁹ Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT'L L. 245, 351 (2006).

has made the front-page news on many recent occasions, the practice of cultural looting is nothing new.¹⁰ Even before the Middle Ages, looting and destruction of culturally significant buildings, monuments, and objects was considered a typical aspect of war, which was often used to compensate leaders and soldiers.¹¹ The inherent value that societies placed on tangible cultural property, such as religious sites and objects, only further fueled the desire to destroy it as a tool of repression or as a symbol that the old regime had ended.¹² Although the destruction of cultural heritage is only one part of armed conflict, it nonetheless has devastating results.¹³

Throughout history, attempts have been made to increase protection for cultural property during hostilities.¹⁴ The first codification of the obligation to safeguard cultural sites and objects during armed conflict is found in the Instructions for the Government of Armies of the United States in the Field, also known as the Lieber Code.¹⁵ Among other provisions protecting cultural tangibles, Article 35 states that “classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as

¹⁰ Techera, *supra* note 8, at 1.

¹¹ Gerstenblith, *supra* note 9, at 249; See Jíří TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 3 (1996).

¹² Gottlieb, *supra* note 7, at 857.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 860.

hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”¹⁶ The Lieber Code, therefore, distinguished these types of “public property” from other types of moveable property which could be used as normal war booty and, subsequently, provided a direct model for later agreements.¹⁷

While the Lieber Code was the first legal document that referred to the protection of cultural property, international codification began with the 1874 Declaration of Brussels and the 1880 Oxford Manual of the Institute of International Law, which prohibited the bombardment of or willful damage to historical monuments or works of art during war time.¹⁸ Specifically, under Article 8 of the Declaration of Brussels, “institutions dedicated to religion, charity and education, the arts and sciences” were to be treated as “private property.”¹⁹ Article 8 further provided that “all seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should

¹⁶ General Orders No. 100: The Lieber Code, *Instructions for the Government of Armies of the United States in the Field*, prepared by Francis Lieber promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 art. 35.

¹⁷ Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 339 (2016).

¹⁸ Daniel M. Cole, *From the Hague to Timbuktu: The Prosecutor v. Ahmad Al Faqi Al Mahdi; a Consequential Case of Firsts for Cultural Heritage and for the International Criminal Court*, 31.2 TEMP. INT’L & COMP. L.J. 397, 406 (2017).

¹⁹ Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

be made the subject of legal proceedings by the competent authorities.”²⁰

Although never ratified, the 1874 Declaration of Brussels’s provisions were later incorporated into the 1880 Oxford Manual of the Institute of International Law.²¹

Together, these instruments provided an important statutory framework, which led to the incorporation of similar principles concerning cultural property in the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land and, importantly, the Regulations annexed to the Conventions. The Hague Conventions and their subsequent Protocols form the most encompassing prohibitions regarding cultural heritage during armed conflict in place today.²²

A. The Hague Conventions of 1899 and 1907

The Hague Conventions of 1899 and 1907 and the Regulations annexed to the Conventions serve as the first significant codification of the laws of war in an international treaty.²³ They include an important series of provisions dealing with the protection of cultural objects during armed conflict and represent a concerted effort by the international community to draft a code for the conduct of warfare.²⁴ Serving as the regulating international authority during both World Wars, these

²⁰ Project of an International Declaration Concerning the Laws and Customs of War, art. 8, Aug. 27, 1874.

²¹ Gerstenblith, *supra* note 9, at 255.

²² Cole, *supra* note 18, at 406.

²³ *Id.*

²⁴ Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB L. POL’Y & ETHICS J., 677, 681 (2009).

conventions continue to retain their significance more than a century later for “both the States that have ratified them and as evidence of customary international law.”²⁵

Echoing the laws and customs of war laid down in the 1874 Brussels Declaration, the 1899 Annex to The Hague Convention contains provisions demanding respect for institutions dedicated to religion, charity and education, and the arts and sciences.²⁶ Articles 23, 28, and 47 prohibit pillage and seizure of the aforementioned institutions by invading forces, “even when taken by assault.”²⁷ Article 56 further requires armies to take all necessary steps to protect “property of the communes, that of religious, charitable, and educational institutions, and those of arts and science” and provides that “seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.”²⁸ The 1899 Hague Convention does not restrict its application to actions committed during the “conduct of hostilities,” or heat of battle. Specifically, Article 2 broadly states that the annexed Regulations be applied “in case of war.”²⁹

²⁵ Gerstenblith, *supra* note 17, at 339.

²⁶ Convention With Respect to the Laws and Customs of War on Land (HAGUE, II), July 29, 1899, 32 Stat. 1803.

²⁷ *Id.* art. 23, 28, 47.

²⁸ *Id.* art. 56.

²⁹ Laurie R. Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, 96 NOTRE DAME L. REV. 249, 265 (2020).

The 1907 Hague Convention revisited the laws and customs of war and expanded the 1899 Hague Convention.³⁰ The Regulations annexed to this Convention contained two key provisions: Article 27 and 56. Indeed, the Trial Chamber of the ICC has acknowledged that “the special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations.”³¹ Article 27, using the expression “sieges and bombardments,” refers to obligations during the conduct of hostilities, while Article 56 says “seizure of, destruction or wilful damage,” referring to military authority over the territory.³²

While there would be later instruments dedicated to the protection of cultural property in armed conflict, Article 27 of the Regulations Annexed to the Convention is the provision that inspired the definition for the war crime of directing attacks against cultural heritage that is enshrined in the Rome Statute.³³ Article 27, under a chapter titled, “Hostilities,” dealt with the obligation to avoid damaging structures:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

³⁰ Gerstenblith, *supra* note 9, at 255.

³¹ *Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, *supra* note 1, ¶ 14.

³² 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, Oct. 18, 1907 [hereinafter The 1907 Hague Convention].

³³ Blank, *supra* note 30.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.³⁴

Though this provision establishes the obligation to avoid damage to cultural structures, its reach is limited by the inclusion of the phrase “as far as possible,” meaning that the obligation may “give way to the exigencies of warfare.”³⁵

However, under Article 56, the obligation to protect property belonging to institutions of a religious, charitable, educational, historic, and artistic character from intentional damage is absolute.³⁶ Article 56, under a chapter titled, “Military Authority Over Territory of the Hostile State,” provides:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁷

Article 56 complements Article 55, which provides that an occupying power has the obligation to preserve and safeguard the value of immovable property, including “public buildings, real estate, forests, and agricultural estates.”³⁸

Articles 27 and 56 are distinct, yet complementary, in that they provide seamless

³⁴ The 1907 Hague Convention, *supra* note 32.

³⁵ Gerstenblith, *supra* note 25, at 682.

³⁶ *Id.* at 683.

³⁷ The 1907 Hague Convention, *supra* note 32, art. 56.

³⁸ *Id.* art. 55.

protection for cultural property.³⁹ The obligation to avoid damage to buildings dedicated to religion, art, science and charity, and historic monuments, whether in the conduct of hostilities or when under the control of a party to the conflict, remains covered.

As international treaties, the Hague Conventions were meant to impose obligations and duties upon States, not to create criminal liability for individuals. As illustrated by the absence of sanctions for their violation, the Conventions declared certain acts to be illegal, but not criminal. Despite their widespread acceptance, the Hague Conventions of 1899 and 1907 failed to protect cultural property during the two world wars.⁴⁰ The extensive destruction, theft, and movement of cultural objects during World War I and II proves that States often ignored the laws of war.⁴¹ However, the 1899 and 1907 Hague Conventions proved to be a good source on the law of war crimes and, immediately following World War I, the Paris Peace Conference of 1919 established a Commission On Responsibility Of The Authors Of The War And On Enforcement Of Penalties, which used the provisions of the 1907 Hague Convention and the Regulations annexed to it for its description of war crimes.⁴² In protecting cultural property,

³⁹ See *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Prosecution Appeal Brief, Office of the Prosecutor (October 7, 2019) [hereinafter *Ntaganda*, Prosecution Appeal Brief].

⁴⁰ Gerstenblith, *supra* note 25.

⁴¹ *Id.*

⁴² WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT*, 5th ed. (2017)

for example, the 1919 Commission on Responsibility identified “wanton destruction of religious, charitable, educational, and historic buildings and monuments” as a war crime.⁴³ However, actual prosecution for violations of the Hague Conventions would have to wait. It was not until the Nuremberg Trials, which followed World War II, that the international community made a true attempt to enforce humanitarian law and establish individual accountability.⁴⁴ The Nuremberg Charter and the ensuing trials were considered the first true international enforcement of the protection of cultural property.⁴⁵ Specifically, Article 6(b) of the Charter identified war crimes as including the “plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”⁴⁶ As a result of the Nuremberg Trials, Alfred Rosenberg, the head of the primary organization which carried out confiscations of art works and cultural objects during the Nazi regime, was indicted and convicted for war crimes and crimes against humanity.⁴⁷

B. The 1949 Geneva Conventions and Their Protocols

⁴³ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, No. 1-2, 1920.

⁴⁴ Gottlieb, *supra* note 7, at 860.

⁴⁵ *Id.*

⁴⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Aug. 18, 1945); 59 Stat. 1544, 82 U.N.T.S. 279.

⁴⁷ Gerstenblith, *supra* note 9, at 258.

The horrific experiences of World War II led the international community to adopt several international conventions focused on humanitarian issues, including the four Geneva Conventions of 1949, supplemented in 1977 by two Additional Protocols.⁴⁸ However, the Geneva Conventions did not specifically protect cultural property, likely because of their characterization as part of international humanitarian law, rather than as a part of the law of armed conflict.⁴⁹ International humanitarian law gives greater emphasis to the protection of human life and civilian objects, while the law of armed conflict provides instructions on the exigencies of warfare.⁵⁰ Without specifically referring to “cultural property,” Article 33 of the Fourth Geneva Convention forbids pillaging, while Article 53 prohibits the destruction of real or personal property, whether publicly or privately owned.⁵¹ The division between international humanitarian law and the law of armed conflict was largely terminated with the 1977 Additional Protocols to the Geneva Conventions, which contain elements of both.⁵²

From 1974 to 1977, several countries updated the 1949 Geneva Conventions, resulting in the Additional Protocols of 1977.⁵³ Article 53 of

⁴⁸ *Id.* at 259.

⁴⁹ Gerstenblith, *supra* note 17, at 345.

⁵⁰ *Id.*

⁵¹ Fourth Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, art. 33, 53.

⁵² Gerstenblith, *supra* note 17, at 345.

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 [hereinafter

Protocol I, which applies in international armed conflict, reflects an enhanced protection of cultural property by outlawing “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”⁵⁴ Article 16 of Protocol II, which applies in cases of non-international armed conflict, echoes this language.⁵⁵ Cultural objects covered under Article 8(2)(e)(iv) of the Rome Statute have been analogized to the “cultural or spiritual heritage” that is afforded special protection under Additional Protocol I to the Geneva Conventions.⁵⁶ This Protocol “covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people.”⁵⁷

In addition to reflecting enhanced protection of cultural property, Additional Protocol I has often been relied on to construe the meaning of the term “attack” pursuant to Article 8(2)(e)(iv) of the Rome Statute and its prohibition on “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments and hospitals.”⁵⁸ Titled

Additional Protocol I]; 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 [hereinafter Additional Protocol II]

⁵⁴ Additional Protocol I, *supra* note 53, art. 53.

⁵⁵ Additional Protocol II, *supra* note 53, art. 16.

⁵⁶ See Paige Casaly, *Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law*, 14 J. INT’L CRIM. JUST. 1119 (2016).

⁵⁷ Additional Protocol I, *supra* note 53.

⁵⁸ Additional Protocol I, *supra* note 53, art. 49.

“Definition of attacks and scope of application,” paragraph 1 of Article 49(1) broadly defines “attacks” as “acts of violence against the adversary, whether in offence or defence.”⁵⁹ The International Committee of the Red Cross (ICRC)’s commentary on this provision notes that the drafters of Additional Protocol I considered including the definition of “attack” in Article 2 (Definitions) but decided instead to “include it at the beginning of the Section dealing with the general protection of the civilian population, where the definition had a special significance.”⁶⁰ The ICRC’s commentary further states that the meaning of “attack” as provided by Additional Protocol I is not the same as the usual meaning of the word, and that the definition given by the Protocol has a “wider scope,” emphasizing its synonymous meaning with “combat action.”⁶¹

C. The 1954 Hague Convention and its Protocols

After World War II wreaked havoc on the cultural heritage of Europe, an international breakthrough occurred that increased cultural property’s protection during armed conflict. The international community’s desire for a separate instrument with the sole purpose of protecting cultural property during wartime led to the drafting and signing of the Convention for the Protection of Cultural

⁵⁹ *Id.*

⁶⁰ International Committee of the Red Cross, Commentary of 1987, Definition of Attacks and Scope of Application, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F5EA0CB6C1075C59C12563CD004345C3> [hereinafter ICRC Commentary].

⁶¹ *Id.*

Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954.⁶² The 1954 Hague Convention was the first international instrument to exclusively address cultural property's fate during war time and is important in the interpretation of the relevant provisions of Additional Protocol I to the Geneva Conventions.⁶³ It lays out several principles for protecting cultural property, including the nations' obligations to care for the cultural property located within their borders and to safeguard both their own and their adversaries' cultural property during wartime.⁶⁴ The 1954 Hague Convention's basic, underlying rule is that cultural property shall not be made the object of an attack or be used for military purposes unless required by military necessity.⁶⁵

Leading up to the adoption of the text, reference was made to the "protection of cultural treasures of inestimable value," an aim which is clearly reflected in the definition of cultural property under Article 1 of the 1954 Hague Convention.⁶⁶ Article 1 provides a broad, all-encompassing definition of "cultural property" as "movable or immovable property of great importance to the cultural heritage of every people."⁶⁷ Following this is a list of examples of cultural property,

⁶² Gottlieb, *supra* note 7, at 860.

⁶³ *Id.*

⁶⁴ Gerstenblith, *supra* note 17 at 348.

⁶⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, 14 May 1954, 249 UNTS 240 [hereinafter: 1954 Hague Convention].

⁶⁶ *Id.*

⁶⁷ *Id.* art. 1.

including but not limited to “monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books”⁶⁸ The idea of protecting this property arose, in part, because of its value and importance to humanity above and beyond its everyday use by civilians.

While the 1954 Hague Convention does not use the word “attack,” the obligation on nations to safeguard cultural property during hostilities is embodied in the two main substantive provisions of the Convention: Article 4, which regulates the conduct of parties during hostilities, and Article 5, which regulates the conduct of occupation.⁶⁹ Under these Articles, State Parties to the Convention must show respect for cultural property by avoiding the exposure of cultural property located within their own territory to danger as well as not causing harm to cultural property situated within the territory of another Party to the Convention.⁷⁰ Article 4 imposes negative obligations, meaning those a State Party is required to refrain from taking.⁷¹ Under Article 4(1), nations should avoid jeopardizing the property and its immediate surroundings in such a way that is

⁶⁸ *Id.*

⁶⁹ Gerstenblith, *supra* note 9, at 262.

⁷⁰ *Id.*

⁷¹ 1954 Hague Convention, *supra* note 65, art. 4.

likely to expose it to destruction or damage in the event of armed conflict.⁷² Further, a hostile nation should refrain from any “act of hostility” directed against another nation’s cultural property.⁷³ This protection, however, is limited by Article 4(2), which provides that these obligations “may be waived only in cases where military necessity requires such a waiver.”⁷⁴ The inclusion of this provision in the 1954 Hague Convention significantly undermines the value of these protections.⁷⁵

Serving as one of the key provisions used in evaluating whether international law has been violated during a war, Article 4(3) sets out the obligation to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property . . .”⁷⁶ Article 5 then turns to a State Party’s obligations during occupation: the primary obligation of an occupying power is to “support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”⁷⁷ Under this, the occupying power should interfere as little as possible with the occupied territory’s cultural property, acting

⁷² *Id.* at art. 4(1).

⁷³ *Id.*

⁷⁴ *Id.* at art. 4(2).

⁷⁵ PATTY GERSTENBLITH, *THE OBLIGATIONS CONTAINED IN INTERNATIONAL TREATIES OF ARMED FORCES TO PROTECT CULTURAL HERITAGE IN TIMES OF ARMED CONFLICT, ARCHAEOLOGY, CULTURAL PROPERTY, AND THE MILITARY*, 4, 9 (2010).

⁷⁶ 1954 Hague Convention, *supra* note 65, art. 4(3).

⁷⁷ *Id.* at art. 5(1).

only in tandem with the competent national authorities.⁷⁸ These provisions of the 1954 Hague Convention set out mechanisms and requirements for protection incumbent on both domestic and foreign parties to conflict.⁷⁹ In addition, under Chapter II of the 1954 Hague Convention, Articles 8 through 11 provide for “special protection” to certain categories of cultural property under specific conditions.⁸⁰ “Special protection” represents a higher level of protection and is granted in three instances: (1) to a limited number of refuges intended to shelter movable cultural property in the event of armed conflict; (2) to centers containing monuments; and, (3) to other, immovable cultural property of very great importance.⁸¹

The First Protocol to the Hague Convention of 1954, written at the same time as the Convention, focuses exclusively on movable cultural objects.⁸² The Second Protocol to the Hague Convention of 1954, a legal instrument that had not yet been adopted at the time of the Rome Conference but whose drafting was already underway, was adopted in 1999.⁸³ The Second Protocol is important in part because it is an international criminal law treaty and ventures one step further

⁷⁸ Gerstenblith, *supra* note 76, at 10.

⁷⁹ Cole, *supra* note 18, at 407.

⁸⁰ 1954 Hague Convention, *supra* note 65, Chapter II.

⁸¹ *Id.* art. 8(1).

⁸² Gerstenblith, *supra* note 9, at 265.

⁸³ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 Mar. 1999 [hereinafter: Second Protocol].

than the 1954 Hague Convention by expanding on the issue of individual criminal responsibility. Article 15 of the Second Protocol provides:

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
 - a. Making cultural property under enhanced protection the object of attack,
 - b. Using cultural property under enhanced protection or its immediate surroundings in support of military action,
 - c. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol,
 - d. Making cultural property protected under the Convention and this Protocol the object of attack,
 - e. Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.⁸⁴

Therefore, the Second Protocol clarifies the criminal responsibility of individuals who violate its provisions and requires States to implement criminal offenses under their domestic law.⁸⁵

Other key developments of the Second Protocol include the creation of a Committee for the Protection of Cultural Property and the elaboration of a system that provides enhanced protection to certain types of cultural property, thus replacing the 1954 Hague Convention's system of "special protection," which had rarely been used.⁸⁶ In fact, very few sites of world cultural heritage were ever

⁸⁴ Second Protocol art. 15(1).

⁸⁵ Gerstenblith, *supra* note 9, at 268-269.

⁸⁶ *Id.* at 338.

registered for special protection.⁸⁷ Under Article 10, cultural property may be placed under enhanced protection if it meets the following three conditions:

- a. It is cultural heritage of the greatest importance for humanity.
- b. It is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection.
- c. It is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.⁸⁸

Cultural property that meets these conditions must be placed on a list managed by the Committee for the Protection of Cultural Property and, under Article 12, is entitled to immunity from attack and “from any use of the property or its immediate surroundings in support of military action.”⁸⁹

D. The Statute of the International Criminal Tribunal for the Former Yugoslavia

As discussed earlier, the destruction of cultural property constitutes an inherent part of armed conflict. However, in numerous conflicts, belligerents have tried to obtain an advantage by directly attacking the enemy’s cultural property as a form of “ethnic cleansing”— a way to erase the manifestation of the adversary’s

⁸⁷ *Id.* at 336.

⁸⁸ Second Protocol, *supra* note 83, art. 10.

⁸⁹ *Id.* art 12.

identity.⁹⁰ Such was the case during the conflict in the former Yugoslavia and, in response to the intentional destruction, mass murder, and ethnic cleansing, the United Nations Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).⁹¹ This Statute gives the ICTY jurisdiction to prosecute natural persons for grave breaches of the four Geneva Conventions of 1949, violations of the laws or customs of war, crimes against humanity, and genocide, without specific mention to the 1954 Hague Convention.⁹² Without reference to the 1954 Hague Convention, the ICTY prosecutions present a mixed message because they appear to advance the protection of cultural property without advancing the central international instrument on cultural property.

While the Statute of the ICTY does not use the term “cultural property,” Article 3(d) provides some insight when it refers to “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.” Specifically, Article 3(d) states:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

⁹⁰ Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1,1 (2001).

⁹¹ Gerstenblith, *supra* note 9, at 269.

⁹² Abtahi, *supra* note 90, at 4.

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.⁹³

Although “cultural property” is not specifically mentioned, the structures listed as protected under Article 3(d), such as historic monuments and institutions dedicated to charity, include cultural property. Further, Articles 3(b) and 3(c) of the statute also include protective measures, although indirect. For example, Article 3(b) prohibits the devastation of property (not justified by military necessity), under which the destruction of property (which could include cultural property) is punishable if it is intentional for “the foreseeable consequences of the act of the accused.”⁹⁴ Under Article 3(c) of the Statute, it is a violation to attack, by whatever means, undefended towns, villages, dwellings, or buildings.⁹⁵ Therefore, cultural property that is an integral part of these sites is also protected. It should also be noted that, under the ICTY Statute, an armed conflict, either international or non-international, is a precondition for applying individual criminal responsibility to crimes against humanity.⁹⁶ Specifically, Article 5

⁹³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute].

⁹⁴ Abtahi, *supra* note 92, at 18.

⁹⁵ ICTY Statute, *supra* note 93, art. 3(c).

⁹⁶ Heike Spieker, *The International Criminal Court and Non-International Armed Conflicts*, 13 LEIDEN J. INT'L L. 395, 404 (2000).

explicitly requires that crimes against humanity are “committed in armed conflict, whether international or internal in character.”⁹⁷

The ICTY Statute punishes the “destruction or wilful damage” of cultural objects, as opposed to “attacks” as the terms appears under the Rome Statute. While the Rome Statute requires no proof of actual damage once an attack has been directed at a protected object, the Statute of the ICTY instead focuses on the result of the attack, specifically, the “seizure of, destruction or wilful damage done.”⁹⁸ Although the ICTY Statute arguably presents a narrower protection of cultural property than the Rome Statute, the jurisprudence of the ICTY has determined the scope and applicability of Article 3.⁹⁹ Examining the nature of these charges and their treatment by the prosecution and the ICTY provides insight into how this crime can and should be defined under international law.

The ICTY’s conviction of defendants for crimes involving cultural property marked a major achievement because it demonstrated the importance of the protection of cultural property during armed conflict. In *Prosecution v. Strugar* and *Prosecution v. Jokić*, two members of the Yugoslav People’s Army, Pavle Strugar and Miodrag Jokić, were separately charged by the Prosecution under Article 3(d) in connection with the shelling of the Old Town of Dubrovnik,

⁹⁷ ICTY Statute, *supra* note 93 at art. 5.

⁹⁸ *Id.* art. 3(c).

⁹⁹ Abtahi, *supra* note 90, at 10.

a UNESCO World Cultural Heritage site, which contained a significant number of “historic monuments, works of art or places of worship which constitute the cultural and spiritual heritage of the peoples.”¹⁰⁰ In reviewing international cultural heritage protections, including the 1907 Hague Convention, the 1954 Hague Convention, and Additional Protocols I and II to the Geneva Conventions, the *Strugar* Trial Chamber held that the texts shared a “similar notion of cultural heritage” and that “accordingly, property considered protected within the meaning of Article 3(d) of the Statute is all property alternatively protected within the meaning of one of the above-mentioned instruments.”¹⁰¹ Similarly, the *Jokić* Trial Chamber held that the Additional Protocols I and II “reiterate the obligation to protect cultural property and expand the scope of the prohibition by, *inter alia*, outlawing ‘any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.’”¹⁰² Together, these decisions shed light on the treatment of attacks on cultural property under international law. They also represent important examples of deliberate damage to cultural heritage that did not involve military necessity.

II. THE ROME STATUTE AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT

¹⁰⁰ Prosecutor v. Strugar, Case No. IT-01-42, Third Amended Indictment, §§ 28 29 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003).

¹⁰¹ Casaly, *supra* note 56, at 1208 n.41.

¹⁰² Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgment, ¶ 50 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

One of the most important landmarks in the field of international criminal law is the establishment of the ICC.¹⁰³ Prior to the ICC, ad hoc international tribunals were created to address the most egregious crimes committed during specific armed conflicts.¹⁰⁴ As mentioned earlier, the Nuremberg Trials tried Germans for war crimes committed during World War II, and the ICTY tried criminals on both sides of the Serbian and Bosnian conflict of the 1990s.¹⁰⁵ However, the scope of these tribunals was limited to the places and times of those conflicts. Established in 2002 by the Rome Statute, the ICC acts as a solution to these tribunals and is the only permanent body with broad, global jurisdiction on these matters.¹⁰⁶ An ICC document drafted after the Rome Statute, the Elements of Crimes, defines crimes in yet greater detail.¹⁰⁷ The ICC is a “court of last resort,” meant to prosecute the most serious crimes of international concern which other courts either cannot or will not. With subject matter jurisdiction over “grave crimes including genocide, war crimes, and crimes against humanity,” a specific case in a country may be referred to the ICC by a member state, the UN Security Council, or the ICC Prosecutor for initial investigation and possible

¹⁰³ Gottlieb, *supra* note 7 at 864.

¹⁰⁴ Cole, *supra* note 18, at 400 n.16.

¹⁰⁵ Spieker, *supra* note 96, at 395.

¹⁰⁶ See generally, B.C. Nirmal, *Jurisdiction of the International Criminal Court*, 3 ISILY.B. INT’L HUMAN & REFUGEE L. 116, 116 (2003).

¹⁰⁷ Caroline Davidson, *How to Read International Criminal Law: Strict Construction of the Rome Statute of the International Criminal Court*, 91 ST. JOHN’S L. REV. 37, 40 (2017)

prosecution.¹⁰⁸ A State Party, not a party to the Rome Statute, can also accept the ICC's jurisdiction with respect to crimes committed in its territory, or by one of its nationals, and request the Prosecutor to carry out an investigation.¹⁰⁹ Because the ICC was founded on the recognition that "all peoples are united by common bonds, their cultures pieced together in a shared heritage and concern" and "that this delicate mosaic may be shattered at any time," crimes against cultural heritage are an important feature of the atrocities that are within the Court's jurisdiction.¹¹⁰

As discussed earlier, intentional attacks on cultural heritage constitute a centuries-old practice that remains a feature of modern conflict.¹¹¹ Cultural heritage represents a unique and important testimony of the culture and identities of people and, subsequently, its destruction constitutes a loss to both the local and international communities.¹¹²

The ICC's jurisdiction over war crimes, which requires a nexus to armed conflict, extends to acts "committed as part of a plan or policy or as part of a

¹⁰⁸ Cole, *supra* note 18, at 402 n.28.

¹⁰⁹ International Criminal Court, *Understanding the International Criminal Court*, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> (last visited May 10, 2021).

¹¹⁰ Office of the Prosecutor, *Draft Policy on Cultural Heritage* (March 22, 2021), available at: <https://www.icc-cpi.int/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf> (last visited May 10, 2021) [hereinafter *Draft Policy*].

¹¹¹ *Id.*

¹¹² *Id.*

large-scale commission of such crimes.”¹¹³ Article 8 of the Rome Statute, reflecting the violations of the 1949 Geneva Conventions and the laws and customs of war, defines a number of war crimes that may be applied in cases related to the destruction of cultural property.¹¹⁴ The war crimes set out in Articles 8(2)(b)(ix) and 8(2)(e)(iv), which apply to international and non-international armed conflicts, respectively, are the most directly applicable to attacks on cultural heritage.¹¹⁵ They prohibit intentionally directing attacks against buildings and historical monuments which fall under the definition of “cultural property.”¹¹⁶ Together, through their prohibition of intentionally directing attacks against certain structures, provided they are not military objectives, these provisions protect cultural property in a variety of conflicts.¹¹⁷

As illustrated above, Article 8(2)(e) enumerates serious violations related to the laws and customs applicable in armed conflicts not of an international character.¹¹⁸ However, the Rome Statute does not provide further guidance defining what exactly justifies charging an individual for the war crime of directing attacks against buildings dedicated to religion and historic monuments

¹¹³ United Nations General Assembly, Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 (July 17, 1998) [hereinafter Rome Statute].

¹¹⁴ Gerstenblith, *supra* note 9, at 272 n. 106.

¹¹⁵ Rome Statute art. 8(2)(b)(ix), (e)(iv).

¹¹⁶ Draft Policy, *supra* note 112, ¶ 2.

¹¹⁷ *Id.* ¶ 42.

¹¹⁸ Rome Statute, *supra* note 115 at art. 8.

which are not military objectives. What is considered an attack? Which buildings or monuments are considered protected non-military targets? The Elements of Crimes, an ICC document drafted after the Rome Statute, attempts to define this crime in greater detail.¹¹⁹ Specifically, the legal elements of the war crime of intentionally attacking protected objects are:

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹²⁰

However, neither the Rome Statute itself nor the Elements of Crimes indicates a definition of the word “attack.” Thus, the Court may look outside of its regulatory framework to determine the scope of Article 8(2)(e)(iv).

Article 21 of the Rome Statute dictates that the Court’s consideration of crimes against cultural heritage occurs within a prescribed regulatory framework:

¹¹⁹ Davidson, *supra* note 107, at 40.

¹²⁰ International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (9 September 2002) [hereinafter *Elements of Crimes*].

first, the Rome Statute; second, the Elements of Crimes, and; third, the Rules of Procedure and Evidence.¹²¹ However, none of these refer explicitly to the destruction of cultural heritage explicitly and, although the crimes set out in the Rome Statute should initially be interpreted on their own terms, the Court may also rely on applicable treaties and rules of international law, including the established principles of international law and armed conflict.¹²² This includes the protections set forth in the core instruments of international humanitarian law, including the 1899 and 1907 Hague Conventions, the 1949 Geneva Conventions and their Additional Protocols, as well as those set out in the 1954 Hague Convention and its Protocols.¹²³ Finally, Article 21 provides that the Court may apply “general principles of law derived by the Court from national laws of legal systems of the world” as long as “those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.”¹²⁴

III. DETERMINING THE SCOPE OF ARTICLE 8(2)(E)(IV) OF THE ROME STATUTE

A. Mali and the International Criminal Court: The Case of Ahmad Al Faqi Al Mahdi

¹²¹ Rome Statute art. 21(1)(a).

¹²² *Id.* at (1)(b)

¹²³ Draft Policy, *supra* note 110, ¶ 34.

¹²⁴ Rome Statute art. 21(1)(c).

While charges for the destruction of cultural heritage have been brought in international criminal cases in the past, they have always been ancillary to charges for more “serious” crimes.¹²⁵ However, on September 27, 2016, the ICC convicted Ahmad Al Faqi Al Mahdi for violating Article 8(2)(e)(iv) of the Rome Statute by directing an attack against buildings dedicated to religion, and historic monuments that were not military objectives.¹²⁶ *Al Mahdi* was the first prosecution before an international tribunal where the destruction of cultural heritage was the sole basis for prosecution.¹²⁷ ICC Prosecutor Fatou Bensouda focused on the structures’ and monuments’ importance to both the local and international communities, stating: “Let us be clear: what is at stake is not just walls and stones. The destroyed mausoleums were important, from a religious point of view, from a historical point of view, and from an identity point of view.”¹²⁸ *Al Mahdi* may, therefore, be seen as a landmark prosecution, furthering the international community’s power to protect cultural heritage during armed conflict and opening the door for future prosecutions for violations which previously seemed beyond the law’s reach.

i. Factual Background

¹²⁵ Casaly, *supra* note 56, at 1199.

¹²⁶ *Al Mahdi*, Judgment and Sentence ¶ 63.

¹²⁷ *Id.*

¹²⁸ Casaly, *supra* note 56, at 1200

With roots dating back to 1100 A.D., Timbuktu served as an important trade city, was well situated to spread Islamic culture and learning, and was particularly famed for its collections of medieval and later, Islamic manuscripts.¹²⁹ Now a designated UNESCO World Heritage Site, the city serves as an important center of Islamic learning and features several important shrines and mosques.¹³⁰ However, in January 2012, violence broke out in Mali, and rebel groups gained control of the territory located in the northern part of the country.¹³¹ By April 2012, the Malian army had withdrawn from Timbuktu, which was subsequently taken over by Ansar Dine, a Malian jihadist group, and its ally, Al Qaeda in the Islamic Maghreb.¹³² Ansar Dine, which translates to “defenders of faith,” sought to enforce its extreme interpretation of Islamic law throughout Mali.¹³³

To accomplish the takeover of Timbuktu, Ansar Dine established a local government, including a morality brigade known as the *Hisbah*, which Al Mahdi, an expert on religious matters, led until September 2012.¹³⁴ In June 2012, Ansar Dine’s leadership directed Al Mahdi to destroy ten mausoleums and other

¹²⁹ *Id.* at 795.

¹³⁰ PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 806 (4th ed. 2019).

¹³¹ *International Criminal Law - Rome Statute - International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage*, 130 HARV. L. REV. 1978 (2017).

¹³² *Id.* at 1979.

¹³³ *Id.*

¹³⁴ *Id.*

significant sites of Timbuktu that local residents and pilgrims frequented for prayer and other religious activities and celebrations.¹³⁵ Although only nine were actually destroyed, none of the ten targeted objects were military objectives, and all were included on the UNESCO List of World Heritage in Danger.¹³⁶

ii. A Victory for Cultural Property Protection: Al Mahdi Before the ICC

Al Mahdi unfolded relatively quickly, from the Malian referral to the end of the ICC's trial. In July 2012, because Mali's courts could not operate or accept these cases at the time, Mali referred its internal situation to the ICC, asking the Prosecutor to open an investigation into the alleged crimes against humanity and war crimes perpetrated since the conflict's onset.¹³⁷ The ICC issued a warrant for Al Mahdi's arrest on September 18, 2015, prompting Nigerian authorities to transfer Al Mahdi from a Nigerian prison to the ICC detention facility at The Hague.¹³⁸ On March 1, 2016, Al Mahdi indicated that he would plead guilty to the single charge against him. On March 24, 2016, the Pre-Trial Chamber I confirmed the allegation that he was responsible for the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Rome Statute.¹³⁹ The trial

¹³⁵ *Id.*

¹³⁶ *International Criminal Law - Rome Statute - International Criminal Court Imposes First Sentence for War Crime of Attacking Cultural Heritage*, 130 HARV. L. REV. 1978 (2017).

¹³⁷ Cole, *supra* note 18, at 416.

¹³⁸ Milena Sterio, *Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case*, 49 CASE W. RES. J. INT'L L. 63, 66 (2017).

¹³⁹ *Id.* at 67.

concluded within a single week, sentencing Al Mahdi to nine years imprisonment on September 27, 2016.

On November 25, 2021, Al Mahdi's imprisonment sentence was reduced by two years.¹⁴⁰ Under Article 110(3) of the Rome Statute, "[w]hen the person has served two thirds of their sentence...the Court shall review the sentence to determine whether it should be reduced."¹⁴¹ The unanimous decision, issued by Judge Solomy Balungi Bossa, Judge Marc Perrin de Brichambaut, and Judge Gocha Lordkipanidze, cut the original nine year sentence by two years, finding that Al Mahdi had admitted his guilt and "took responsibility for his actions as early as the first day of his interviews with the prosecution."¹⁴² The date for the sentence's completion is September 18, 2022.¹⁴³

Al Mahdi represents the first international criminal prosecution for the destruction of cultural heritage where the alleged perpetrator did not commit any other war crimes or crimes against humanity.¹⁴⁴ Specifically, Al Mahdi was the first person to be tried solely for "attacks" on cultural property under the Rome Statute.¹⁴⁵ Noting that Article 8(2)(e)(iv) had not previously been applied by the

¹⁴⁰ Three Judges of the Appeals Chamber Appointed For The Review Concerning Reduction Of Sentence, ICC-01/12-01/15, November 25, 2021, https://www.icc-cpi.int/CourtRecords/CR2021_10958.PDF.

¹⁴¹ Rome Statute, *supra* note 19, at Article 110.

¹⁴² Three Judges, at ¶ 26.

¹⁴³ *Id.* ¶ 77.

¹⁴⁴ Gerstenblith, *supra* note 17, at 387.

¹⁴⁵ William Schabas, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, 49 CASE W. RES. J. INT'L L. 75, 77 (2017).

Court, the Trial Chamber announced that it would “proceed to interpret the crime and its elements.”¹⁴⁶

The opinion expressly recognized that Article 8(2)(e)(iv) singles out cultural property as a special kind of civilian object that warrants a higher level of protection.¹⁴⁷ The Court observed that the special protection afforded to cultural property under international law could be traced back to Articles 27 and 56 of the 1907 Hague Convention and the 1919 Commission on Responsibility, which identified the war crime of “wanton destruction of religious, charitable, educational, and historic buildings and monuments.”¹⁴⁸ Further, while the Geneva Conventions set forth the special protection of certain objects, including hospitals, subsequent agreements, such as Additional Protocols I and II to the Geneva Conventions and the Second Protocol to the 1954 Hague Convention, reflect an even greater protection of cultural property.¹⁴⁹ In determining the scope of the word “attack” pursuant to Article 8(2)(e)(iv), the Chamber stated:¹⁵⁰

The Chamber considers 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

¹⁴⁶ *Al Mahdi*, Judgment and Sentence ¶ 13.

¹⁴⁷ *Id.* at ¶ 17.

¹⁴⁸ *Id.* at ¶ 14.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at ¶ 15.

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.

The Court further distinguished the protections afforded to cultural property under the Rome Statute, noting that the statute “protects persons and cultural objects differently.”¹⁵¹ Specifically, people are protected by multiple provisions meant to apply at different times, such as “during hostilities, after an armed group has taken control, and against various and specific kinds of harm.”¹⁵² However, under Article 8(2)(e)(iv), cultural objects in non-international armed conflicts are not protected this way; no distinction is made between attacks made in the conduct of hostilities or afterwards.¹⁵³ As a result of the Chamber’s findings, this prosecution for the destruction of cultural heritage helped move the international community one step closer to elevating the destruction of cultural heritage as a war crime.

B. Cultural Heritage and Conflict: The Case of Bosco Ntaganda

Therefore, *Al Mahdi* left open the question of how the Court would treat smaller, lesser-known religious or cultural sites, such as those not specifically designated as World Heritage Sites. The Prosecutor in *Al Mahdi* explained that the mausoleums were of historical and cultural importance for the entire world,

¹⁵¹ *Id.* at ¶ 16.

¹⁵² *Id.*

¹⁵³ *Al Mahdi*, Judgment and Sentence ¶ 16.

noting that “with one exception, all of sites in Timbuktu had been designated by UNESCO as World Heritage sites” because they “constituted a chapter in the history of humanity.” However, while these structures represented an important cultural asset to both the local and international communities, the question arises as to how the Court would treat smaller, lesser known religious or cultural sites, those which are not specifically designated as World Heritage Sites.

As *Al Mahdi* was coming to a close, the trial of a Congolese militia leader, Bosco Ntaganda, was commencing. The case, which involved 18 charges of war crimes and crimes against humanity committed in the Ituri district of the Eastern Democratic Republic of the Congo between 2002 and 2003, opened before the Trial Chamber at the ICC in The Hague on September 2, 2015.¹⁵⁴ One noteworthy charge was for the war crime of intentionally attacking protected objects under Article 8(2)(e)(iv) of the Rome Statute for destroying a church.¹⁵⁵ However, in contrast to the Court’s holding in *Al Mahdi*, the ICC ultimately dismissed this charge, finding that the crimes committed under Ntaganda’s command did not constitute an “attack.”¹⁵⁶

i. Factual Background

¹⁵⁴ International Criminal Court, *Ntaganda trial opens at International Criminal Court* (2 September 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1143> (last visited May 10, 2020).

¹⁵⁵ Ntaganda, Judgment, *supra* note 3.

¹⁵⁶ *Id.*

Born in 1973, Bosco Ntaganda grew up in Rwanda before fleeing to the Democratic Republic of the Congo (DRC) as a teenager when ethnic violence escalated against his fellow Tutsis in Rwanda.¹⁵⁷ At the age of 17, he joined the rebel group known as the *Rwandan Patriotic Front* (RPF), composed mostly of Tutsis in southern Uganda. He fought under the command of former RPF leader and current Rwandan President, Paul Kagame in an effort to end the genocide in Rwanda.¹⁵⁸ As the conflicts between groups in Rwanda started to spill over into neighboring countries, Ntaganda began to move back and forth between the rebel groups and national armies in both Rwanda and the DRC.¹⁵⁹

In 2002, Ntaganda joined the *Forces Patriotiques pour la Libération du Congo* (FLPC), the military wing of the *Union des Patriotes Congolais* (UPC). He spent the next three years as Thomas Lubanga's Deputy Chief of Staff and commander of Military Operations.¹⁶⁰ The UPC was a political group situated in Ituri, a northeastern province of the DRC, which was formed in 2000 to further the interests of the Hema, a pastoralist ethnic group living in the region.¹⁶¹ The competing political group, the *Nationalist and Integrationist Front* (FNI),

¹⁵⁷ Penny Dale, *Bosco Ntaganda – the Congolese “Terminator,”* BBC NEWS (July 8, 2019), <https://www.bbc.com/news/world-africa-17689131> (last visited May 10, 2020).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (Thomas Lubanga was recently sentenced to fourteen years in prison by the ICC – Lubanga was found guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate in hostilities, the same group of victims that would also implicate Ntaganda).

represented the interests of the Lendu, an agriculturalist ethnic group also living in Ituri.¹⁶² From 1999 to 2003, the UPC and FNI engaged in armed conflict until European Union intervention fractured the UPC into smaller groups.¹⁶³ Though the conflict did not end entirely, this resulted in significantly reduced armed hostilities.¹⁶⁴

ii. An Unexpected Outcome: Ntaganda Before the ICC

Between 2002 and 2003, Ntaganda was alleged to have used the militant force of the FPLC to conduct widespread and systematic attacks in and around Ituri, primarily against the Lendu people.¹⁶⁵ In 2004, Congolese President Joseph Kabila referred the situation in the DRC to the ICC Prosecutor.¹⁶⁶ After a preliminary investigation determined that action was warranted, the Prosecutor initiated an official investigation on June 21, 2004.¹⁶⁷ Ultimately, as a result of the UPC's and FPLC's actions and because of his military leadership during this time, Ntaganda was charged with 13 counts of war crimes and five counts of crimes against humanity.¹⁶⁸

¹⁶⁵ *Id.* at 7.

¹⁶⁶ Sarah T. Deutch, *Putting the Spotlight on the Terminator: How the ICC Prosecution of Bosco Ntaganda Could Reduce Sexual Violence during Conflict*, 22 WM. & MARY J. WOMEN & L. 655, 681 (2016).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 681-682

The 13 counts of war crimes included: murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying enemy property; and rape, sexual slavery, enlistment and conscription of child soldiers who were used in active hostilities.¹⁶⁹ The five counts of crimes against humanity included: murder and attempted murder; rape; sexual slavery; persecution; and forcible transfer of populations.¹⁷⁰ Almost nine years later, on March 18, 2013, Ntaganda walked into the United States embassy in Kigali, Rwanda and voluntarily surrendered himself, asking to be transferred to the ICC in The Hague.¹⁷¹ He is the first person to voluntarily surrender to the ICC and, although Ntaganda's reasons for surrender are unknown, he presumably did so to avoid being killed.¹⁷² It is likely that he no longer felt safe in either Rwanda or the DRC and knew his days in Central Africa were numbered.¹⁷³

On June 9, 2014, the Court confirmed the charges against Ntaganda, finding substantial grounds to believe that the military groups under his command committed war crimes in the eastern DRC from 2002 to 2003.¹⁷⁴ Count 17, the

¹⁶⁹ *Id.* at 682 n. 236

¹⁷⁰ *Id.* at 682 n. 327

¹⁷¹ *Id.* at 680.

¹⁷² *Id.* at 680-681

¹⁷³ *Id.*

¹⁷⁴ Anna Kuniewicz, *International Criminal Court Prosecutor v. Bosco Ntaganda*, 15 CHI.-KENT J. INT'L & COMP. L. 1, 6 (2015).

war crime of intentionally attacking protected objects, alleged that, on or about November 24, 2002, Ntaganda oversaw an assault on Sayo, a locality within Ituri.¹⁷⁵ In the immediate aftermath of the takeover, the UPC and FLPC set up a base inside Mungu Samaki, a church, where they removed the furniture, dug trenches, and started a fire inside to prepare their food.¹⁷⁶ The Prosecution argued that pillaging the church constituted an attack against protected objects.¹⁷⁷ As a result, the ICC Prosecutor charged Ntaganda, as an individual, with the war crime of intentionally attacking protected objects.

On July 8, 2019, the Trial Chamber found Ntaganda guilty beyond a reasonable doubt of 13 counts of war crimes and all five counts of crimes against humanity committed in Ituri.¹⁷⁸ However, the Court declined to hold Ntaganda criminally responsible for Count 17, the charge of attacks against protected objects, because the Chamber did not consider the pillaging of the church to constitute an attack within the meaning of Article 8(2)(e)(iv).¹⁷⁹ In rendering its decision, the Trial Chamber looked to the Rome Statute's text and the Elements of Crimes, the ICC document drafted after the Rome Statute that was intended to assist the Court in the interpretation and application Articles 6, 7, and 8.¹⁸⁰ After

¹⁷⁵ *Id.*

¹⁷⁶ *Ntaganda*, Judgment, *supra* note 3, ¶ 526.

¹⁷⁷ *Id.* ¶ 760.

¹⁷⁸ *Id.* ¶ 1199.

¹⁷⁹ *Id.* ¶ 1136.

¹⁸⁰ Davidson, *supra* note 109 at 40.

observing that neither the Rome Statute nor the Elements of Crimes included a definition of the word “attack,” the Trial Chamber turned to the framework of international law and relied on the definition of “attack” adopted in relation to the crime of intentionally attacking civilians:¹⁸¹

Having regard to the established framework of international law, the Chamber notes that the crime as described in Article 8(2)(e)(i) of the Statute is based on Article 13(2) of Additional Protocol II. This protocol does not define attacks, but Additional Protocol I does, and the term is considered to have the same meaning in Additional Protocol II. “Attack” must therefore be understood within the meaning of Article 49 of Additional Protocol I as “acts of violence against the adversary, whether in offence or defence.”

Thus, the Court determined that “attack” must be understood within the meaning of Article 49 of Additional Protocol I to the 1949 Geneva Conventions as “acts of violence against the adversary, whether in offence or defence.”¹⁸² The Trial Chamber observed that the crime of attacking protected objects, like the war crime of attacking civilians, belongs to the “category of offences committed during the actual conduct of hostilities.”¹⁸³ The Trial Chamber thus declined to find the pillaging under Count 17 to constitute an “attack.” Specifically, the Court found that, since the attack on the church “took place sometime after the assault, and therefore not during the actual conduct of hostilities,” the first element of

¹⁸¹ *Ntaganda*, Judgment, *supra* note 3 ¶ 916.

¹⁸² *Ntaganda*, Judgment, *supra* note 3.

¹⁸³ *Ntaganda*, Judgment, *supra* note 3, ¶ 916.

Article 8(2)(e)(iv) was not met.¹⁸⁴ In making this determination, the Trial Chamber concluded that Article 8(2)(e)(iv) provided two different standards of protection: a narrow prohibition of “attacks” in the conduct of hostilities for all of the objects enumerated under Article 8(2)(e)(iv) and a broader prohibition of “attacks” in a wider sense for “cultural objects enjoying a special status.”¹⁸⁵ The Trial Chamber did not further discuss whether the church fell under the category of “cultural objects enjoying a special status” and, as a result, did not further consider the incident. Accordingly, Ntaganda was not held criminally responsible for the charge of attacks against protected objects under the Rome Statute.¹⁸⁶

iii. Fighting Back: The Prosecutor, Defense, and Amici Curiae

Over the course of 248 hearings, the Chamber heard 80 witnesses and experts called by the Prosecutor, 19 witnesses called by the Defense, three witnesses called by the legal representatives of the victims participating in the proceedings, and five victims who presented their own views and concerns.¹⁸⁷ In addition, a total of 2,129 victims, represented by the ICC Office for Public Counsel for the Victims, participated in the trial after the Chamber authorized

¹⁸⁴ *Id.* n. 3147.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* ¶ 763.

¹⁸⁷ *The Prosecutor v. Bosco Ntaganda*, <https://www.icc-cpi.int/CaseInformationSheets/ntagandaEng.pdf> (last visited May 10, 2020).

them to do so.¹⁸⁸ During the trial phase, the Trial Chamber issued 347 written decisions and 257 oral decisions.¹⁸⁹ After the presentation of evidence, of which almost 2,000 items were admitted, the Chamber received the written closing submission from the parties, consisting of, in total, more than 1,400 pages.¹⁹⁰ The total number of filings from the parties, participants, and the Chamber's decisions is now more than 2,300 filings.¹⁹¹

However, both Ntaganda and the ICC Prosecutor filed appeals against the Trial Chamber's decision.¹⁹² In his appeal, Ntaganda raised fifteen grounds for challenging the fairness of the proceedings and argued that the Court committed several errors of law, fact, and procedure.¹⁹³ The Prosecutor raised two grounds of appeal challenging the Trial Chamber's interpretation of the word "attack" in Article 8(2)(e)(iv) of the Rome Statute.¹⁹⁴ The Prosecution argued that while the attack on the church at Sayo may seem relatively minor, given the gravity and variety of conduct for which Ntaganda was ultimately convicted, it nevertheless illustrates an important matter of legal principle.¹⁹⁵ As such, clarifying the law on this point "will not only be of general importance for the practice of this Court,

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Ntaganda*, Appellate Decision, *supra* note 6, ¶ 30.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Ntaganda*, Prosecution Appeal Brief, *supra* note 39, ¶ 3.

but will contribute to the better protection of the victims of armed conflict around the world.”¹⁹⁶

Under one of the two grounds on appeal, the Prosecutor argued that the Court erred in failing to consider that the term “attack” in Article 8(2)(e)(iv) has a “special meaning,” and that an “attack” for the purpose of the provision “is not limited to the conduct of hostilities.”¹⁹⁷ Specifically, the Prosecutor argued that Article 8(2)(e)(iv) only requires that the perpetrator commit violence against a protected object, irrespective of whether this took place during the conduct of hostilities or when the object was under control of a party to the conflict.¹⁹⁸ Referencing the Trial Chamber’s approach in *Al Mahdi*, the Court’s leading case on the application of Article 8(2)(e)(iv), the Prosecutor noted its interpretation of the term “attack” to mean “act of hostility” in the broader sense as defined by 1954 Hague Convention and Additional Protocols I and II to the 1949 Geneva Conventions.¹⁹⁹ Under this, she argued, “act of hostility” is a term of art meant to indicate that cultural property may not be subject to any deliberate act of violence, building upon the broad protections set forth in Articles 27 and 56 of the 1907 Hague Convention, its predecessors, and the subsequent endorsement of that approach for the protection of cultural property in the 1954 Hague Convention

¹⁹⁶ *Id.*

¹⁹⁷ *Ntaganda*, Appellate Decision, *supra* note 6, ¶ 1145.

¹⁹⁸ *Ntaganda*, Prosecution Appeal Brief, *supra* note 40, ¶ 21.

¹⁹⁹ *Id.* ¶ 27.

and the 1977 Additional Protocols.²⁰⁰ Article 8 must be interpreted “within the established framework of international law” which, as a whole, makes clear that the cultural property listed in Article 8(2)(e)(iv) is protected not only from attacks which take place during the conduct of hostilities, or heat of battle, but more widely.

Ntaganda, on the other hand, opposed the Prosecutor’s reading of Article 8(2)(e)(iv), contending that the term “attack” has only one meaning within international law: namely, “acts of violence against the adversary, whether in offence or defence” in accordance with Article 49(1) of Additional Protocol I.²⁰¹ He agreed with the Trial Chamber’s interpretation of the term “attack,” further asserting that the provision does not have a special meaning for “cultural objects” and is limited to acts committed during the actual conduct of hostilities.²⁰² In Ntaganda’s view, the Trial Chamber correctly applied the law and did not commit an error when it considered that the facts of the church’s destruction did not fit the required criteria.

Through written and oral observations, *amici curiae* presented various views on the meaning of “attack” under Article 8(2)(e)(iv) of the Rome Statute.²⁰³ For example, the Association for the Promotion of International Humanitarian

²⁰⁰ *Id.*

²⁰¹ *Ntaganda*, Appellate Decision, *supra* note 6, ¶ 1156.

²⁰² *Id.*

²⁰³ *Id.* ¶ 1161.

Law argued that, under international humanitarian law, the term “attack” means “combat action” and that this same definition should be applied to the term as used in Article 8(2)(e)(iv), while the Public International Law and Policy Group proposed that the meaning of “attack” is broader in the context of cultural property and “must account for the conduct of hostilities and its aftermath.”²⁰⁴ Additionally, the Antiquities Coalition, Blue Shield International, and Genocide Watch asserted that the term “attack” should “not be narrowly restricted only to actions committed during the ‘conduct of hostilities,’ or heat of battle, and should instead reflect the full framework of special protections afforded to cultural property and heritage under international law.”²⁰⁵ They further submitted that if the Trial Court’s decision is not reversed, an “attack” would not be punishable unless it occurred during the immediate “conduct of hostilities,” therefore contradicting the “distinct nature, object, and purpose of Article 8(2)(e)(iv)” as well as the holding in *Al Mahdi*.²⁰⁶

iv. Appellate Decision and Dissent

Ultimately, the Appeals Chamber confirmed, by a majority, the Conviction Decision, rejecting both Ntaganda’s and the Prosecutor’s appeals.²⁰⁷ Two judges, Judge Morrison and Hofmański, agreed with the Trial Chamber that

²⁰⁴ *Id.* ¶ 1161-1162.

²⁰⁵ *Id.* ¶ 1162.

²⁰⁶ *Ntaganda*, Appellate Decision, *supra* note 6, ¶ 1162.

²⁰⁷ *Id.* ¶ 1163.

the term “attack” used in Article 8(2)(e)(iv) means “combat action” and that the Court did not err by not applying a different definition.²⁰⁸ Alternatively, Judge Eboe-Osuji contended that an “attack” under the Rome Statute could occur outside the “conduct of hostilities” but declined to overturn the Trial Chamber’s findings on the matter.²⁰⁹ Similarly, Judge Balungi Bossa deemed unacceptable the Trial Chamber’s finding that the conduct of hostilities had ceased. However, she also declined to overturn Ntaganda’s acquittal for the charge of attacking protected objects as a war crime against the church in Sayo.²¹⁰

In her dissenting opinion, Judge Ibáñez Carranza argued that the Prosecutor’s appeal should be granted and that the conviction decision should be overturned because its interpretation of the term “attack” was too narrow, thus resulting in the dismissal of the charge against Ntaganda for the attack on the church in Sayo.²¹¹ She further asserted that the term “attack” should be interpreted within the ordinary meaning of the word and “in light of the object and purpose of the provision, and the Rome Statute more broadly.”²¹² Under this theory, the definition more properly reflects the common understanding of “attack,” which is

²⁰⁸ *Id.* ¶ 1164.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Ntaganda*, Appellate Decision, *supra* note 6, ¶ 1165.

²¹² *Id.*

ordinarily defined as “an act of using violence to try to hurt or kill somebody” and as “a violent act intended to hurt or damage someone or something.”²¹³

Additionally, the definition stipulated by Article 49(1) of Additional Protocol I to the 1949 Geneva Conventions, which provides that “attack” means “any act of violence against the adversary, whether in offence or defence,” should be interpreted considering the consequences of the act, “particularly whether injury, death, damage or destruction are intended or foreseeable consequences.”²¹⁴ Accordingly, Judge Carranza opined “attack” should be read broadly to encompass “the preparation, the carrying out of combat action and the immediate aftermath thereof, including criminal acts committed during *ratissage* operations carried out in the aftermath of the combat action.”²¹⁵ This interpretation would include the attack on the church committed in the aftermath of the combat action under Article 8(2)(e)(iv) of the Rome Statute.

IV. A PERILOUS PRECEDENT: THE EFFECT OF THE NTAGANDA DECISION

A. The Limited Scope of Article 8(2)(e)(iv) Creates A “Window of Opportunity”

In determining the scope of the term “attack,” the Trial Chamber concluded that the pillaging of the church in Sayo was not an “act of violence against the adversary” and, consequently, that it did not constitute an attack within

²¹³ *Id.* ¶ 1166.

²¹⁴ *Id.*

²¹⁵ *Id.* ¶ 1167.

Article 8(2)(e)(iv) because the attack took place sometime after the assault not during the actual conduct of hostilities.²¹⁶ Yet, although the term “attack” is not defined in either the Rome Statute or the Elements of Crimes, Article 49 of Additional Protocol I to the 1949 Geneva Conventions defined “attacks” to mean “acts of violence against the adversary, whether in offence or defence.” By terminating its analysis simply because the attack took place after the assault, the Trial Chamber failed to recognize the special protection of cultural property set forth by Article 8(2)(e)(iv). Importantly, confining an Article 8(2)(e)(iv) “attack” to actions during the “heat of battle” significantly limits the Article’s protections and creates a “window of opportunity” following active combat where cultural and religious objects would lose their protection, and those who destroy such objects would become immune from prosecution. By narrowly restricting Article 8(2)(e)(iv)’s application, the Court contradicts both the broader prohibition in international humanitarian law and the Trial Chamber’s recognition in *Al Mahdi* of the “special status of religious, cultural, historical and similar objects.”²¹⁷

Under Article 21 of the Rome Statute, the Court must first apply the Rome Statute, the Elements of Crimes, and its Rules of Procedure and Evidence.²¹⁸ Since the term “attack” is not defined in either the Rome Statute or the Elements

²¹⁶ *Ntaganda*, Judgment, *supra* note 3, ¶ 1141.

²¹⁷ *Al Mahdi*, Judgment and Sentence, *supra* note 1, ¶ 15.

²¹⁸ Rome Statute art. 21(1)(a).

of Crimes, under Article 21, the Court is to next apply “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”²¹⁹ Thus, while the Trial Chamber correctly acknowledged that it must consider “the established framework of international law,” it nevertheless erred when it equated the term “attack” in Article 8(2)(e)(iv) with “acts of violence against the adversary, whether in offence or defence” as set forth in Article 49 of Additional Protocol I. By simply looking to the Article 49(1) definition of “attack,” the Court fails to account for the full framework of special protections that international law affords cultural property.

An examination of the relevant international humanitarian law more accurately “reflect[s] a special meaning which is necessary to give effect to the broader prohibition in [IHL] which this crime was intended to implement.”²²⁰ The Hague Conventions of 1899 and 1907 and the Regulations annexed to the Conventions include an important series of provisions dealing with the protection of cultural property during armed conflict. Together, Articles 27 and 56 provide “seamless protection” for cultural property through the obligation to avoid damage to buildings dedicated to religion, art, science and charity, and historic monuments, whether in the conduct of hostilities or when under the control of a

²¹⁹ *Id.*

²²⁰ *Ntaganda*, Prosecution Appeal Brief, *supra* note 39, ¶ 30.

party to the conflict.²²¹ Limiting the protection of Article 8(2)(e)(iv) only to Article 27, during sieges and bombardments, represents a significant constraint on the protection of cultural property and directly contradicts the Trial Chamber's decision in *Al Mahdi*, which stated that "special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations."²²² Confining Article 8(2)(e)(iv) to only that of Article 27 would create a step backwards in the fight to protect cultural property during armed conflict.

In addition to the 1899 and 1907 Hague Conventions, Article 49 of Additional Protocol I to the Geneva Conventions has often been used under international humanitarian law to help define "attacks," and several decisions of the Court have relied upon it. For example, in *The Prosecutor v. Bahr Idriss Abu Garda*, the Pre-Trial Chamber justified using Article 49(1) by pointing out the reference in Article 8(2)(e) of the Rome Statute to apply "the established framework of international law" as well as that in Article 21(2) to use the established principles of "international law of armed conflict."²²³ Additionally, ICRC commentary on the provision provides that the meaning of "attack," as defined by Additional Protocol I, is not the same as the usual meaning of the

²²¹ *Id.* ¶ 35.

²²² *Al Mahdi*, Judgment and Sentence, *supra* note 1, ¶ 14.

²²³ *The Prosecutor v. Bahr Idriss Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges (February 8, 2010)

word, and that the definition given by the Protocol has a “wider scope,” noting its synonymous meaning with “combat action.”²²⁴

Following the 1949 Geneva Conventions, the 1954 Hague Convention became the first international instrument to exclusively address the fate of cultural property during war time and implement the core principles of Articles 27 and 56 of the 1907 Hague Convention. Under Article 4, which applies equally to conduct during armed conflict as well as occupation, parties to the Convention must show respect for cultural property by both avoiding the exposure of cultural property located within their own territory to danger and causing harm to cultural property situated within the territory of another State Party to the Convention.²²⁵ This provision is significant because it is not limited to the “conduct of hostilities” or heat of battle, but instead encompasses all acts of violence.²²⁶ The 1954 Hague Convention, therefore, underscores the principle that international law prohibits all acts of violence against cultural property, irrespective of whether they occur in the conduct of hostilities or not. The Additional Protocols implement this approach, establish similar prohibitions on acts of violence against cultural property, and confirm that these obligations apply in international and non-international armed conflict.

²²⁴ *Id.*

²²⁵ 1954 Hague Convention, *supra* note 65, art. 4.

²²⁶ *Ntaganda*, Prosecution Appeal Brief, *supra* note 39, ¶ 49.

Thus, Article 8(2)(e)(iv) of the Rome Statute must be read more broadly considering the importance attributed to the protection of cultural property under the established framework of international humanitarian law, including the Hague Conventions of 1899 and 1907, the 1949 Geneva Conventions and their Protocols, and the 1954 Hague Convention and its Protocols. In finding that an “attack” under Article 8(2)(e)(iv) is confined to acts committed during the “conduct of hostilities,” the Trial Chamber undermined the “special status of religious, cultural, historical and similar objects” set forth in these international laws. The term “attack” should therefore be interpreted in a way that accounts for both combat action and its aftermath. Limiting the scope strictly to combat action interferes with the object and purpose of this provision, and whether the destruction is carried out in an immediate attack during a military offensive or occurs later as part of a general attack is not the central aspect of the sought prohibition. By excluding the destruction of cultural property in the aftermath of an attack, the Court imposed an additional limit on Article 8(2)(e)(iv) and set a dangerous precedent.

As illustrated above, if the term “attack” is to be construed in accordance with the Trial Chamber’s definition, an attack on cultural property under Article 8(2)(e)(iv) would not be punishable unless it occurs during the immediate conduct of hostilities. This definition creates a gap in time under which, after the heat of battle has subsided but “during continuous activities serving the military

objectives of the attackers, the Court will not recognize the harm to the victims.”²²⁷ There is no logical reason to leave open a “window of opportunity” under which an attacker can destroy cultural property with no consequences. To hold otherwise blatantly contradicts the Trial Chamber’s holding in *Al Mahdi* when it stated that “the element of directing an attack encompasses any acts of violence against protected objects” and that it would “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.”²²⁸

As further illustrated by the Trial Chamber in *Al Mahdi*, Article 8(2)(e)(iv) finds its origin in the “prohibition of wanton destruction of religious, charitable, educational, and historic buildings and monuments.”²²⁹ The central aspect of the protections is not whether the destruction is carried out during the conduct of hostilities or immediately after. Rather, as discussed above, the central prohibition lies in the aim of the conduct: the destruction of the protected party. By ruling otherwise, the Trial Chamber imposed an additional limit by excluding the destruction of the protected property in the immediate aftermath of the assault on

²²⁷ Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on Behalf of the Antiquities Coalition, Blue Shield International and Genocide Watch (September 18, 2020) [hereinafter *Amicus Curiae* Observations].

²²⁸ *Al Mahdi*, Judgment and Sentence, *supra* note 1, ¶ 15.

²²⁹ *Id.* ¶ 14.

Sayo, thus creating a “window of opportunity” following active combat under which cultural and religious objects lose their protections.²³⁰

B. Are Some Cultural Sites More Important Than Others?

In determining that the pillaging of the church in Sayo did not constitute an “attack” under the Rome Statute because it “took place sometime after the assault, and therefore not during the actual conduct of hostilities,” the Trial Chamber concluded that Article 8(2)(e)(iv) provides two different standards of protection: a narrow prohibition of “attacks” in the conduct of hostilities for all the objects enumerated under Article 8(2)(e)(iv), and a broader prohibition of “attacks” in a wider sense for “cultural objects enjoying a special status.”²³¹ This alludes to the possibility that the Court may hold certain types of cultural objects as more worthy of protection than others, despite there being no mention of “special status” of cultural property in the Rome Statute. Without further explanation, the Court stated that “the Chamber’s findings do not relate to the interpretation of an ‘attack’ under Article 8(2)(e)(iv) when cultural objects enjoying a special status are the object of the attack.” It failed to clarify whether it considered all cultural objects, or only a select few, to have a “special status.” Though the Trial Chamber did not discuss whether the church fell under the

²³⁰ *Amicus Curiae* Observations, *supra* note 224, ¶ 6.

²³¹ *Ntaganda*, Prosecution Appeal Brief, *supra* note 39, ¶ 65.

category of “cultural objects enjoying a special status,” it is relatively clear from the holding that it did not consider it to.

The Court’s suggestion that the prohibition in Article 8(2)(e)(iv) varies depending on the status of the cultural property in question presents serious challenges for future applications. While *Al Mahdi* represented a landmark for the ICC, being the first time that “intentionally directing attacks to historical, religious and cultural properties” was prosecuted as a war crime before an international court, and the first time a guilty plea was recorded for such a crime, the Court appeared to weigh heavily on the recognized global significance of the mausoleums in its judgment. Specifically, the Trial Chamber noted that the structures “were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali” and further emphasized that “at the time of the destruction, all cemeteries in Timbuktu, including the Building/Structures within those cemeteries, were classified as world heritage and thus under the protection of UNESCO.”²³² By identifying the sites’ importance to both the local *and international* communities, the Court reflected the international outrage that resulted around the world following the destruction of these religious and historical structures. This raises the question of whether the structures’ status as protected UNESCO world heritage sites, in contrast to the relatively unknown

²³² The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Decision on the confirmation of charges against Amhad Al Faqu Al Mahdi (March 24, 2016) [hereinafter *Al Mahdi*, Decision on Charges].

church in Sayo, influenced the ICC’s interpretation of an “attack” under Article 8(2)(e)(iv).

In assessing the seriousness of Al Mahdi’s acts for sentencing, the *Al Mahdi* Trial Chamber looked to an expert witness’s testimony that “Timbuktu is at the heart of Mali’s cultural heritage” and that the structures in question “were of great importance to the people of Timbuktu.”²³³ Recognizing the targeted buildings’ importance, the Court deemed them religious buildings and historical monuments under Article 8(2)(e)(iv) of the Rome Statute.²³⁴ However, the *Ntaganda* Trial Chamber made no reference to the church’s cultural significance beyond its vague statement that certain types of “cultural objects enjoying a special status” may be protected by Article 8(2)(e)(iv). By implying that two standards of protection that may hinge on the importance of particular cultural objects exist, under Article 8(2)(e)(iv), the Court incorrectly terminated its analysis of the attack on the church at Sayo, contradicted previous caselaw, and created questions as to how the term “attack” will be construed going forward.

C. Implications for Al Mahdi and Future Cases

As discussed earlier, the *Al Mahdi* decision was heralded as “landmark,” a “breakthrough,” and a “historic judgment.” It also represented an increased effort

²³³ *Al Mahdi*, Judgment and Sentence, *supra* note 1, ¶ 78.

²³⁴ *Id.*

by the ICC to protect cultural heritage, prevent crimes against humanity, and prevent war crimes, particularly cultural genocide.²³⁵ However, the Trial Chamber's holding in *Ntaganda* brings the charges in *Al Mahdi*, which arose from the 2012 destruction of ten sites in Timbuktu during the occupation of Northern Mali, into question. Has the Court's message—that attacks on cultural heritage are no longer crimes that can be committed with impunity—been destroyed? In determining that the term “attack” under Article 8(2)(e)(iv) of the Rome Statute is confined to acts committed during the “conduct of hostilities,” the Trial Chamber not only undermined the interpretation of the crime for which Al Mahdi was convicted, but also created a dangerous precedent for future cases.

Despite admitting responsibility for the acts related to the destruction of several mausoleums and a mosque in Timbuktu, Al Mahdi may be able to withdraw his guilty plea based on the Trial Chamber's holding in *Ntaganda*. Although a civil war continued in Mali, Timbuktu appeared to have been securely in the hands of the rebels at the time of the attacks.²³⁶ Although Al Mahdi oversaw and subsequently participated in the planned destruction, based on the Trial Chamber's holding in *Ntaganda*, it is now unclear whether the structures'

²³⁵ Schabas, *supra* note 145, at 75.

²³⁶ *Id.* at 76.

destruction constitutes an “attack.”²³⁷ The *Ntaganda* decision creates a dangerous precedent going forward.

In addition to affecting the *Al Mahdi* case, the Trial Chamber’s interpretation of “attack” under Article 8(2)(e)(iv) could have detrimental consequences on future cases. By limiting “attack” to acts committed during the “conduct of hostilities,” or “heat of battle,” the Court undermines the charge of “intentionally directing attacks against buildings dedicated to religion and historic monuments” in *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, a current case pending trial at the ICC.²³⁸ As the *de facto* chief of the Islamic Police, Al Hassan, a Malian national and member of Ansar Dine, is accused of the war crime of intentionally directing attacks against buildings in Timbuktu which were dedicated to religion and historic monuments under Article 8(2)(e)(iv) of the Rome Statute.²³⁹ Similar to the possible effect on the *Al Mahdi* case, if the Trial Chamber determines that the attacks took place at a time when Timbuktu had already fallen into the hands of the rebels and, thus, not during the “heat of battle,” Al Hassan may not be held liable for the war crime of intentionally attacking protected objects.

²³⁷ Casaly, *supra* note 56, at 1211.

²³⁸ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Questions and Answers (updated July 2020) <https://www.icc-cpi.int/itemsDocuments/200713-al-hassan-qa-trial-openingENG.pdf>

²³⁹ *Id.*

This would significantly limit the scope of Article 8(2)(e)(iv) and creates serious inconsistencies in the interpretation of acts against cultural property and cultural heritage in times of armed conflict. While the *Ntaganda* Trial Chamber suggested that the “special status” of a protected object may be relevant in assessing the legal framework under Article 8(2)(e)(iv), the Office of the Prosecutor (OTP) recently stated in a Draft Policy on Cultural Heritage that the status of a cultural object is “not relevant as such to liability under the Statute.”²⁴⁰ The OTP further agreed with the Trial Chamber’s holding in *Al Mahdi*, under which “attack” in Article 8(2)(e)(iv) has a special meaning, “insofar as it includes acts against hostilities directed against protected objects under the control of a party to the conflict.”²⁴¹ The dispute within the ICC in defining “attack” is further illustrated by Judge Carranza’s dissenting opinion where she argued that the Trial Chamber’s interpretation of the term “attack” was too narrow.”²⁴² Judge Carranza opined that the term “attack” should be read broadly to encompass “the preparation, the carrying out of combat action and the immediate aftermath thereof” and, as a result, the attack on the church committed in the aftermath of the combat action would fall under Article 8(2)(e)(iv) of the Rome Statute.²⁴³ Therefore, analysis of the recent ICC opinions in *Al Mahdi* and *Ntaganda*,

²⁴⁰ Draft Policy, *supra* note 110.

²⁴¹ *Id.*

²⁴² *Ntaganda*, Appellate Decision, *supra* note 6, ¶ 1165.

²⁴³ *Id.*

including Judge Carranza's dissenting opinion in *Ntaganda*, and the Draft Policy on Cultural Heritage released by the OTP, shines a light on the inconsistent opinions present within the Court as to the interpretation of Article 8(2)(e)(iv) as it applies to acts against cultural property during armed conflict.

V. CONCLUSION

In determining the scope of the term “attack” under Article 8(2)(e)(iv), the Trial Chamber in *Ntaganda* concluded that the pillaging of the church at Sayo was not an “act of violence against the adversary” because it took place after the assault, and therefore not during actual hostilities. Such a narrow interpretation is not only inconsistent with international humanitarian law but also with the Trial Chamber's recognition in *Al Mahdi* of the “special status of religious, cultural, historical and similar objects.” To find that an “attack” under Article 8(2)(e)(iv) is confined to acts committed during the “conduct of hostilities” raises three immediate issues moving forward.

First, limiting the scope of an Article 8(2)(e)(iv) “attack” to actions committed only during the “conduct of hostilities” creates a “window of opportunity” following active combat where cultural and religious objects lose their protections. It also fails to account for the continuous nature and duration of acts of violence. Second, in determining that the pillaging of the church at Sayo did not constitute an “attack,” the Trial Chamber concluded that Article

8(2)(e)(iv) provides for two standards of protection and alluded to the idea that certain types of cultural objects are more worthy of protection than others. This presents serious challenges in future applications of Article 8(2)(e)(iv) if the central focus depends on the “special status” of the object in question. Third, the Trial Chamber’s holding in *Ntaganda* brings the charges in *Al Mahdi* into question, given that the record before the Court suggested that no “military” or “combat” activity occurred at the time the structures were destroyed. In conclusion, to limit the protection of cultural property under Article 8(2)(e)(iv) of the Rome Statute not only has detrimental effects on current and future caselaw at the ICC but also hinders the development of international law and takes a step backwards in protecting and respecting cultural property.