



## CULTURAL HERITAGE IN THE ICC: UNCERTAINTY AT THE CROSSROADS OF CULTURAL AND HUMAN RIGHTS

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It's probably the oldest mosque here in town, and is considered a heritage site . . . .  
[T]hey think that this is heritage. Does "heritage" include worshipping cows and trees?<sup>1</sup>

In *Prosecutor v. Al Mahdi*, the International Criminal Court ("ICC") prosecuted the intentional destruction of cultural property for the first time.<sup>2</sup> The defendant, Ahmad Al Faqi Al Mahdi, was convicted as co-perpetrator in an attack against ten mausoleums and mosques in Timbuktu, Mali.<sup>3</sup> In the quote above, as the court noted, Al Mahdi shows scorn for the values underlying international cultural heritage: the "wide diffusion of culture, and the education . . . indispensable to the dignity of man."<sup>4</sup> Al Mahdi challenged the validity of a culture's heritage he did not respect, taking it upon himself to decide the value of its historical and religious buildings—with devastating consequences.<sup>5</sup>

The ICC Office of the Prosecutor made a similar decision in its new policy on cultural heritage, released in June of this year.<sup>6</sup> The policy broadly construes *cultural heritage* to accommodate not only material objects and artifacts, but also products and processes.<sup>7</sup> Cultural heritage includes natural sites, buildings, monuments, and works of art, as well as “representations, expressions, knowledge and skills.”<sup>8</sup> As for its meaning, cultural heritage embodies a community’s “sense of identity and belonging,” inherited from its ancestors and preserved for future generations.<sup>9</sup> It “touch[es] upon the very notion of what it means to be human”<sup>10</sup> and implicates a number of related rights, such as freedom of expression, thought, and personal development.<sup>11</sup>

The policy provides some standards to guide its application. As a threshold matter, the Office can only prosecute cases within the ICC’s jurisdiction over crimes of aggression, war crimes, crimes against humanity, and genocide.<sup>12</sup> In assessing crimes, the Office will consider the victims’ suffering, vulnerability, and fear, and the social, economic, and environmental harm to the community.<sup>13</sup> The Office will also decide, on a case-by-case basis, whether an investigation would serve the interests of justice.<sup>14</sup>

In particular, human rights principles will guide the Office’s approach.<sup>15</sup> The Office may not draw “any adverse distinction” based on gender; age; race, color, or national, ethnic, or social origin; wealth; language; religion, belief, or opinion; among others.<sup>16</sup> The policy also explains—in a footnote—that cultural rights do not amount to *cultural relativism*, or the view that there are no “right” or “wrong” cultures.<sup>17</sup> Cultural rights do not justify human rights violations, discrimination, or imposing an identity or practice on others.<sup>18</sup> The Office promises a sensitivity to culture “in all its richness and diversity,” so long as it is consistent with the Rome Statute,<sup>19</sup> international law, and international customs.<sup>20</sup>

Still, the policy leaves an important question unanswered: whose cultural heritage will be protected? Cultural heritage is “less a substance than a quality.”<sup>21</sup> No matter the type, cultural heritage builds a sense of identity within a group and enriches the cultural life of the wider international community.<sup>22</sup> Damage to any cultural property, then, damages “the cultural heritage of all humankind.”<sup>23</sup> International cultural heritage recognizes the rights of all to “access, participate in and contribute to cultural life.”<sup>24</sup> But in rejecting cultural relativism, the ICC’s policy adopts the view that cultures can be “wrong,” thus imposing limits on who is allowed to fully participate in cultural life.

Cultural heritage represents values rooted in time and place; it is necessarily relative. Two examples from the development of cultural heritage law illustrate this point. First, even though modern cultural heritage law arose from the destruction and looting of art during World War II,<sup>25</sup> some countries refuse to repatriate “Nazi art” seized from Germany.<sup>26</sup> This example shows how multiculturalism sometimes comes into conflict with human rights principles, as Germany’s interest in remembering its past might be in conflict with other countries’ interest in preventing any possible resurgence of Nazi ideology. Second, in the nineteenth and twentieth century, colonial empires used cultural property laws to appropriate the heritage of other nations, all in the name of “civilising duty.”<sup>27</sup> This example shows that cultural heritage will be interpreted and enforced based on prevailing values of the time, and by whoever has the power to do so. History may not look back on such decisions kindly, as has been the case for colonialism.

For its policy on cultural heritage, the ICC Office of the Prosecutor had to decide whether it would respect all cultures or serve the interests of justice; it could not do both. Maybe the Office’s rejection of cultural relativism referred only to flagrant human rights violations and similar acts. The policy does not make this clear. While the ICC’s new policy does afford

greater protections of cultural rights and hopefully will raise awareness for the significance of cultural heritage,<sup>28</sup> it leaves ambiguous whose heritage will in fact be protected.

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<sup>1</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 46 (Sep. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf) [<https://perma.cc/V26S-E6WC>] (quoting defendant).

<sup>2</sup> See *id.* ¶ 13.

<sup>3</sup> See *id.* ¶¶ 10, 63 (applying Article 8(2)(e)(iv) of the Rome Statute).

<sup>4</sup> See *id.* ¶ 46.

<sup>5</sup> The ICC recognized the gravity of these consequences by holding Al Mahdi liable for 2.7 million euros in individual and collective reparations. See Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Reparations Order, ¶ 135 (Aug. 17, 2017), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-236> [<https://perma.cc/7SVP-Y7N3>]. Reparations were awarded for the physical damage to the buildings, as well as the resulting economic losses and moral harm. See *id.* ¶ 104. Nominal damages were awarded to the Malian State and the international community. See *id.* ¶¶ 106, 107.

<sup>6</sup> See ICC Office of the Prosecutor, *Policy on Cultural Heritage* (2021), <https://www.icc-cpi.int/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf> [<https://perma.cc/DE5R-U7LH>].

<sup>7</sup> See *id.* ¶ 15.

<sup>8</sup> *Id.* ¶ 16.

<sup>9</sup> See *id.* ¶ 15.

<sup>10</sup> See *id.* ¶ 17.

<sup>11</sup> *Id.* ¶ 28.

<sup>12</sup> See *id.* ICC Office of the Prosecutor, *Policy on Cultural Heritage*, ¶ 37 (2021), <https://www.icc-cpi.int/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf> [<https://perma.cc/DE5R-U7LH>].

<sup>13</sup> *Id.* ¶ 95.

<sup>14</sup> *Id.* ¶ 96.

<sup>15</sup> See *id.* ¶ 7.

<sup>16</sup> *Id.* ¶ 36.

<sup>17</sup> See *id.* at 5 n.8.

<sup>18</sup> *Id.*

<sup>19</sup> Rome Statute of the ICC, July 17, 1998, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [<https://perma.cc/L5MA-4QVF>]. The Rome Statute established the ICC and gave it jurisdiction over international crimes, including war crimes affecting cultural heritage. See *id.* art. 1, 5, 8(2)(b)(ix), 8(2)(e)(iv).

<sup>20</sup> See ICC Office of the Prosecutor, *supra* note 6, ¶ 25.

<sup>21</sup> See Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L.Q. 61, 84 (2000).

<sup>22</sup> See *id.* at 84–85.

<sup>23</sup> U.N. Special Rapporteur, *Cultural Rights*, ¶ 8, U.N. Doc. A/71/317 (Aug. 9, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/254/44/PDF/N1625444.pdf> [<https://perma.cc/5ESD-HS3G>].

<sup>24</sup> *Id.* ¶ 13.

<sup>25</sup> See Blake, *supra* note 21, at 61.

<sup>26</sup> See Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 Tenn. L. Rev. 691, 694–95 (1998). A similar problem for the protection of cultural heritage has arisen from the destruction of Confederate monuments in the United States. See generally E. Perot Bissell V, *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, 128 YALE L.J. 1130, 1133 (2019), <https://www.yalelawjournal.org/note/monuments-to-the-confederacy-and-the-right-to-destroy-in-cultural-property-law> [<https://perma.cc/8UVC-6QCV>] (arguing for limited right to destroy cultural property). Although contrary to preservation, the “logic of cultural-property law,” the destruction of Confederate monuments provided catharsis and the opportunity to disown white supremacist values. See *id.* at 1133. In response, one art historian suggests that the *who* and *why* determine whether destroying cultural property is permissible. See Jonah Engel Bromwich, *What Does It Mean to Tear Down a Statue?*, N.Y. TIMES (June 11, 2020), <https://www.nytimes.com/2020/06/11/style/confederate-statue-columbus-analysis.html> [<https://perma.cc/BSP3-HXWA>]. He contrasts the destruction of Confederate monuments by American protestors to the Islamic State's destruction of monuments in Palmyra. See *id.* But, although it may fly in the face of common sense, even these two examples depend on whose perspective we take.

<sup>27</sup> See Sebastian M. Spitra, *Civilisation, Protection, Restitution: A Critical History of International Cultural Heritage Law in the 19th and 20th Century*, 22 J. HIST. INT'L L. 329, 341 (2020), <https://doi.org/10.1163/15718050-12340154> [<https://perma.cc/WWC3-VBY7>].

<sup>28</sup> See ICC Office of the Prosecutor, *supra* note 6, ¶ 24.