

2017

# Al Mahdi Has Been Convicted of a Crime He Did Not Commit

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## Recommended Citation

William Schabas, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, 49 Case W. Res. J. Int'l L. 75 (2017)

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# AL MAHDI HAS BEEN CONVICTED OF A CRIME HE DID NOT COMMIT

*William Schabas\**

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## I. INTRODUCTION

On September 27, 2016, Ahmad Al Faqi Al Mahdi was convicted by a Trial Chamber of the International Criminal Court for the 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. Al Mahdi was sentenced to nine years’ imprisonment. A month earlier, he had pleaded guilty to the charge at the beginning of his trial, which as a consequence took only a few days.

Pundits heralded the trial with clichés reserved for such occasions—“landmark,” “historic judgment,” “breakthrough”—and it seemed as if it was a long-awaited tonic for the struggling institution. This was an easy win for the Court: an expeditious trial of a few days for a contrite defendant previously linked to the global pariah, the “deviant people” of Al Qaeda.<sup>1</sup> But perhaps this gift came at a price that was too good

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1. These were the words of Al Mahdi himself in his statement to the Court: *Al Mahdi* (ICC-01/12-01/15), Transcript, 22 August 2016, p. 9, line 3.

to be true. A closer look at the Rome Statute suggests that Al Mahdi did not commit the crime for which he was convicted.

Al Mahdi admitted responsibility for acts relating to the destruction of several mausoleums and the door of a mosque in Timbuktu, Mali, buildings that had been traditionally used by the local population as part of their religious observance. In 2012, when a rather complex civil war erupted in Mali, the government abandoned the northern provinces and religious extremists associated with Ansar Dine seized control of Timbuktu. The Prosecutor of the International Criminal Court observed that “[t]he Ansar Dine leadership is able to control and govern parts of the territory through local councils established in towns that fell under its control. Additionally, the group reportedly set up a specialized police force in Timbuktu in order to enforce the Sharia law.”<sup>2</sup> As an eminent religious personality who had joined the rebels, Al Mahdi delivered a sermon condemning worship at the mausoleums. Subsequently, the rebel administration ordered that the mausoleums be destroyed. Al Mahdi, who presided over a morality tribunal known as the *Hisbah*, played a crucial role in implementing the decision to destroy<sup>3</sup> the buildings or structures in question, which at the time were classified by UNESCO as “world heritage.”

Essentially identical provisions of the Rome Statute, one applicable to international armed conflict and the other to non-international armed conflict, govern the crime of “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.” Al Mahdi pleaded guilty to article 8(2)(e)(iv), the text that applies to non-international armed conflict. That the structures targeted by Al Mahdi were “buildings dedicated to religion” or that they were “historic monuments” does not seem to be seriously disputed. It was precisely because of their religious significance, something that did not suit the beliefs of the regime with which Al Mahdi was associated, that they were destroyed.<sup>4</sup> Clearly they did not constitute a “military objective.” Although civil war continued in the country, Timbuktu seems to have been securely in the hands of the rebels at the time and would remain so until the first months of the following year. Indeed, based on the record before the Court it does not seem that there was any activity that could be called “military” or “combat” at the time the structures were destroyed. For this reason it is not at all evident that the implementation of the administrative decision to

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2. Office of the Prosecutor, Situation in Mali (Art. 53(1) Report, 16 January 2013, para. 82.
  3. *Al Mahdi* (ICC-01/12-01/15), Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2015, para. 49.
  4. *Ibid.*, paras. 41-2.

destroy the structures, carried out “with a variety of tools, including pickaxes and iron bars,”<sup>5</sup> constituted an “attack” as the term is used in article 8 of the Rome Statute. And if it was not an “attack” as the term is meant in article 8(2)(e)(iv), then Al Mahdi did not commit the offense.

The definitions of crimes set out in the Rome Statute of the International Criminal Court are to be “strictly construed” and may not “be extended by analogy.” Moreover, “[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”<sup>6</sup> In this respect, the International Criminal Court may differ from other international criminal tribunals that have been set up on a temporary basis and where a more liberal and teleological approach to judicial interpretation has been adopted, usually with reference to the rules of the Vienna Convention on the Law of Treaties.<sup>7</sup> Judge Van den Wyngaert has suggested that “[b]y including this principle in Part III of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of “judicial creativity” of which other jurisdictions may at times have been suspected.”<sup>8</sup> Because in contending that the destruction of the buildings in Timbuktu was an “attack,” judicial creativity is precisely what is required.

## II. MEANING OF “ATTACK” IN ARTICLE 8

Al Mahdi is the first accused person to be tried for “attacks” on cultural property. Declaring that article 8(2)(e)(iv) has not previously been applied by the Court, the Trial Chamber said it would “proceed

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5. Ibid., para. 37.

6. Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 22(2).

7. See, for example, the 1994 Yearbook of the International Criminal Tribunal for the former Yugoslavia where it is stated that ‘[i]n drafting the rules, the judges of the Tribunal tried . . . to strike a balance between the strictly constructionist and the teleological approaches in the interpretation of its *Statute*’ (International Criminal Tribunal for the former Yugoslavia, Yearbook 1994, The Hague: United Nations Publications, 1994, para. 53). Also: *Tadić* (IT-94-1-A), Judgment, 15 July 1999, para. 73; *Erdemović* (IT-96-22-A), Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 49; *Kayishema et al.* (ICTR-95-1-T), Judgment, 21 May 1999, para. 103; *Akayesu* (ICTR-96-4-T), Judgment, 2 September 1998, para. 319; *Rutaganda* (ICTR-96-3), Judgment, 6 December 1999, para. 51; *Musema* (ICTR-96-13), Judgment, 27 January 2000, para. 155.

8. *Ngudjolo* (ICC-01/04-02/12), Concurring Opinion of Judge Christine Van den Wyngaert, 18 December 2012, para. 19.

to interpret this crime and its elements.”<sup>9</sup> It did not cite any case law to support its conclusions. The Trial Chamber said case law of the Court pertaining to attacks against civilian population “does not offer guidance.”<sup>10</sup> As for the International Criminal Tribunal for the former Yugoslavia, which has issued several decisions concerning attacks on and destruction of cultural property, the Chamber said it is “limited guidance” because the relevant legal text was not the same.<sup>11</sup> Actually, there is a lot of relevant case law that the Chamber ought to have considered.

In ordinary usage, the term “attack” is not the word that would be used to describe the demolition or destruction of structures, using implements that are not weapons or military in nature, and where armed adversaries are not to be found within hundreds of kilometers. It is true that the Rome Statute contemplates an “attack” that takes place in peacetime, but this is in the provision dealing with crimes against humanity, not war crimes. Moreover, elsewhere in article 8, the Rome Statute defines some crimes that involve “destruction,” and this might suggest that “attack” and “destruction” are not synonymous. The Chambers of the International Criminal Court as well as those of the International Criminal Tribunal for the former Yugoslavia have considered the meaning of the word “attack” as it is used in the definitions of war crimes on many occasions.

The words “[i]ntentionally directing attacks” are used in eight subparagraphs of article 8, the war crimes provision of the Rome Statute. Neither the Statute itself nor the Elements of Crimes, adopted pursuant to article 9 to supplement the Statute, indicate a definition of the word “attacks.” The provisions of article 8 are derived from various treaties governing the law of armed conflict, notably the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 and their Additional Protocols of 1977. Article 49 of Additional Protocol I is entitled “Definition of attacks and scope of application.”<sup>12</sup> Paragraph 1 of article 49 states that “‘Attacks’ means acts of violence against the adversary, whether in offence or in defense.”

Several decisions of Chambers of the Court rely upon article 49(1) of Additional Protocol I in order to construe the word “attacks” as it is used in various sub-paragraphs of article 8 of the Statute.<sup>13</sup> In *Abu*

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9. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 14.

10. *Ibid.*, para. 16.

11. *Ibid.*

12. Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3.

13. *Katanga et al.* (ICC-01/04-01/07), Decision on the confirmation of the charges, 30 September 2008, para. 267; *Abu Garda* (ICC-02/05-02/09),

*Garda*, a Pre-Trial Chamber justified recourse to article 49(1) by noting the reference in article 8(2)(e) to “the established framework of international law” as well as that in article 21(2) to applicable treaties and the principles and rules of international law, including the established principles of “the international law of armed conflict.”<sup>14</sup> The Chamber said that although article 49(1) of Additional Protocol I only applied to international armed conflict, “this term is given the same meaning in article 13(2) of Additional Protocol II (“APII”), which applies to armed conflicts not of an international character.”<sup>15</sup>

Basing itself on article 3 of its Statute, the International Criminal Tribunal for the former Yugoslavia has confirmed the customary nature of war crimes involving the direction of attacks against civilian objects. Referring to article 49(1) of Additional Protocol I, the Tribunal has consistently confirmed the technical meaning to be given to the term “attack” of acts of violence, committed during combat using “armed force” in a “military operation.”<sup>16</sup>

That “attacks” is to be interpreted with reference to article 49(1) of Additional Protocol I is also confirmed in the authoritative academic commentary on the Elements of Crimes published under the auspices of the International Committee of the Red Cross. With respect to the various provisions of article 8 that concern “attacks,” the Commentary says that “[t]he concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict.”<sup>17</sup> Discussing the term “attack” as it is used

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Decision on the Confirmation of Charges, 8 February 2010, para. 64; *Banda et al.* (ICC-02/05-03/09), Corrigendum of the ‘Decision on the Confirmation of Charges’, 7 March 2011, para. 61; *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, para. 109; *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 45.

14. *Abu Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010,, para. 64.
15. *Ibid.*, para. 65.
16. *Galić* (IT-98-29-T), Judgment, 5 December 2003, para. 52; *Kordić and Čerkez* (IT-95-14/2-A), Judgment, 17 December 2004, para. 47; *Strugar* (IT-01-42-T), Judgment, 31 January 2005, para. 2iç82; *Milošević, Dragomir* (IT-98-29§1-T), Judgment, 12 December 2007, para. 943; *Perišić* (IT-04-81-T), Judgment, 6 September 2011, para. 91; *Prlić et al.* (IT-04-81-T), Judgment, 6 September 2011, para. 91; *Karadžić* (IT-95-5/18-T), Public Redacted Version of Judgment Issued on 24 March 2016, 24 March 2016, para. 451.
17. Knut Dörmann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge: Cambridge University Press, 2002, pp. 134, 150-151, 156, 169, 178-179, 216, 350-351

in article 8 in his contribution to the *Triffterer Commentary*, Knut Dörmann wrote:

The term “attack” is specifically defined for IHL purposes and means acts of violence against the adversary, whether in offense or in defence (article 49 para. 1 Add. Prot I). Its meaning is unrelated to meanings given to the same term under *ius ad bellum*. It refers to any combat action, thus offensive acts and defensive acts (sometimes also called “counter attacks”). Thus, for the purpose of this definition, it does not matter whether the acts are committed by an aggressor or by the party acting in self-defence.<sup>18</sup>

The commentary of the International Committee of the Red Cross on article 49 of Additional Protocol I confirms that “the term “attack” means “combat action.”<sup>19</sup>

Finally, even the Office of the Prosecutor, in another context, appears to have understood the special meaning to be given to the term “attack” as it is used in article 8 of the Rome Statute. In its report on the *Gaza flotilla incident*, the Office considered the application of certain provisions of article 8 to the acts of Israeli military forces. It said “that an attack for the purposes of this discussion must include a forcible boarding operation, by analogy with other areas of international humanitarian law in which an attack includes all acts of violence *against an adversary*.”<sup>20</sup> This shows that the Office of the Prosecutor understood that article 8 should be interpreted with reference to international humanitarian law in general. The expression “violence against an adversary” used by the Office is obviously taken from article 49(1) of Additional Protocol I.

The word “attack” is also used in the crimes against humanity definition, article 7 of the Rome Statute. However, the meaning of “attack” in article 7 is not the same as in article 8. In fact, the Elements of Crimes define in some detail the “attack directed against a civilian population” of crimes against humanity, specifying that “[t]he acts need

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18. Roberta Arnold, Elisabeth Baumgartner, Michael Cottier, Knut Dörmann, Robin Geiß, Julia Grignon, Sabine Klein, David Křivánek, Emilia Richard, Stefan Wehrenberg and Andreas Zimmermann, ‘Article 8’, in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 3rd edn, Munich: C.H. Beck; Baden-Baden: Nomos; Oxford: Hart, 2015, pp. 281–567, at p. 342 (internal reference omitted).
  19. Claude Pilloud and Jean Pictet, ‘Article 49’, in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols to the Geneva Conventions*, The Hague: Martinus Nijhoff, 1987, pp. 601-608, at p. 603.
  20. Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia, 6 November 2014, para. 93 (emphasis added).

not constitute a military attack.”<sup>21</sup> This “clarification” of the meaning of the term in article 7 has been endorsed by Chambers of the Court.<sup>22</sup> It provides confirmation of distinct meanings of the term “attack,” depending upon whether article 7 or article 8 is being considered, and also suggests, *a contrario*, that “military attack” is precisely what is contemplated by article 8.

Had the *Al Mahdi* Trial Chamber discussed this case law and other authorities, it would have been required to explain how the implementation of a decision to demolish buildings using picks and similar implements, in the absence of military activity by an adversary, can be described as a “military attack” or “combat action.” The Chamber explained 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.”<sup>23</sup> All that can be said is that this is a major departure from a consistent line of case law and scholarly commentary that the Trial Chamber declined to even consider. The only explanation it provided is that “[t]he Statute makes no such distinction.”<sup>24</sup> It is an odd comment, given that the Statute uses the term “attack” in eight subparagraphs while elsewhere it uses terms such as “destruction.” The Chamber continued, in its very brief explanation:

This reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute. Indeed, international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.<sup>25</sup>

It is of course quite true that international humanitarian law protects cultural objects both in battle and out of it, but that is hardly an argument to support the application of a provision that is clearly

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21. Elements of Crimes, Introduction to Article 7 of the Statute, paragraph 3.
  22. *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 80; *Situation in the Republic of Côte d’Ivoire* (ICC-02/11), Corrigendum to ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire’, 15 November 2011, para. 31; *Bemba* (ICC-01/05-01/08), Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 149.
  23. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 15.
  24. *Ibid.*
  25. *Ibid.* (internal reference omitted).



directed at acts perpetrated during a battle to those that take place “out of it.”

The Chamber should also have acknowledged the decisions of other Chambers of the International Criminal Court that recognize a clear distinction between the crimes involving “attacks,” where these have been held this to involve a battle or military action between combatant forces, and war crimes that are directed at persons under the control of one of the parties but that take place away from the actual battlefield. According to a Pre-Trial Chamber,

[t]he war crime provided for in article 8(2)(b)(i) of the Statute is the first in the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as “conduct of hostilities crimes”). Accordingly, this crime is applicable only to attacks (acts of violence) directed against individual civilians not taking direct part in the hostilities, or a civilian population, that has not yet fallen into the hands of the adverse or hostile party to the conflict to which the perpetrator belongs.<sup>26</sup>

The Pre-Trial Chamber distinguished such “conduct of hostilities crimes” from other war crimes that apply once the victims have “fallen into the hands” of the adverse party. Convicting Katanga for the war crime of attacking civilians, the Trial Chamber provided a detailed description of the armed military attack on Bogoro in which non-combatant civilians were targeted.<sup>27</sup> It is noteworthy that the *Katanga* Pre-Trial Chamber referred in directly to the war crime of attacking cultural objects when it referred to “the series of war crimes for which one essential element is that the crime must be committed during the conduct of hostilities (commonly known as ‘conduct of hostilities crimes’).”

The same assessment of article 8 was made by a Pre-Trial Chamber in *Ntaganda*: “The war crime of attacking civilians belongs to the category of offences committed during the actual conduct of hostilities by resorting to prohibited methods of warfare.”<sup>28</sup> The Pre-Trial Chamber said that “in principle, any conduct, including shelling, sniping, murder, rape, pillage, attacks on protected objects and destruction of property, may constitute an act of violence for the purpose of the war crime of attacking civilians, provided that the

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26. *Katanga et al.* (ICC-01/04-01/07), Decision on the confirmation of the charges, 30 September 2008, para. 267 (internal footnotes omitted).

27. *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 798.

28. *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 45.

perpetrator resorts to this conduct as a method of warfare and, thus, that there exists a sufficiently close link to the conduct of hostilities.”<sup>29</sup> The Chamber explained that “this sufficiently close link between acts of violence underlying the “attack” and the actual conduct of hostilities does not exist when the acts of violence (such as murder, rape, pillage or destruction of property) are committed against civilians that have fallen into the hands of the attacking party or are committed far from the combat area.”<sup>30</sup>

Thus, case law of the Court has made a very clear distinction between the war crimes associated with “battlefield attacks,” of which article 8(2)(e)(iv) is a species, and those that are associated with the conflict but that take place after a civilian population has “fallen into the hands” of the party charged with violating the laws and customs of war. The situation in “occupied” Timbuktu belongs to this second category. At the very least, the Trial Chamber in *Al Mahdi* should have discussed these inconvenient precedents.

The distinction made in the case law of the Court between offenses related to the conduct of the hostilities and those applicable to persons and property that have fallen into the hands of a party to the conflict was not cut from whole cloth. It finds its origins in the earliest legal instruments of the laws of armed conflict. The same distinction appears in the regulations annexed to the second Hague Convention of 1899 and fourth Hague Convention of 1907, which are the ancestors of our modern law on war crimes. One section of the 1907 regulations governs “Means of Injuring the Enemy, Sieges, and Bombardments” while another is concerned with “Military Authority over the Territory of the Hostile State.” Each of these two sections contains a provision on cultural property. one applicable to the conduct of hostilities, using the expression “sieges and bombardments” (art. 27), and the other to military authority over the territory (art. 56), where the words “seizure of, destruction or wilful damage” are used. It is article 56, not article 27, that applies to the acts of Al Mahdi in Timbuktu.

The Trial Chamber quite correctly acknowledges that there are two relevant provisions in the Hague Convention, and that “[t]he special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations.”<sup>31</sup> Its curiosity as to why there are two provisions does not seem to have been aroused. As a general rule, when there are two distinct provisions dealing with an issue in a legal instrument, there is a reason. The drafters are not presumed to be like the man who wears both a belt and braces, as if to emphasize a point by stating it twice. The Trial Chamber ought to have examined the rationale of the two provisions, especially given the

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29. Ibid.

30. Ibid., para. 47.

31. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 14.

phrase “within the established framework of international law” in the *chapeau* of article 8(2)(e).

The drafters of the Rome Statute understood the distinction between the two provisions in the Hague Regulations. In finalizing article 8, they quite deliberately used article 27, not article 56, as the model. According to William J. Fenrick, the provisions in article 8 on cultural property “restate [. . .], in substance, article 27 of the Regulations annexed to Hague Convention IV.”<sup>32</sup> This is very clear from the *travaux préparatoires* of the Rome Statute.

### III. ORIGINS OF THE ROME STATUTE CULTURAL PROPERTY PROVISIONS

The draft statute of an international criminal court submitted to the United Nations General Assembly by the International Law Commission in 1994 provided for jurisdiction over “[s]erious violations of the laws and customs applicable in armed conflict.”<sup>33</sup> The Commission did not actually propose a detailed definition but it cited the war crimes provisions of two relevant instruments: the Statute of the International Criminal Tribunal for the former Yugoslavia (“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”<sup>34</sup>) and the draft Code of Crimes against the Peace and Security of Mankind (“wilful attacks on property of exceptional religious, historical or cultural value”<sup>35</sup>). The former appears inspired by article 56 of the Hague Regulations, while the latter is derived from article 27.

The text of article 8 of the Rome Statute was negotiated over the course of three years within the Preparatory Committee and only underwent a limited number of final adjustments at the Rome Conference, in 1998. At the first session of the Preparatory Committee, in March-April 1996, the chairman circulated an informal text with a lengthy list of war crimes that included the text of article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia,<sup>36</sup> a provision that is adapted from article 56 of the regulations annexed to the fourth Hague Convention of 1907. A revised text, issued by the chairman at the conclusion of that session, included

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32. William J. Fenrick, ‘Intentionally directing attacks against protected buildings’, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Baden-Baden: Nomos, 1999, p. 214.

33. UN Doc. A/CN.4/SER.A/1994/Add.1 (Part2), pp. 38-40.

34. UN Doc. S/RES/827 (1993), annex, art. 2(d).

35. UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), pp. 94-97, art. 22(f).

36. Chairman’s Informal Text No. 4, 4 April 1996. Proposals to this effect had been made earlier in the session by Italy and Austria.

a much more elaborate proposal. Listed under the rubric of “grave breaches” of the Geneva Conventions was the following:

making clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing, as a result, intensive destruction thereof, where there is no evidence of the violation by the adverse party of using such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives[.]<sup>37</sup>

The text reproduces article 85(4)(d) of Additional Protocol I to the Geneva Conventions. It speaks of an “attack” that causes or results in “intensive destruction.” The draft also included a second category of war crimes in international armed conflict labelled “other serious breaches of the laws and customs of war.” It contained a paragraph taken from article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia. There was also a much shorter list of war crimes in non-international armed conflict with no provision on cultural property.<sup>38</sup>

In the interim, between the two 1996 sessions of the Preparatory Committee, the International Law Commission adopted the final version of the draft Code of Crimes Against the Peace and Security of Mankind. It containing the text of the provision on cultural property in the Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>39</sup> The provision only applied to international armed conflict. The Code’s very summary paragraphs on non-international armed conflict did not include a text on cultural property. The accompanying commentary explained that the sub-paragraph on cultural property “would cover, *inter alia*, the cultural property protected by the Convention for the Protection of Cultural Property in the Event of Armed Conflict, as well as the literary and artistic works protected by the Berne Convention for the Protection of Literary and Artistic Works.”<sup>40</sup>

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37. Chairman’s revised informal text on war crimes, UN Doc. A/AC.249/CRP.9/Add.4, pp. 6-7. Also: Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996, UN Doc. A/AC.249/1, pp. 62-3; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, UN Doc. A/51/22, pp. 59-60.

38. Ibid.

39. UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), p. 53.

40. Ibid., p. 55.

In August 1996, Japan circulated a draft war crimes provision, confined only to international armed conflict, with a definition similar to that of article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia: “Seizure or destruction of or wilful damage to institutions dedicated to religion, charity and education or the arts and sciences, historic monuments and works of art and science.”<sup>41</sup> However, the definitions of crimes were not discussed at the August 1996 session of the Preparatory Committee. The report on the 1996 sessions of the Preparatory Committee states that “[s]everal delegations expressed the view that the list of offenses should include sufficiently serious violations of the Hague law, with references being made to ... the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.”<sup>42</sup>

At the third session of the Preparatory Committee, in February 1997, the United States produced a new draft of a war crimes provision. Under the subheading “other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law” was the following text, where the outlines of the final provisions in the Rome Statute can be easily discerned: “intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, unless such property is used in support of the military effort.” The United States draft also contained a text on war crimes in non-international armed conflict but with no text on cultural property.<sup>43</sup> When all of the submissions on war crimes were compiled subsequently, a footnote indicated that the United States proposal on cultural property was based on article 27 of the Regulations annexed to the fourth Hague Convention of 1907.<sup>44</sup> That text in full reads as follows: “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.” It is clearly a “battlefield” provision, directed to the conduct of hostilities, and not one addressed to the treatment of

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41. Proposal submitted by Japan on the definition of war crimes, UN Doc. A/AC.249/WP.48.

42. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, UN Doc. A/51/22, para. 81.

43. Proposal submitted by the United States, UN Doc. A/AC.249/1997/WG.1/DP.1.

44. Draft consolidated text, UN Doc. A/AC.249/1997/WG.1/CRP.2, p.4, fn. 12. See also: Decisions taken by the Preparatory Committee at its session held from 11 to 21 February 1997, UN Doc. A/AC.249/1997/L.5, pp. 8-9.

civilians and their property once they have fallen into the hands of the adverse party.

Switzerland and New Zealand also prepared a draft war crimes provision with a text on cultural property in international armed conflict derived from article 85 of Additional Protocol I. Their draft contained a more succinct text applicable to non-international armed conflict: "Attacks directed against historic monuments, works of art or places of worship, which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort."<sup>45</sup>

In June and July 1997, the German foreign ministry hosted informal meetings devoted to the war crimes provisions of the draft statute. Germany subsequently circulated an "informal working paper" reflecting the discussions at those meetings. The various alternative provisions on cultural property had been dropped in favor of the text proposed by the United States, which was made applicable to non-international as well as to international armed conflict. The concluding words "unless such property is used in support of the military effort" were replaced with "provided they are not being used at the time for military purposes."<sup>46</sup> The German compilation was circulated officially at the December 1997 session of the Preparatory Committee.<sup>47</sup> There, an alternative text emerged whereby the word "education," was added after religion.<sup>48</sup> The two texts underwent no further modification by the Preparatory Committee.<sup>49</sup>

The cultural property provisions were subject to slight further modification during the Rome Conference, in June and July 1998. The version containing the word "education," was adopted and the last phrase changed to read "provided they are not military objectives." The Official Records of the Rome Conference credit authorship of the cultural property provisions to a proposal by the United States.<sup>50</sup> No other changes or amendments appear to have been proposed. Accounts

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45. *Ibid.*, p. 4.

46. Informal working paper on war crimes (Rev. 1), 14 July 1997, pp. 2, 4. Also Informal working paper on war crimes, 31 October 1997.

47. Informal working paper on war crimes, UN Doc. A/AC.249/1997/WG.1/CRP.7; also Informal working paper on war crimes, UN Doc. A/AC.249/1997/WG.1/CRP.8.

48. War crimes, UN Doc. A/AC.249/1997/WG.1/CRP.9, pp. 4, 9; Decisions taken by the Preparatory Committee at its session held from 1 to 12 December 1997, UN Doc. A/AC.249/1997/L.9/Rev.1, pp. 6, 11.

49. Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1, pp. 18, 22-3.

50. United States of America: proposal regarding article 5, UN Doc. A/CONF.183/C.1/L.8.

by participants in the Rome Conference and by academic commentators do not shed additional light on the provision.<sup>51</sup>

The *travaux préparatoires* indicate that the drafters were familiar with two models or types of provision governing cultural property, one applicable to the conduct of hostilities and the other to persons and property that have fallen under the control of one of the parties. The second of the two, derived from article 56 of the 1907 Hague regulations, figured in the Statute of the International Criminal Tribunal for the former Yugoslavia,<sup>52</sup> and was actively considered at the initial sessions of the Preparatory Committee. It was also adopted by the International Law Commission in the 1996 draft Code of Crimes. However, consensus subsequently emerged around a draft proposed by the United States, where the word “attacks” was employed, that was based on the alternative whose ancestor was article 27 of the Hague Regulations.

In addition to the two cultural property articles, several other provisions of article 8 deal with directing attacks at unlawful targets. The sub-paragraphs of the Rome Statute dealing with international armed conflict begin with provisions about targeting civilians and civilian objects. Those governing non-international armed conflict are somewhat leaner, with a prohibition on targeting civilians but nothing about civilian objects. These texts were largely derived from the two Additional Protocols of 1977, and the more laconic provisions of the Rome Statute dealing with non-international armed conflict reflect the fact that the Additional Protocol II, governing non-international armed conflict, is much shorter than the Additional Protocol I. As the Commentary on the Protocols by the International Committee of the Red Cross explains, “[u]nlike Protocol I, which contains detailed rules, only the fundamental principles on protection for the civilian population are formulated in Protocol II and it is done in a very rudimentary form in this article...”<sup>53</sup> Early drafts of Additional Protocol II contained a text on attacks directed at civilian objects but this was

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51. Herman von Hebel and Daryl Robinson, ‘Crimes within the jurisdiction of the Court’, in Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague/London/Boston: Kluwer Law International, 1999, pp. 79-126; William J. Fenrick, ‘Article 8’, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, Baden-Baden: Nomos, 1999, pp. 186-7, 214.
52. Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc. S/25704 (1993), paras. 41-4.
53. Sylvie-Stoyanka Junod, ‘Article 13’, in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds., *Commentary on the Additional Protocols to the Geneva Conventions*, The Hague: Martinus Nijhoff, 1987, pp. 1447-1453, at p. 1448.

“dropped at the last moment as part of a package aimed at the adoption of a simplified text.”<sup>54</sup>

That civilian objects may not be made the object of an attack is a well-understood principle of the law of armed conflict. It might be asked why there is any need for a specific prohibition dealing with attacks upon cultural property, given that it appears to be nothing more than a specific manifestation of an attack that is in any case prohibited by the general provision. The Pre-Trial Chamber in *Al Mahdi* described article 8(2)(e)(iv) as “*lex specialis* to the war crime of intentionally attacking civilian objects.”<sup>55</sup> Writing about the cultural property provisions of the Rome Statute, Michael Bothe said that “in addition to creating confusion as to buildings enjoying a special protected status, the present provision does not add anything to the general protection of those buildings as civilian objects.”<sup>56</sup> In *Al Mahdi*, The Trial Chamber did not use the *lex specialis* terminology. It dismissed the relevance of case law dealing with attacks on civilians and civilian objects, treating article 8(2)(e)(iv) as a kind of *sui generis* provision rather than as a specialized example of the more general rule.<sup>57</sup>

Because the drafters of the Rome Statute rejected the formulation on cultural property in the Statute of the International Criminal Tribunal for the former Yugoslavia, the very abundant case law of that body is of rather limited use in the interpretation of article 8 of the Rome Statute.<sup>58</sup> Recently, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, in *Prlić et al.*, held that Bosnian Croat forces had committed the grave breach of “Extensive Destruction of Property, Not Justified by Military Necessity and

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54. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law, Vol. I: Rules*, Cambridge: Cambridge University Press, 2005, at p. 27.
55. *Al Mahdi* (ICC-01/12-01/15), Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2015, para. 43.
56. Michael Bothe, ‘War crimes’, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Oxford: Oxford University Press, 2002, pp. 379-426, at p. 410.
57. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 15.
58. On the case law of the Yugoslavia Tribunal, see: Roger O’Keefe, ‘Protection of Cultural Property under International Criminal Law’, (2010) 11 *Melbourne Journal of International Law* 339; Roger O’Keefe, ‘Protection of Cultural Property’, in Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014, pp. 492-520; Micaela Frulli, ‘Advancing the Protection of Cultural Property through the Implementation of Individual Criminal Responsibility: the Case-Law of the International Criminal Tribunal for the Former Yugoslavia’, (2005) 15 *Italian Yearbook of International Law* 195.



Carried Out Unlawfully and Wantonly” when, in the days following battles in various municipalities of Bosnia and Herzegovina they destroyed homes of the Muslim population as well as mosques.<sup>59</sup> It also dealt with damage to other buildings of cultural and historical significance, including the famous old bridge of Mostar, under the heading “Wanton Destruction of Cities, Towns or Villages, or Devastation Not Justified by Military Necessity,” a violation of the laws or customs of war.<sup>60</sup> Moreover, it addressed the destruction of some mosques as the war crime of “Destruction or Wilful Damage to Institutions Dedicated to Religion or Education.”<sup>61</sup> Any of these war crimes, recognized by the International Criminal Tribunal as punishable under customary international law,<sup>62</sup> might have provided a basis for prosecution of the acts perpetrated by Al Mahdi in Timbuktu. Unfortunately, none of them is to be found in the provisions of the Rome Statute dealing with non-international armed conflict.

The *Al Mahdi* Trial Chamber made a curious comment about the possible application of another war crime, that of “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict,” set out in article 8(2)(e)(xii). It said that the matter was not raised by the parties and concluded that it was not therefore necessary for it to consider a re-characterization of the crime, in exercise of its authority under Regulation 55 of the Regulations of the Court.<sup>63</sup> It appeared to think this unnecessary because “the specific intent of the defendant to attack protected objects meets squarely the *mens rea* requirement of Article 8(2)(e)(iv).”<sup>64</sup> There is at least one good reason why article 8(2)(e)(xii) is inapplicable. Like several crimes involving the destruction or seizure of property, as opposed to an attack on such objects, ownership of the object must be established. Article 8(2)(e)(xii) requires that the property be that “of an adversary.” According to the Trial Chamber in *Katanga*, “this means that the property in question—whether moveable or immovable, private or public—must belong to individuals or entities aligned with or with allegiance to a party to the conflict adverse or

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59. *Prljić et al.* (IT-04-74-T), Judgment, 29 May 2013, Vol. 3, paras. 1523-1556.

60. *Ibid.*, paras. 1557-1599.

61. *Ibid.*, paras. 1600-1618.

62. See, for example, *Kordić et al.* (IT-95-14/2-T), Judgment, 26 February 2001, para. 203; *Kordić et al.* (IT-95-14/2-A), Judgment, 17 December 2004, paras. 76. 91-92.

63. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 12.

64. *Ibid.*

hostile to the perpetrator.”<sup>65</sup> But in this civil war in Mali, where the rebel Ansar Dine forces appear to have enjoyed some degree of popular support, at least in the early months, can it really be said that the cultural objects were the property of the “adversary?” They seem to have belonged to the community in a collective sense. In the sentencing part of the judgment, the Trial Chamber noted how Al Mahdi had initially opposed the destruction of the structures “so as to preserve good relations with the population of Timbuktu.”<sup>66</sup>

Had the Trial Chamber considered article 8(2)(e)(xii) more thoroughly, it might also have observed that there is a companion provision applicable to international armed conflict, article 8(2)(b)(xiii). According to Andreas Zimmermann and Robin Geiß, this provision “was indeed meant to address the fate of any enemy property located in territories which have come under the *de facto* control of a belligerent.”<sup>67</sup> Of course, article 8(2)(b) also has a paragraph dealing with attacks on civilian objects, but there is no corresponding provision in article 8(2)(e). This further confirms that the drafters of the Rome Statute distinguished between war crimes committed in the conduct of hostilities and those committed when persons and property have fallen under the control of the adverse party.

#### IV. OTHER LEGAL INSTRUMENTS OF RELEVANCE

Reference has already been made to the relevant provisions of the Regulations annexed to the 1907 Hague Convention and to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, both of which were familiar to the drafters of the Rome Statute and influential in the drafting. However, neither of these two early texts concerns criminal prosecution. The 1954 Convention is also important in the interpretation of the relevant provisions of Additional Protocol I. The 1954 Convention is the centerpiece of a substantial body of international law concerning “cultural property”<sup>68</sup>

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65. *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 892. Also: *Mbarushimana* (ICC-01/04-01/10), Decision on the confirmation of charges, 16 December 2011, para. 171.

66. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 89.

67. Andreas Zimmermann and Robin Geiß, ‘Paragraph 2(b)(xiii): Prohibited destruction’, in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 3<sup>rd</sup> edn., Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2015, pp. 436-444.

68. (1956) 249 UNTS 240. See: Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge: Cambridge University Press, 2006; Kevin Chamberlain, *War and Cultural Heritage: An Analysis of the 1954 Convention for the Protection of Cultural Property in the Event*

although most of it is not of much relevance to the interpretation of the Rome Statute provisions. For example, it defines a special category of structure deserving of “special protection.”<sup>69</sup> However, in the Rome Statute, there is no such distinction. The International Criminal Court does not have to determine whether the target of the attack constituted “cultural property” or something “of great importance to the cultural heritage of every people,” concepts set out in article 1 of the 1954 Convention. The provisions of the Rome Statute apply to “buildings dedicated to religion, education, art, science or charitable purposes, historic monuments,” regardless of whether they are part of the “cultural heritage.” Testifying as an expert before the Court in *Al Mahdi*, the assistant director general of UNESCO spoke of the 1954 Hague Convention being “less effective than we would hope because of the nature of the conflict. However, it is the only one that the international community has in terms of a tool . . .”<sup>70</sup>

One legal instrument that had not yet been adopted at the time of the Rome Conference but whose drafting was already well underway is the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted in 1999.<sup>71</sup> It is of particular interest because it is in part an international criminal law treaty. Article 15 of the Protocol is entitled “[s]erious violations of the Protocol” and reads as follows:

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;

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*of Armed Conflict and its Two Protocols*, Leicester: Institute of Art and Law, 2004; Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on Other Instruments of International Law Concerning such Protection*, Aldershot: UNESCO, 1996.

69. There is a substantial discussion of this background in the Triffterer Commentary, by Roberta Arnold and Stefan Wehrenberg: Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 3<sup>rd</sup> edn., Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2015, pp. 405-9. See also: Roger O'Keefe, 'Protection of Cultural Property', in Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict*, Oxford: Oxford University Press, 2014, pp. 492-520, at p. 499.
70. *El Mahdi* (ICC-01/12-01/15), Transcript, 23 August 2016, p. 35, lines 3-4.
71. (2004) 2253 UNTS 172.

- 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.

It is not without interest that the Protocol distinguishes between “attack” on cultural property, in paragraphs a and d, and its “destruction,” in paragraph c, echoing the distinctions that date back to the 1907 Hague Convention. Various obligations concerning a duty to prosecute and extradite and similar matters apply with respect to such crimes. The Protocol now has about seventy States Parties.<sup>72</sup>

Another subsequent instrument is the Law on the Extraordinary Chambers of Cambodia. It makes specific reference to the 1954 Hague Convention (although not to the 1999 Protocol): “The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from April 17, 1975 to January, 6 1979.”<sup>73</sup> Use of the noun “destruction” seems especially apropos given that the prosecutions deal with acts perpetrated by a regime in the exercise of State power rather than those committed in the heat of battle, during the conduct of armed hostilities.

## V. THE NEXUS REQUIREMENT

The issue of the nexus between the acts of Al Mahdi and the armed conflict is distinct from the interpretation of article 8(2)(e)(iv) of the Rome Statute, although some similar issues present themselves. If a strict interpretation of article 8(2)(e)(iv) is adopted, the provision does not apply to the acts of Al Mahdi and the issue of nexus simply does

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72. On the second Protocol, see Micaela Frulli, ‘The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency,’ (2011) 22 *European Journal of International Law* 203.

73. See Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law: With a Case Study on the Khmer Rouge’s Destruction of Cambodia’s Heritage*, The Hague: Martinus Nijhoff, 2013.

not arise. However, even if the broadened understanding of “attacks” that was adopted by the Trial Chamber is followed, it is still necessary to establish a nexus with the acts and the armed conflict. The *nexus* issued was essentially ignored in both the confirmation decision and the final judgment. All that the Trial Chamber did was declare itself to be “satisfied” that there was an association between the destruction of the mausoleums and the armed conflict.<sup>74</sup>

The requirement that there be a nexus or connection between the impugned conduct and an armed conflict is a well-accepted principle of international criminal law. Each of the Elements of Crimes of war crimes requires that “[t]he conduct took place in the context of and was associated with an armed conflict.” The *nexus* is sometimes explained as follows: “the alleged crimes were closely related to the hostilities.”<sup>75</sup> The principle was set out in an early judgment of the International Criminal Tribunal for the former Yugoslavia: “[t]he existence of an armed conflict . . . is not sufficient . . . For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.”<sup>76</sup>

According to case law of the International Criminal Court, the armed conflict “must play a substantial role in the perpetrator’s decision, in his ability to commit the crime or in the manner in which the conduct was ultimately committed.”<sup>77</sup> But “[i]t is not necessary, however, for the armed conflict to have been regarded as the ultimate reason for the criminal conduct, nor must the conduct have taken place in the midst of the battle.”<sup>78</sup> Acts perpetrated in the course of armed hostilities provide the most straightforward application of the nexus. An “attack” directed at a civilian object located on or near a battlefield, “in the course of fighting or the take-over of a town during an armed conflict,”<sup>79</sup> does not present much difficulty in this respect, nor do

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74. *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, para. 49.

75. *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of the Charges, 29 January 2007, para. 288; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 380.

76. *Tadić* (IT-94-1-T), Judgment, Trial Chamber, 7 May 1997, para. 572.

77. *Ibid.*, para. 287; *Katanga et al.* (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, para. 380; *Abu Garda* (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010, para. 90. See also: *Bemba* (ICC-01/05-01/08), Judgment pursuant to Article 74 of the Statute, 21 March 2016, para. 142; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1776.

78. *Ibid.*

79. *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, para. 193.

situations where “the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.”<sup>80</sup> The nexus will also be apparent in the case of a prison camp operated in the context of an armed conflict.<sup>81</sup> In the *Lubanga case*, the Trial Chamber barely considered the nexus issue, given the obvious connection between the recruitment of child soldiers and the armed conflict itself.<sup>82</sup> It may even be possible for war crimes other than the child soldier offenses to be perpetrated against victims who have not “fallen into the hands of the adverse party” but are “on the same side” as the perpetrator. A case currently pending before the Court concerns sexual assaults perpetrated against child soldiers by members of the forces to which they belong.<sup>83</sup>

Where the victims are civilians in an occupied territory, the nexus also seems self-evident, to the extent that the act is directly dependent upon the situation of occupation and would not have taken place without it. The nexus issue will generally be resolved with reference to the status of the perpetrator and the victim. In other words, the nexus is established because the act is perpetrated by the occupier against the occupied, who is “in the hands of the adverse party.” The Rome Statute only has one category of crime that is specifically directed to a situation of occupation, the “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.” There is no equivalent provision applicable to non-international armed conflict. In a civil war, both sides are vying for power and control; neither can really be characterized as an “occupier.” It is not without interest that in the *Al Mahdi* case, the Prosecutor, the Pre-Trial Chamber and the Trial Chamber all spoke of the “occupation” of Timbuktu.<sup>84</sup> The term

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80. *Kunarac et al.* (IT-96-23-T & IT-96-23/1-T), Judgment, 22 February 2001, para. 568.
81. *Delalić et al.* (IT-96-21-T), Judgment, 16 November 1998, paras. 196-7.
82. *Lubanga* (ICC-01/04-01/06), Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 1350.
83. *Ntaganda* (ICC-01/04-02/06), Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, 9 October 2015, para. 25. Also: *Ntaganda* (ICC-01/04-02/06), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, paras. 76–82.
84. *Al Mahdi* (ICC-01/12-01/15), Version publique expurgée du « Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d’accusation dans l’affaire contre Ahmad AL FAQI AL MAHDI » ICC-01/12-01/15-66-Conf, 17 December 2015, paras. 13, 18, 31-46, etc.; *Al Mahdi* (ICC-01/12-01/15), Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2016, paras. 30,

seems appropriate, but in a colloquial rather than a legal sense, because the “occupiers” were parties to a non-international armed conflict. To their supporters, they were the “liberators,” not the “occupiers,” of Timbuktu. From the standpoint of international humanitarian law, they had as much right to be there as the government of the country. For this reason, the obvious nexus where a territory is occupied in the course of an international armed conflict cannot be mechanistically transposed to a civil war.

The word “nexus” does not appear in the confirmation decision or the judgment. In submissions to the Chamber prior to the confirmation hearing, the Prosecutor set out a detailed argument with respect to the nexus.<sup>85</sup> The Prosecutor’s analysis of the nexus issue can be summarized as follows: the “attack” on the structures was undertaken by members of groups that were responsible for military activities in the north of the country; the members of these groups were able to commit the “attack” because they had conquered parts of the north of the country and the city of Timbuktu; the “attack” was supervised by the head of an organization set up by the armed groups; the apparent motives of the “attack” were the same as those of the armed groups; Al Mahdi’s conduct was “facilitated” by the existence of an armed conflict and motivated by the ideological goals of the armed groups to which he fully subscribed. In *Al Mahdi*, the Court seems to have assumed that because the armed conflict persisted after the rebel forces had taken control of Timbuktu, essentially everything that the Anser Dine regime did was enough to satisfy the nexus.

The Prosecutor confounded the military aspect of the conflict and the ideological agenda of the rebel group. In her report on the preliminary examination, the Prosecutor described Ansar Dine as “a Tuareg jihadist salafist movement, aiming to impose Sharia law in all of Mali.”<sup>86</sup> In her principal submission to the Pre-Trial Chamber, she cited the following as evidence of the motives of Ansar Dine: “Le groupe entend instaurer la charia sur ses membres et les autres musulmans pour la paix et le salut au Mali. De fait, le Mali a envoyé des militaires sur nos terres et on s’est défendu.”<sup>87</sup> These are not “military” objectives.

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44-5, 50, 54, etc.; *Al Mahdi* (ICC-01/12-01/15), Judgment and Sentence, 27 September 2016, paras. 33, 36, 53.

85. *Al Mahdi* (ICC-01/12-01/15), Version publique expurgée du « Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d’accusation dans l’affaire contre Ahmad AL FAQI AL MAHDI » ICC-01/12-01/15-66-Conf, 17 December 2015, paras. 258-261.
86. Office of the Prosecutor, Situation in Mali (Art. 53(1) Report, 16 January 2013, para. 31 (reference omitted).
87. *Al Mahdi* (ICC-01/12-01/15), Version publique expurgée du « Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d’accusation dans l’affaire contre Ahmad AL FAQI

The destruction of the structures was in pursuit of Ansar Dine's extremist ideology and would undoubtedly have taken place had the group been able to take and hold power without the use of force.

Sometimes "rebel" organizations take power peacefully, often through democratic elections. Obviously, then, their acts of public administration, however repressive and objectionable, do not deserve to be labelled war crimes. Can it really be right that the same acts, when they are the work of an organization that has taken power by armed means and are perpetrated subsequent to the seizure of power, fulfil the criteria of war crimes? Their only relationship with the armed conflict is chronological: they follow the seizure of power. Yet the observation that a group may be in a position to do things after it has taken power that it was not previously able to do hardly seems an adequate nexus for war crimes law to apply.

The discussions about the nexus generally involve establishing a distinction with "ordinary" crimes. For example, not every killing that takes place during a period of armed conflict constitutes a war crime. The consequence is jurisdictional: if the act is a war crime, then the international tribunal may be in a position to prosecute. Furthermore, related concepts, such as universal jurisdiction and *aut dedere aut judicare*, may also apply. Even if it is not a war crime, the act remains a crime subject to prosecution by a domestic court, so that not all criminal activity committed during an armed conflict automatically drifts into the war crimes category. Moreover, the prosecution of such "ordinary" crimes when they involve violent attacks on human dignity may well be mandated by other sources of international law, such as the international law of human rights.<sup>88</sup>

But the nexus problem may not present itself in the same manner if the underlying act is not an "ordinary" crime at all. In some circumstances such acts may constitute violations of international law, particularly human rights law, but they will certainly not be war crimes. When damage to or destruction of "buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected" is concerned, it is easy to imagine situations where such acts will be entirely innocent when conducted outside the context of armed conflict. Obviously, it is within the authority of a government to decide to demolish "civilian" buildings, whether or not they are those enumerated in the specific cultural property provision. It will often be very clearly in the public interest to do so. Suppose that Ansar Dine had decided that, in pursuit of its fundamentalist goals, all brothels, drug dens and taverns were to be demolished. Suppose that in a sermon,

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AL MAHDI » ICC-01/12-01/15-66-Conf, 17 December 2015, para. 2590, fn. 872. The Prosecutor's submission is in French only. It uses the term 'motifs' in a context that suggests what is meant is motives.

88. *Marguš v. Croatia* [GC], no. 4455/10, § 139, 27 May 2014.



and following a decision by the governmental authorities, Al Mahdi had exhorted his followers to take their picks and iron bars and destroy such institutions on the grounds that they were immoral and corrupt. Would this too be a violation of international humanitarian law?

One consequence of the very broad approach to the nexus requirement that the Court seems to have adopted is that it does not treat the rebel “occupiers,” whose conduct becomes almost inherently criminal, in the same way as it treats the government forces. This is a one-sided approach to civil war that does not sit well with the fundamental principles of international humanitarian law by which all parties to a conflict are approached as equals. If Ansar Dine cannot knock down a “civilian” structure in territory it controls without this being labelled a war crime, then the same rule ought to apply to the government of Mali, but it does not. Ansar Dine’s intent was to hold on to power and eventually to govern the entire State. Acts of a rebel regime may engage international responsibility, as crimes against humanity, but the fact that power has been seized during an ongoing civil war should not in and of itself be sufficient to constitute the nexus required for prosecution as war crimes with respect to the efforts of the rebel group to govern the territory that it holds.

## VI. GENOCIDE AND CRIMES AGAINST HUMANITY

In the course of League of Nations activity in the field of international criminal justice, in the early 1930s, Raphael Lemkin proposed two categories of international crime, “barbarity” and “vandalism.” Many years later he wrote that this corresponded to the concept he had labelled “genocide.” The two crimes were addressed to “actions aiming at the destruction and oppression of populations.” Lemkin described “vandalism” as “malicious destruction of works of art and culture because they represent the specific creations of the genius of such groups.”<sup>89</sup> In 1947, Lemkin and two other consultants retained by the United Nations Secretariat produced a draft genocide convention that included, as a punishable act, the “systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic,

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89. Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, p. 91; Raphael Lemkin, ‘Genocide as a Crime Under International Law’, (1947) 41 *American Journal of International Law* 145, at pp. 146-147. The idea that ‘vandalism’ should be an international crime did not originate with Lemkin, however, but seems to have been mooted by Vespasian V. Pella at least as early as 1929. See: Mark Lewis, *The Birth of the New Justice*, New York: Oxford University Press, 2014, p. 188; Philippe Sands, *East West Street, On the Origins of Genocide and Crimes against Humanity*, London: Weidenfeld and Nicolson, 2016, p. 157.

or religious value and of objects used in religious worship.”<sup>90</sup> But this and other acts of “cultural genocide” were dropped from subsequent drafts of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>91</sup>

Acts of cultural genocide, such as the “systematic destruction of historical or religious monuments,” are therefore not punishable pursuant to the definition of the crime that appears in the 1948 Genocide Convention, a definition that is reproduced in article 6 of the Rome Statute. At best, evidence of cultural genocide may support allegations that physical genocide has been perpetrated. In the *Bosnia v. Serbia* case, the International Court of Justice held that there was “conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question.” However, said the Court, with reference to the *travaux préparatoires* of the Convention, “[a]lthough such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention.”<sup>92</sup> Taking the same approach, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia said that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”<sup>93</sup>

There is a substantial body of case law from the International Criminal Tribunal for the former Yugoslavia holding that under certain circumstances the destruction of property may constitute the crime against humanity of persecution.<sup>94</sup> In the recent *Karadžić* judgment, the Trial Chamber concluded that Serb forces had heavily damaged mosques and Catholic churches as well as other cultural monuments and sacred sites, “with discriminatory intent against Bosnian Muslims and Bosnian Croats.” It said that “these incidents of wanton destruction of private and public property, including cultural monuments and sacred sites, constitute acts of persecution as a crime against humanity.”<sup>95</sup>

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90. UN Doc. UN Doc. E/447, p. 17, art. I(3)(e).

91. UN Doc. UN Doc. A/C.6/SR.83.

92. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 344.

93. *Krstić (IT-98-33-T)*, Judgment, 2 August 2001, para. 580.

94. *Blaškić (IT-95-14-A)*, Judgment, 29 July 2004, para. 149.

95. *Karadžić (IT-95-5/18-T)*, 24 March 2016, paras. 2548-2559.

In *Prlić et al.*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia found that the crime against humanity of “inhumane acts” was committed with respect to a number of acts directed against the Muslim population, including burning down the village mosque in Gračanica.<sup>96</sup> It also concluded that the crime against humanity of persecution had been committed because of a number of acts, including the burning of mosques in Sovići and Doljani.<sup>97</sup> It said the same crime had been committed in East Mostar, where the Croat forces willfully destroyed ten mosques and the Old Bridge of Mostar “which had undeniable cultural, historical and symbolic value for the Muslims.”<sup>98</sup> The destruction of the Sultan Selim Mosque in the town of Stolac was also deemed the crime against humanity of persecution,<sup>99</sup> as was the demolition of a mosque in Capljina.<sup>100</sup>

In her decision to proceed with an investigation into the *Situation in Mali*, the Prosecutor ventured a very preliminary assessment that “the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali,” although she reserved her right to revisit the issue in the future.<sup>101</sup> She has not pursued the issue of crimes against humanity in *Al Mahdi*, although at the August 2016 hearing the Office of the Prosecutor insisted upon the discriminatory intent behind the destruction of the mosques and mausoleums.<sup>102</sup> The submissions were in the context of aggravating factors for determination of the sentence although they would certainly be germane to charges of the crime against humanity of persecution. There appears to be evidence that may justify a more substantial analysis by the Office of the Prosecutor of the application of crimes against humanity to the destruction of cultural property in Mali.<sup>103</sup>

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96. *Prlić et al.* (IT-04-74-T), Judgment, 29 May 2013, Vol. 3, para. 1212.

97. *Ibid.*, para 1704.

98. *Ibid.*, paras. 1711-1713.

99. *Ibid.*, paras. 1725-1726.

100. *Ibid.*, paras. 1727-1729.

101. Office of the Prosecutor, Situation in Mali (Art. 53(1) Report, 16 January 2013, para. 128.

102. *Al Mahdi* (ICC-01/12-01/15), Transcript, 24 August 2016, p. 11, lines 1-12.

103. Sebastián A. Green Martínez, ‘Destruction of Cultural Heritage in Northern Mali, A Crime Against Humanity?’, (2015) 13 *Journal of International Criminal Justice* 1073.

## VII. CONCLUDING REMARKS

The trial of *Al Mahdi* generated much in the way of kudos for the Prosecutor. At the same time, the case seemed far removed from where the priorities of the Office of the Prosecutor ought to be at the current time. The Court did not need yet another African situation, something that could only bolster many of its critics. Although the destruction of the Timbuktu monuments generated a certain amount of social alarm, it is hard to reconcile this case of property destruction with the hesitant position taken by the Prosecutor in other situations involving attacks on human life and other violent crimes. The Mali case seems inconsistent with the 2014 policy paper of the Office of the Prosecutor pledging to focus on sexual and gender-based violence.

However, this article has not been concerned with the policy issues but rather with the legal integrity of the Court. In its rush to pick some low-hanging fruit, the Office of the Prosecutor based its case on a provision in article 8 whose application to the facts is very doubtful. Al Mahdi himself confirmed that he had been provided with legal advice by counsel,<sup>104</sup> but there is no way of knowing of what that consisted. Perhaps he was told that there was a good argument about the inapplicability of the charge but nevertheless chose not to contest. But perhaps his counsel, like the judges, never took a close look at the relevant text of article 8, the case law of the Court and of the International Criminal Tribunal for the former Yugoslavia, relevant academic commentary, and the *travaux préparatoires* of the Rome Statute. Al Mahdi was clearly responsible for a disgraceful act of destruction but he had no involvement in an “attack” as this term is used in article 8(2)(e) of the Rome Statute. Indeed, there was no “attack” on the buildings and structures of Timbuktu, as the word “attack” is meant in article 8(2)(e). Moreover, the proceedings also indicate an approach to the nexus in a non-international armed conflict by which the acts of rebels seem to be judged by a different standard than those they are trying to displace.

The destruction of the religious and historical structures in Timbuktu by religious extremists under the leadership of Al Mahdi is rightly deplored around the world. Outrage at these acts cries out for a response, including criminal prosecution of those who are responsible. But that is not a good reason to convict Al Mahdi for a crime that he did not commit. If he is found guilty as charged, in what for all intents and purposes amounts to an *ex parte* hearing, where no vigorous defense challenged the claims of the Prosecutor, a precedent of doubtful value will be established. Reportedly, the Prosecutor intends to develop more cases dealing with destruction of cultural property. Sooner or later the

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104. *Al Mahdi* (ICC-01/12-01/15), Transcript, 22 August 2016, p.10, lines 18-21.

very serious shortcomings of the relevant provisions in article 8 of the Rome Statute will become apparent.