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FAO: International Criminal Court, Office of the Prosecutor, Legal Advisory Section,

Responses to OTP Draft Policy on Cultural Heritage by Dr Michael John-Hopkins (Oxford Brookes University, UK) and Dr Shea Esterling (University of Canterbury, New Zealand).

Summary

We welcome the OTP Draft Policy on Cultural Heritage and have set out a number of responses that cover the following issues:

- Pragmatic considerations arising from the draft policy.
- Implications for maintaining the legitimacy of ICC/OTP practices.
- Balancing pragmatic considerations with the need to develop international criminal law and maintain coherence with human rights law and heritage law.
- Being more explicit about tensions between principle and pragmatism, as well as international criminal law and human rights law, and developing the draft policy further to help resolve these tensions, for example balancing the protection of heritage versus the legitimacy of the ICC, and balancing the protection of heritage from a universalist stance versus protection from the stance of the individual community.
- We note that the human rights doctrines of cultural relativism and the margin of appreciation, as well as the approach to justifying inferences with qualified rights associated with cultural heritage, e.g. freedom of expression, assembly, association, may have major implications for OTP policy in this area, and are worth considering further, as they may assist with admissibility decisions.
- Given the recourse implications of introducing evidence going towards the special status of cultural heritage at the international level as well as its significance at a local level, we suggest that further consideration be given to whether this may actually result in heavier sentences, and whether this outcome is desirable.
- Furthermore, following *Al Mahdi*, we query whether recourse to special status at the international level is in practice leading to higher thresholds being applied at admissibility and trial stages. We welcome that the draft policy engages with this issue so as to curb policy developing in this way.

ICC Statute Article 21 (3) and human rights law: cultural relativism, margin of appreciation doctrine and non-discrimination (draft policy paragraphs [1][7][25][26][38])

1. We welcome the recognition that the draft policy gives to the importance of protecting cultural heritage and associated human rights, and that the investigation and prosecution of crimes against or affecting cultural heritage gives rise to complex issues of law, principle and pragmatism. We also welcome the policy to apply and interpret the statute consistently with internationally recognised human rights, and note a number of further considerations that the OTP may wish to take into account.
2. We propose that the OTP consider more closely the relationship between its draft policy on investigating and prosecuting crimes against cultural heritage and human rights law more broadly to include human rights principles and approaches.
3. The draft policy recognises that respect and sensitivity should be shown to diverse cultural heritage, norms and practices, provided that they are not inconsistent with internationally recognised norms and standards. We agree with this approach, and suggest that the policy could therefore benefit from greater clarity, for instance, by examining the import of doctrinal and practical approaches to cultural relativism and the margin of appreciation doctrine within the jurisprudence of the European Court of Human Rights. In particular, human rights associated with cultural heritage, such as freedom of political and religious thought, expression, assembly and association are rights which are generally qualified, and may be either subject to formalities, conditions, restrictions or penalties, where necessary in a democratic society, e.g. to protect the rights and freedoms of others, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of morals. [1]
4. Accordingly, we suggest that it is important that the draft policy be clearer and more sensitive to state and collective interests to pursue and prescribe such legitimate aims in law. This goes hand in hand with the subsidiary nature of the ICC as well as regional human rights systems, and prevents manipulation of these mechanisms (e.g. abuse of process) and linked to this, adverse publicity (e.g. manifestly politically motivated allegations and/or defences). It is suggested that information-psychological operations and political warfare on the part of both state and non-state actors have become increasingly common in the global information environment, and may be used as ways of creating social-cultural-political cleavages that lead to social and political tensions.[2]

Impact and approaches to cultural heritage (draft policy paras [18][19][25][94][97]).

5. We welcome the recognition that crimes against cultural heritage can have an emotional and economic impact for distinct groups at the local level, as well as the

[1] John-Hopkins, M. Esterling, S. Harding, C. 'Reflections on International Justice as a Commemorative Process' in Gilbert,C. McLoughlin, K and Munro, N. *On Commemoration Global Reflections upon Remembering War* (Peter Lang 2020).
[2] Ibid.

international community as a whole. This approach is useful as it is clearly linked to, and can guide decision making at investigations, charging, prosecution, sentencing and reparations stages. However, we suggest that it is important to consider more closely various approaches to the status of cultural heritage as this can have important substantive, resource, strategic, and public relations implications.[3]

6. We suggest that it is important to ensure that general approaches to cultural heritage elsewhere in international law do not result in discriminatory or exclusionary practices before the ICC, whereby cultural heritage that is not given formal recognition at the international level is given lesser protection. This is important given that some victim groups/communities may not have the ability to speak with one voice and gain as much regional and international recognition as others. It is important that investigations and prosecutions do not reflect existing patterns of inequality. [4]
7. At the same time, we welcome the policy that interruptions to the function of a protected object within the context of its society need not constitute an important aspect of the harm caused. In particular, the policy recognises that 'anthropocentric' concerns may be overridden in accordance with the established framework of international law in the sense that attacks on objects which qualify as cultural property may be regarded as very serious irrespective of the regard in which they may be held by their immediate society at the material time. This may be of immense value, e.g. to displaced diaspora, who may wish to avail themselves of their right to return to their country of origin, or otherwise value the continued existence of certain cultural property from afar. Furthermore, this approach serves to enhance protection, not only under human rights law but also international criminal law, in that it prevents the denial of protection based on relative or localised social or cultural standards and practices, which may be viewed as being repugnant and indefensible from an international standpoint. Additionally, it helps to overcome any moral hazard that may arise whereby local or customary norms and practices have become sidelined or obsolete as the world becomes increasingly globalised and interconnected.
8. That said, caution must be taken when overriding the concerns of the immediate society at the immediate time, which may wish to take sever links with the past that are manifest in cultural heritage as part of their own process of reconciliation or moving forward.[5] An interventionist policy that can override local concerns may undermine the public perception of the court. It is suggested that the policy must indicate when or the grounds on which such an interventionist approach may be taken in more detail, e.g. where there is a UN Security Council Referral to the OTP, or otherwise a UN Security Council Resolution.
9. Furthermore, this type of approach may run in stark contrast with the part of the draft policy that advocates taking a culturally sensitive approach, which, for instance, takes into account all the circumstances, and collects evidence with appropriate

[3] Ibid.
[4] Ibid.
[5] Ibid.

respect for local customs, culture and religion in order to assess issues of liability and the gravity of the crime. Here, the interests of relevant stakeholders, including civilian and military leaders and civil society organisations of the state in question, may be diametrically opposed to diaspora and/or the international community. It is proposed that human rights approaches to the margin of appreciation and cultural relativism here may be significant where cultural property is significant at the international level, but not necessarily at the local level.

10. This type of evaluative controversy is closely linked to the issue of whether it is in the interests of justice to prosecute. We propose the following type of model or thinking, rooted in human rights law, as it may generally assist with policy based decisions on admissibility involving complex socio-cultural situations and factors.
    a. Where interference with cultural heritage is regarded as being very important, both to the external and internal community, then it is strongly in the interests of justice to investigate and prosecute.
    b. Where interference with cultural heritage is regarded as being very important to the external community, but unimportant to the internal community, it is nevertheless in the interests of justice to investigate and prosecute, despite the possibility of it being contentious with the internal community, and the likelihood of tensions arising between the external and internal communities.
    c. Where interference with cultural heritage is very important to the internal community, but unimportant to the external community, then it is not in the interests of justice to investigate and prosecute.
    d. Where interference with cultural heritage is unimportant to both external and internal communities, then it may not be in the interests of justice to prosecute.

Admissibility (draft policy paragraphs [34]-[36][43] [94])

11. We welcome the commitment to investigate and prosecute crimes committed against cultural heritage, wherever such crimes occur provided that admissibility criteria are met. As far as war crimes are concerned, the draft policy recognises that the special status of protected property under international law to peoples, or the international community, is not strictly relevant to liability under articles 8(2)(b)(ix) and 8(2)(e)(iv), and that respectively, it is not a substantive requirement here that cultural property be of great importance for attacks to be considered unlawful, although it may go towards gravity at the sentencing stage.
12. Nevertheless, there may be certain instances where such a threshold criterion may be used in order to prevent ICC investigations and prosecutions from being manipulated, or from drawing adverse publicity. For example, the OTP may wish to avoid launching investigations and prosecutions in situations that are manifestly political and where political/ideological movements do not have a sufficient degree

of permanence or stability, but wish to use perceived 'attacks' on what they claim to be their tangible or intangible 'cultural heritage' in order to undermine their adversaries for moral or political reasons.

13. In this regard, we welcome the context-specific social, political, cultural and historical training of OTP staff, and propose the vetting and accreditation of individuals and organisations that provide information and evidence on attacks on cultural heritage, in a similar fashion to the way the participation and consultation with NGOs is regulated by the United Nations Human Rights Programme.[6] Protection work involving cultural heritage as a form of human expression may be extremely complex and require expert local socio-cultural knowledge, whilst at the same time, ensuring that OTP remains neutral and objective. Furthermore, it is important that assumptions are constantly tested to ensure that bias is not does not creep into OTP processes, and that they are not manipulated, either by the external or the internal community. Whilst international expertise and synergies may be useful in ensuring a neutral and objective approach, there is the risk that external assumptions and policies are being applied, particularly where these mechanisms are political in nature. Following on from this, there is the risk that over reliance on international expertise and synergies may replicate existing patterns of discrimination and inequality, and undermine the effective investigation and prosecution of cases when challenged by defence counsel.
14. As such, it is suggested that the draft policy could benefit from a clear statement of principle that the OTP seeks to avoid manifestly political situations, ensure non-discrimination and to do no harm (such as becoming involved with and escalating socio-cultural tensions). A clear statement of principle may assist in avoiding adverse public perceptions of the OTP's work when intervening in complex and polarised socio-cultural-political situations.
15. More generally, it is suggested that the draft policy consider the OTP's interoperability with human rights mechanisms, which may for instance, have given states a broad margin of appreciation to interfere with cultural property or cultural heritage in order to pursue certain legitimate interests that are prescribed in law and necessary in a democratic society. There is the risk that by having a strong presumption that prosecutions of crimes against or affecting cultural heritage are in the interests of justice, OTP processes are then expected to be used as a form of 'collateral attack' where human rights mechanisms are perceived as having failed, e.g. where human rights mechanisms have found that interferences with an a group's cultural heritage not to amount to a violation of their human rights, e.g. freedom of expression, assembly, association, but then pressure is placed on the OTP to investigate and prosecute. Again, it is suggested that approaches adopted by human rights mechanisms, e.g. the margin of appreciation doctrine and approaches to qualified rights, may be useful in assessing whether it is in the interests of justice to investigate and prosecute. This is because they may help human rights mechanisms from becoming involved in complex socio-cultural disputes, which risk state and/or

[6] e.g. under ECOSOC Resolution 1996/31.

public perceptions that they are going beyond their subsidiary roles, and intervening too greatly in political or policy matters that are deemed to be within the exclusive domain of the state. For example, the margin of appreciation doctrine before the European Court of Human Rights may take into account factors such as whether there is value consensus on a particular issue, whether the issues involve matters of social or economic policy for which national authorities may be better placed to determine what measures are necessary to achieve a fair balance between individual and collective interests, the weight to be given to key and intimate rights, and any special circumstances, such as a historical context of atrocities arising out sectarian violence or authoritarian regimes for instance. In intervening with complex socio-cultural issues, the European Court of Human Rights may frequently experience blowback from states and non-state actors where it is deemed to have been too interventionist in relation to sensitive cultural issues (e.g. see *Lautsi v Italy* and the reactions to the Lower Chamber's decision in relation to cultural heritage by states and religious organisations, which forced a reversal by the Grand Chamber).[7]

Investigations and charging decisions (draft policy paragraphs [2] [5] [6] [8] [9] [10] [11] [16] [17] [24] [41] [44] [106] [108])

16. We welcome the draft policy recognising that crimes against and affecting cultural property can be charged as freestanding war crimes and/or crimes against humanity, and not subsumed within more general crimes relating to war crimes or crimes against humanity focused on attacks or persecution directed at civilians or civilian populations. The draft policy acknowledges that this sends a strong message at the local and international levels that the intentional targeting of cultural heritage is a serious crime and should be punished. This serves a valuable deterrent function.[8]
17. Although *Al Mahdi* focused solely on crimes against cultural heritage, it did so through the prism of war crimes charges in relation to cultural property. This is important as the draft policy notes that at present, war crimes under Article 8 offer the most straightforward means to address intentional harm to cultural heritage. As such, the draft policy should carefully consider, and be more transparent about charging decisions in relation to war crimes and crimes against humanity. Some victim communities may not consider that prosecutions for war crimes adequately reflect or label the persecutory or even the genocidal policy that they endured. However, the OTP may find, especially in the early stages of any given conflict or situation, that there simply is not sufficient evidence to meet the substantive requirements for charging crimes against humanity or genocide. [9]

[7] Above no 1.
[8] John-Hopkins, M. Esterling, S, 'The Creation and Protection of History through the Prism of International Criminal Justice in Al Mahdi' 9 (2018) Journal of International Humanitarian Legal studies, 5, 13.
[9] *Ibid*, 27 - 30.

18. It is suggested therefore that effective communication with stakeholders may involve being clear and transparent as to why decisions have been taken to prosecute war crimes, rather than crimes against humanity or genocide.[10]
19. Furthermore, as discussed below, it is problematic, both in principle and practice, to state that war crimes prosecutions are the most straightforward means to address intentional harm to cultural heritage, given that the draft policy recognises that war crimes under Article 8 ICCS do not cover such harm to cultural heritage as it has been broadly construed in the draft policy. [11]
20. We suggest that there needs to be a clear, nuanced, and careful use of the terms cultural property and cultural heritage, as this has major implications for OTP strategy as well as public perceptions about its protection work. Furthermore, as stated above, whilst the draft policy seeks to address alleged crimes against or affecting cultural heritage at all stages of its work, i.e. preliminary examination, investigation, prosecution, and reparations stages, it is important not to neglect outreach work at all of these stages in order to explain investigatory and prosecutorial strategies and decisions to victim communities and relevant stakeholders, particularly where charges may focus on war crimes, and where a lot of the available evidence is in electronic format and comes via international sources. [12] For example, the draft policy highlights that in comparison with war crimes, crimes against humanity relating to cultural heritage have more elements that require proof beyond reasonable doubt. We suggest that the draft policy be more transparent about the need to balance principle and pragmatism in order to avoid dissatisfaction from victims and victim communities, e.g. evidentiary gaps, time and resource limitations that militate against charging crimes against humanity or genocide. In such instances, given the evidentiary challenges associated with prosecuting crimes against or affecting cultural heritage as crimes against humanity, and given that the special status of a protected object under international law may not be relevant to assessing liability under articles 8(2)(b)(ix) and 8(2)(e)(iv), then arguably, the policy should indicate that charging decisions based on war crimes may be more appropriate in certain instances, given the need to facilitate expeditious and cost-effective trials.[13]

Sentencing and reparations (draft policy paragraphs [4] [17] [108])

21. We welcome the acknowledgement in the draft policy that the destruction of cultural heritage constitutes a loss to the direct victim community, as well as the international community as a whole. Furthermore, we welcome a holistic and contextual approach that allows for a better assessment of gravity, such as by establishing the intent or motivation of the perpetrators, as well as the scale, nature, manner of commission and impact of crimes. To this end, it is also important to note

[10] *Ibid*, 51 - 52.
[11] *Ibid*, 26, 47-48, 50, 57.
[12] *Ibid*, 51 - 52
[13] *Ibid,* 4 - 6.

that human rights law may permit states to limit or suspend forms of human expression, assembly and association, and that such factors may be related to questions of liability, as well as gravity when it comes to sentencing (e.g. anti-negation laws relating to genocide or atrocity denial). [14]

22. Given the resource implications of demonstrating the significance of cultural property at both the local and international levels, it may be worth considering whether time and resources should be devoted to demonstrating both at trial, or whether one level of analysis would suffice. In one sense, a broad analysis may be required for the purposes of fair labelling, justice and the historical record. In another sense, it may undermine the proportionate and expeditious prosecution of cases, and take resources away from other cases or situations. Either way, it is suggested that attention should be paid as to whether there is a mismatch between the draft policy on cultural heritage and OTP and ICC strategy, so as to forestall any unrealistic public expectations or dissatisfaction. [15]
23. One of the advantages of a focused yet open ended approach to investigations down stream is that the OTP can indeed play a more central role in recording, documenting and preserving cultural heritage. In this respect, it can gather important archival information that can be used upstream e.g. in relation to monuments, buildings or groups of buildings, sites, movable objects, intangible cultural heritage, and natural heritage.[16] However, this raises the issue of whether the OTP has the capacity and competence to store, disclose, and make publicly available information that would enable the repair, preservation, restoration or restitution of cultural heritage. In this regard, it is worth the OTP considering its policy on the availability of information, analysis and documentation gathered during investigations and prosecutions to local stakeholders, e.g. to help with restoration, or resolve issues or disputes concerning access or ownership where this information has been destroyed or lost in its country of origin. A clearer policy on accessing and disclosing information (e.g. land title plans) following investigations or prosecutions may serve to prevent future harm, e.g. causing an escalation of pre-existing disputes, or being seen to work more closely with international organisations rather than local stakeholders. [17]

Substantive issues (draft policy paragraph [23])

24. The draft policy sets out some useful strategic approaches, and stresses that these do not constitute guidelines, procedures and standards for operations. That said, it is important to bear in mind that policy can and does affect the investigation, charging and prosecution decisions that undergird the application and interpretation of law. That said, it is arguably worth the draft policy being clearer and more transparent by

[14] Above n 1.
[15] Above n 8, 25, 32 - 35, 48, 59.
[16] *Ibid*, 5, 12,16, 17, 37, 51, 52, 56,
[17] ICRC, *Professional Standards of Protection work*, (ICRC, 3rd ed June 2020), Chapters 6 and 7.

incorporating elements of OTP strategic plans, as they have affected situations involving cultural heritage. [18]

Loss of immunity from attack (draft policy paragraphs [1][25])

25. We welcome the recognition that the draft policy gives to the issue of loss of protection from attack, as this affects the question of liability for war crimes, or crimes against humanity in relation to cultural property/heritage, e.g. where cultural property/heritage is used, or is likely to be used for military purposes, and/or where it forms part of an attack that can be construed as discriminate and proportionate.[19]
26. Whilst this approach balances military and humanitarian considerations, we propose that it be considered further, and in a more nuanced fashion. In particular, cultural property and heritage may not only be used to adversely affect military operations or capacity, but also as part of the commission of crimes against persons or objects protected against direct attack. In this respect, the use of cultural property or heritage to direct attacks against civilians or civilian objects may amount to, or be bound up with direct or active participation in hostilities.[20] Given that this has a bearing on status and immunity from attack under IHL, then it also has a bearing on the commission of alleged crimes relating to civilians, and civilian objects subject to special protection.[21] Therefore, we invite the OTP to consider this issue further, particularly insofar as cultural heritage embodies ideological, religious, and discriminatory views or practices that are used, or manipulated, for example, to instigate, incite or aid and abet the commision of war crimes and crimes against humanity. Arguably, it is important to factor this into investigations so as to prevent acquittals at a later stage, as these may be issues that defence counsel pick up during the course of their own trial preparation and cross-examination.

Civilians and cultural practices (draft policy paragraph [14]).

27. In relation to cultural heritage and cultural practices, it is worth considering ICCS Article 8 paragraphs (2)(b)(i) and (2)(e)(i) in so far as practices based on ideological, religious, and discriminatory constitute taking a direct part in hostilities, or are bound up with membership of an organised armed group. As this has an impact on criminal liability for attacks directed at the individuals involved in such practices, it is worth developing a policy to identify such factors as early as possible, e.g. in order to prevent cases from collapsing at trial.

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[18] Above n 8, 9-14, 22-29, 32-35, 43, 59.
[19] John-Hopkins, M. 'Extrapolation of Criminal Law Modes of Liability to Target Analysis under International Humanitarian Law: Developing the Framework for Understanding Direct Participation in Hostilities and Membership in Organized Armed Groups in Non-International Armed Conflict' (2016) Journal of Conflict and Security Law, 18-20.
[20] *Ibid*, 22-33.
[21] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, part IV, section B(iii).

Objects of attack and tangibility (draft policy paragraphs [3][4] [14][15][45][94]).

28. The draft policy represents a basis for developing the law relating to the protection of cultural property and heritage by recognising the latter broadly to include both tangible and intangible 'expressions of human life'. We suggest that the policy needs to be considered carefully, and further work needs to be done in order to ensure that there is a stronger legal basis on which to charge and prosecute in relation to intangible cultural heritage. In particular, it is suggested that the OTP needs to carefully consider its broader approach to cultural heritage as it relates to its intangible forms, such as digital artefacts, but also the practices or attributes of a group or society. In this respect, it is worth revisiting to what extent the law relating to military objectives has expanded, and ensuring that there is a clear distinction between cultural property and cultural heritage, particularly when it comes to investigations and prosecutions for war crimes. Civilian objects are generally protected unless their nature, location, use renders them military objectives. Cultural objects are generally protected unless they constitute military objectives. The 1987 ICRC Commentary to API, and the majority of the experts contributing to the Tallinn Manual 2.0 indicate that the prevailing view is that objects amount to legitimate objectives within the framework of IHL where they are 'visible and tangible'. Accordingly, the ambit of the term attack currently appears limited to operations against individuals or physical objects, unless attacks against non-physical entities foreseeably results in injury or death to individuals, or damage or destruction of physical objects.[22] Consequently, this calls into question whether data and 'digital artefacts' constitute an 'object' for the purposes of IHL, and whether attacks directed against data or 'digital artefacts' can therefore be subject to penal repression without further physical damage or loss. The minority of experts were of the view that the approach taken by the majority is under inclusive, and so it is worth the draft policy seeking further development and consensus on the issue of whether an attack on intangible features of human expression *per se* qualifies as an attack for the purposes of IHL. It is important to do this in order to ensure that a policy to pursue investigations and prosecutions in relation to intangible forms of human expression is worthwhile, given the concomitant resources implications of doing this, and risk of acquittals.
29. In relation to the broader approach taken to the destruction of cultural heritage where it results in mental suffering, it is worth noting that operations to influence civilian morale, such as by restricting or undermining cultural practices, may not be considered unlawful when determining whether an object of attack qualifies as a military advantage, and this may have broader implications for prosecuting crimes against humanity or genocide. A decline in civilian morale is not generally deemed to be a military advantage for the purpose of what constitutes a military objective, nor does it constitute collateral damage for the purposes of proportionality or

[22] Schmitt, M (ed) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2017), 416, 435 -445.

precautions in attack.[23] This would indicate that it is currently worth developing a policy that focuses on the attack on cultural property itself as a war crime, unless there is sufficient evidence to support charges for crimes against humanity or genocide that can better accommodate the mental harm resulting from attacks on cultural heritage. It is suggested therefore that the draft policy ensure that there is a clear distinction for substantive and policy reasons between the effects of attacks on cultural property (being relevant to war crimes) and the effects of attacks on cultural heritage (being relevant to crimes against humanity and genocide, but also sentencing and reparations procedures in cases exclusively focusing on war crimes involving cultural property). This may help to manage public perceptions, and to ensure that appropriate strategic and resource decisions are made when responding to situations involving complex socio-cultural issues. There may be the risk that if cultural heritage analysis bleeds into war crimes analysis, then it becomes difficult to prosecute, and may create unrealistic expectations on the part of victim communities about the relevance and importance of information relating to cultural heritage. This is especially the case where limited resources may mean that OTP needs to take a narrow approach to war crimes investigations and prosecutions.[24]

30. More broadly, as part of the culturally sensitive approach to investigating the effects of attacks on cultural heritage outlined in the draft policy, it is proposed that it is sensible not only to build synergies with international organisations that have expertise with cultural heritage, but also, with appropriate vetting and accreditation, relevant stakeholders at the national or local level, not merely to form an assessment of the impact of crimes against or affecting cultural heritage on individuals and communities, but also to gain a localised appreciation of what constitutes an object and what constitutes an attack from the point of view of both victim and perpetrator communities. It is suggested that this may not only require digital and forensic evidence combined with testimony, but those with anthropological and ethnographic understanding and training. There may be the risk that if too much weight is given to views and opinions either at the local or the international level, then there is the risk of assumptions, and biases creeping into analysis, which calls into question the independence and neutrality of the OTP.
31. We welcome the OTPs clarification that 8(2)(b)(ix) and 8(2)(e)(iv) merely require 'directing an attack', rather than proof of actual damage, and that this element relates to acts of hostilities directed against protected objects under the control of a party to the conflict, and not merely those those under the control of the adverse party. This is useful to distinguish the elements of these offences from conduct of hostilities offences under 8(2)(b) and (e). We find that there has been some confusion on this issue, and the clarity in the draft policy is therefore welcome.[25] We find that this approach is pragmatic in the context of inter or intra-communal violence, where there modes of criminality may include inciting or aiding and

[23] *Ibid*, 443.
[24] Above n 8, 28-29.
[25] Schabas, W. 'Al Mahdi Has Been Convicted of a Crime He Did Not Commit, 49 (1) Case Western Reserve Journal of International Law' (2017), 75–101.

abetting attacks on cultural property, but at the same time, the policy must be mindful of, and consider more fully, the need for a nexus to the wider hostilities and contextual information in this regard, as well as how to frame this in relation to indictments exclusively based on attacks on cultural property or heritage.[26]

General conclusions: the main objectives of the draft policy and contributing to the jurisprudence relating to cultural heritage (draft policy paragraphs [20] [26][38][80][106][107]).

32. In relation to providing clarity and guidance to OTP staff in the application and interpretation of the Statute and RPE, and in contributing to the jurisprudence relating to cultural heritage, we suggest that going forward, there could be more consideration of general IHL in relation to military objectives, particularly in relation to intangible objects, in order to ensure that there is a sound basis for investigating attacks on intangible forms of cultural heritage as war crimes, particularly with regards to digital artefacts and archives. In particular, in a global information environment and a digital society, data, digital artefacts and digital archives may be increasingly indispensable not only to human expression, but to human survival. Otherwise, attacks on intangible forms of cultural heritage may constitute specific crimes against humanity or underlying crime base evidence going towards genocide. The substantive and evidentiary requirements with crimes against humanity and genocide indicate that it may be worthwhile being able to prosecute attacks on cultural heritage as war crimes, but the current law and mainstream thinking suggeststst that this is not possible. It is worth interrogating this further, and seeking consensus going forward in order to expand the jurisprudence in this area.
33. We also suggest that more consideration is given not only to human rights law, but also human rights doctrines and approaches, particularly in responding to violations of qualified rights, and approaches taken to cultural relativism and the margin of appreciation. Here rights such as access to and enjoyment of all forms of cultural heritage, minority and indigenous rights to self-determination, freedom of expression, freedom of thought, conscience and religion, the right to education, economic rights, and the right to development may be qualified, limited, or suspended under human rights law. The right to identity does not have a clear basis in law, but may at the periphery of other substantive rights. Although the functions, norms and principles of ICL and HRL are different, it is important to ensure that one does not undermine the other, for instance in situations where there are no violations found of socio-cultural rights, but then investigations and/or prosecutions are commenced under the ICCS.
34. We welcome the recognition in the draft policy that attacks on cultural heritage *per se* can cause serious mental harm to members of a group, and that such attacks against cultural heritage may be used in connection with other physical or biological

[26] Above n 8, 26 - 28.

acts in providing or showing the gravity of genocide charges based on Article 6(b) ICCS.

35. In terms of contributing to the jurisprudence of cultural heritage, we would welcome this approach, given that the notion of cultural genocide *per se* remains outside of the ICCS and Elements of Crimes, albeit within international criminal law and human rights. This policy reflects the approach taken in *Kristic* that cultural genocide was expressly rejected by the Genocide Convention given that it was 'too vague and too removed from the physical or biological destruction that motivated the Convention.'[27] However, this does not push the jurisprudence of ICL further as it simply reaffirms what the ICTY Trial Chamber in Krstić observed, namely '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... the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group'.[28]
36. Granted, this does provide coherence in the development of international criminal law, but more broadly speaking, it does little to push its development forward with regards to the protection of cultural heritage in so far as it relates to the destruction or repression of cultural practices which constitute existential features of a group, particularly where viewed by a perpetrator to be the most efficacious way of destroying a group. It seems at odds with the ICC draft policy which states that the OTP 'views cultural heritage as the bedrock of cultural identity and endorses the understanding that crimes committed against cultural heritage constitute, first and foremost, an attack on a particular group's identity and practices, but in addition, an attack on an essential interest of all humankind and the entire international community. Crimes against or affecting cultural heritage often touch upon the very notion of what it means to be human, sometimes eroding entire swaths of human history, ingenuity, and artistic creation.'
37. Here, we query how the draft policy seems to tie cultural heritage to the bedrock of cultural identity as there is no broad right to cultural identity *per se*. Whilst this seeks to align ICL with human rights law, indigeous rights and heritage law, an important question to consider is whether this general alignment is a good thing for the OTP to set out in its policy without a more detailed assessment of the implications of doing so, particularly given that regional human rights law may take divergent approaches on questions of culture/cultural identity. Human rights on this matter may be broader or more restrictive depending on which jurisprudential framework is being examined, and whether it arises from judicial or quasi-judicial bodies. At the same time, where there is divergence, some human rights mechanisms may be more specialised than others given their mandate, or the context within which they have operated. As noted above, restrictive approaches may actually detract from the

[27] *Prosecutor v Krstic* (Trial Chamber Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case no IT-98-33-T, 2 August 2001), 576.
[28] *Ibid*, 580.

protection of cultural heritage within international criminal law. Broad approaches may come into conflict with criminal law principles of legality and *in dubio pro reo.* In policy terms, the alignment is important, but in practice, this may sit uncomfortably with individual penal repression and punishment for violations of the laws and customs of war, especially for senior political and military leaders, and providing fair and expeditious trials. A major element that is missing from the draft policy concerns the liability of individuals behind private transnational corporations for attacks on cultural property/heritage. This is by far one of the most significant issues, and arguably requires more consideration in relation to investigations and prosecutions - indeed this was something that was highlighted and supported by former ICC Prosecutor Luis Moreno-Ocampo, but appears to have been side-lined or forgotten in this draft policy. This is by far the most significant gap in the draft policy.

38. As such, the draft policy may be read as containing the seeds for future development of jurisprudence in this area. That said, the draft policy reveals certain tensions or schisms in that these broader comments on cultural heritage actually seem to undermine previous statements relating to the status of cultural genocide under international criminal law. The main concerns with cultural genocide during the drafting of the Genocide Convention were that it might create confusion as to what acts are prohibited and what acts are lawful by the inclusion of this lesser crime of cultural destruction in with physical destruction. The potential for such confusion was viewed as having the potential to detract from the Convention's goal of the prevention of physical extermination of protected groups, reflecting the position that life is more important than property. However, at its core, this reflects the more deep-seated philosophical and evidential questions of identifying the various ways in which a group may be destroyed, ranging from killing at one end of the spectrum, to destroying its cultural heritage at the other. The policy document does little to identify and set out the spectrum of existing views, even though cultural heritage has been broadly defined at paragraph 16 to include practices, objects and features which may be indispensable to a group's continued survival and existence.

Yours Sincerely,

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ANNEX - DISCUSSION OF AL MAHDI AND ICC DRAFT POLICY ON CULTURAL HERITAGE: APPROACHES TO CULTURAL HERITAGE

The *Al Mahdi* narrative which unfolded within the ICC demonstrates that the ICC takes a dual approach to culture; simultaneously acknowledging the significance of cultural heritage to the local community while recognizing the importance of this heritage to the international community. In effect, the *Al Mahdi* narrative (both the decision to prosecute and the judgement) reflects conflicting views of culture embodied in the theories of cultural internationalism and cultural intra-nationalism.[29]

The significance of this conflicted narrative in *Al Mahdi* regarding culture raises concerns about the future of the approach to the protection and preservation of cultural heritage in ICL and the relationship of the latter with IHRL. [30]

First, it tells us that ICL endorses the protection and preservation of cultural heritage as understood by UNESCO and its bestowal of World Heritage status. It relies on the logic of internationalism by using the UNESCO World Heritage status of almost all of the sites that were destroyed as evidence of their qualification as religious buildings and historical monuments under Article 8(2)(e)(iv) of the ICC Statute. [31]

However, the *Al Mahdi* narrative also demonstrates that such an understanding of heritage goes beyond endorsement, and that in this instance UNESCO World Heritage status serves as the measure for determinations of gravity for the purposes of admissibility before the ICC.

The Prosecution's approach to the charges in *Al Mahdi*, in relying on such internationalist logic, makes clear for the future that ICL understands the destruction of heritage with UNESCO World Heritage status of "outstanding universal value" as meeting the requirements of gravity necessary for admissibility.

In and of itself, we do not think that this is problematic. However, issues arise as the *Al Mahdi* narrative leaves open the question of whether heritage that does not have this status would satisfy admissibility criteria as expounded in policy terms. If interpreted not simply as endorsement of UNESCO World Heritage status but as a threshold requirement for gravity, the internationalist logic of the *Al Mahdi* narrative would have devastating consequences for the protection of heritage by ICL through limiting its scope and applicability.

In turn, we advocate against such an interpretation rooted in a rigid internationalist approach; not only on the grounds of disastrous consequences for cultural heritage but on the grounds that a broader contextual analysis reveals that such an interpretation is out of step with developments in other threads of international law, namely human rights. [32]

Human rights law increasingly embraces an approach to culture rooted in cultural intra-nationalism or cultural indigenism. It is evidenced in human rights law by the development of new instruments and the interpretation of existing instruments in a fashion

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[29] Esterling, S. John-Hopkins, M. 'Culture in Conflict and Conflicts: Exploring the Protection of Cultural Heritage through The Prosecutor v. Ahmad Al Faqi Al Mahdi' [draft paper, forthcoming], 2
[30] *Ibid,* 5-6
[31] *Ibid*, 6
[32] *Ibid*, 6-7.

that increasingly privileges a concept of culture developed by social anthropologists who view culture not simply as a means of interpreting the world but as a tool for survival. [33]

Preamble aside, we suggest that the text of the ICC statute does not wed ICL to cultural internationalism. In particular, there is nothing in the text of Article 8(2)(e)(iv) which specifically relates to cultural heritage that suggests an internationalist approach. Again, in defining these objects, it protects against: "[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments … provided they are not military objectives'' nothing in the text indicates an internationalist bent through a threshold level of significance of or importance to all of humanity. Further, a purposive analysis supports this interpretation. The drafters of the ICC rejected an earlier version of this article which required "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." Unlike the final text, this draft version focuses on the significance of the heritage by requiring it to be recognized as such by the international community. In rejecting this draft, the ICC clearly signals that it rejects a strict understanding of heritage rooted internationalism leaving open space for an intra-nationalist approach. [34]

Further, the thrust of the *Al Mahdi* narrative provides scope for such an intra-nationalist approach to cultural heritage. The conflicting approach to culture in the *Al Mahdi* narrative is symptomatic of a recalibration of ICL from an internationalist to intra-nationalist understanding of heritage. Indeed, ICL has experienced such a recalibration before. Vrdoljak details how with the rise of IHRL from the mid-twentieth century ICL and IHL have experienced a recalibration of the underlying rationale for the protection of cultural heritage; from one of exceptionalism requiring protection as a result of its "perceived significance to humanity through its advancement of the arts and sciences, and knowledge" to one based not on such exclusivity but rather on its importance to all humanity by ensuring the contribution of all peoples to humankind. In turn, a textual analysis demonstrates that now the thrust of the conflicting *Al Mahdi* narrative reflects this fragmentation in ICL as it undergoes another recalibration from that of internationalism to intra-nationalism again mirroring changes in IHRL. Al Mahdi's own words when making his admission of guilt reflects this shift. He begins by noting that "I regret what I have caused to my family, my community in Timbuktu, what I have caused my home nation, Mali." He continues specifically directing his plea for forgiveness to those who were most directly affected noting: "[m]y regret is directly -- or, is directed particularly to the generations, the ancestors of the holders of the mausoleums that I have destroyed. I would like to seek their pardon…" Importantly, the Trial Chamber accepts Al Mahdi's expression of remorse and uses this apology as a mitigating circumstance in determining his sentence.

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[33] *Ibid*, 8-9.
[34] *Ibid*, 9.

Beyond Al Mahdi's statement, the thrust of the gravity portion of the judgment reads as an incorporation of an intra-nationalist logic. As noted, strictly speaking the judgement in *Al Mahdi* relies on internationalist logic using the UNESCO World Heritage status of almost all of the sites that were destroyed as evidence of their qualification as religious buildings and historical monuments under Article 8(2)(e)(iv) of the ICC Statute. Moreover, as noted the weight of the gravity portion of the judgment relies on intra-nationalist logic. In addition, at its core its focus is on the importance of the heritage to the local community demonstrating the active use and attachment to the mausoleums by the whole of the local community. Aside from its prominence, the incorporation of this intra-nationalist in logic at the gravity section affords it a position of particular importance. Pleading guilty, without a full trial the ICC did not have much scope for elaboration on the nature of the offence. However, the ICC created this opportunity by proceeding to discuss the merits of the case for the purposes of the gravity of the offence in relation to sentencing as opposed to the defendant's culpability. In turn, we are left with not only a rich historic record regarding the destruction of the cultural heritage in Timbuktu but a record of the views of the ICC as regards it understanding of culture within the context of the protection of cultural heritage which suggests that an intra-nationalist approach to heritage is vital tool in sentencing. As the Trial Chamber notes, "the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed." [35]

It is for the same reasons that we welcome the use of the term 'cultural heritage' by the ICC in its draft policy as it brings it in line with developments elsewhere in law. Issues of terminology have long plagued international cultural heritage law. There exists a difficulty of interpretation of the core concepts of "cultural heritage" (or "cultural property") and "cultural heritage of mankind" and no generally agreed definition of the content of these terms appears to exist. The increasing global importance of cultural heritage instruments and the ever-expanding scope of the term and the areas in which it is used require a workable definition of the nature of the cultural heritage. Each such expansion introduces much more complex issues concerning the nature of cultural heritage and the construction of cultural identity than were apparent in earlier developments in this field. The danger therefore exists of creating future international instruments, which extend the range of the term without having settled on a clear understanding of its meaning as employed in existing texts.[36]

This suggested change in terminology from 'cultural property' to 'cultural heritage' reflects the wider preference in modern international cultural heritage law, human rights and indigenous rights regarding terminology. The term "cultural property" has fallen out of favor as it carries with it an "ideological load", which creates the potential for misunderstandings. This load is that property has commercial connotations, which include "control by the owner expressed by his ability to alienate, to exploit and to exclude others from the object." This contributes to commodification or thinking solely in terms of economic value, which is

[35] *Ibid,* 9-10

[36] Esterling, S. *Indigenous Cultural Property and International Law: Chasing Culture* (Routledge: 2021), Chapter 2.

problematic as it shifts the emphasis away from the importance of heritage for the preservation of cultural identity.[37]

Ultimately, the use of the term 'cultural heritage' brings the ICC in line with contemporary developments elsewhere including human rights, indigenous rights and heritage studies. This alignment is crucial for the (perceived) legitimacy and coherence of development of the law which underpins the effective protection of people and their cultural heritage. [38]

[37] *Ibid.*

[38] Above n 29, 11