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NAVIGATING THE ICC'S NEBULOUS JURISPRUDENCE ON CULTURAL HERITAGE AND ITS LATEST DEVELOPMENTS IN THE AL HASSAN AND YEKATOM AND NGAÏSSONA CASES. WINNING A BATTLE, LOSING THE WAR?

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1. Introduction

On June 26, 2024, the International Criminal Court (hereinafter “ICC”) rendered its judgment in the *Al Hassan* case,¹ convicting the accused of multiple war crimes and crimes against humanity perpetrated in Timbuktu, Mali, between 2012 and 2013. However, while Al Hassan was found guilty on several counts,² the Court acquitted him of the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Rome Statute³. The charge levelled against Al Hassan concerned the destruction of religious and historical monuments in Mali, an episode that had been at the center of the well-known *Al Mahdi* case.⁴ In that precedent, Al Mahdi was sentenced to nine years’ imprisonment for orchestrating and directing the destruction of nine mausoleums⁵ (included in the UNESCO World Heritage List in 1988) and the door of a mosque.⁶ In its reasoning, the Court acknowledged Al Hassan’s awareness

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¹ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Chamber X, Judgment, 26 June 2024.

² *Ibidem*, para. 1785.

³ *Ibidem*, paras. 1038-1044, 1055.

⁴ *The Prosecutor v. Ahmad Al Faki Al Mahdi*, ICC-01/12-01/15, Trial Chamber VIII, Judgment and Sentence, 27 September 2016; see also ICC, *Case Information Sheet: Situation in the Republic of Mali. The Prosecutor v. Ahmad Al Faki Al Mahdi*, ICC-01/12-01/15, ICC-PIDS-CIS-MAL-01-09/22_Eng, The Hague, January 2022 (available at <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf> accessed 27 July 2025).

⁵ *Ibidem*.

⁶ For a more detailed account of the turbulent history surrounding the inscription of these monuments, see UNESCO, *Reconstruction of the Destroyed Mausoleums of Timbuktu (Mali)*, 2021 (available at <https://whc.unesco.org/en/canopy/timbuktu/>, accessed 17 June 2025): «Timbuktu was inscribed on the World Heritage list in 1988 under criteria (ii), (iv) and (v) due to its outstanding universal value as an African intellectual and spiritual capital in the 15th and 16th centuries. Its three great mosques, Djingareyber, Sankore

of the planned demolitions, particularly given his senior position within the Islamic Police.⁷ Nonetheless, it determined that the evidence presented was insufficient to establish, beyond any reasonable doubt, his direct involvement in these acts;⁸ as a matter of fact, this evidentiary threshold was the one that led to his acquittal on this specific charge.

The *Al Mahdi* case has been hailed as a significant milestone in international criminal law,⁹ representing the first judgment based exclusively on the crime under Article 8(2)(e)(iv) of the Rome Statute.¹⁰ This extremely brief yet impactful trial¹¹ yielded compelling and innovative reparations orders, marking a historic moment where not only the local community of Timbuktu but also the entire international community (represented by UNESCO)¹² was awarded symbolic reparations for their losses.¹³

It would be misleading to underestimate the pivotal nature of this case, despite the many doubts and concerns raised about the definitions of “attacks” and other related issues.¹⁴ The Court's forward-thinking approach deserves recognition, as it strives to evolve the understanding of cultural heritage from a “cultural value” to a more profound “human dimension” perspective embedded within the ICC reasoning;¹⁵ both stances - the “cultural value” and the “human dimension” - are present in the Court's decision on the *Al Mahdi*

and Sidi Yahia, recall Timbuktu's golden age. Although continuously restored, these monuments are today under threat from desertification, management issues, especially concerning the involvement of the local communities, and lack of resources for site management and maintenance. The site was inscribed on the List of World Heritage in Danger between 1990 and 2005, and once again in 2012, when the site was occupied by armed groups. The 2019 State of Conservation Report highlighted that the property is affected by deliberate destruction of heritage, lack of functioning management systems and war. In 2012, several buildings in Timbuktu, including 14 of the 16 mausoleums which form part of the World Heritage site, were destroyed within the context of armed conflict and civil unrest. Attacks also targeted the Al Farouk monument, which was completely destroyed».

⁷ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Chamber X, Judgment, cit., paras. 1676-1686.

⁸ *Ibidem*, paras. 1050-1055, 1181.

⁹ M. LOSTAL, *The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC*, in *McGill Journal of International Law and Legal Pluralism*, 2017, pp. 45-58.

¹⁰ *Rome Statute of the International Criminal Court*, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 3.

¹¹ F. CAPONE, *An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage*, in *Journal of International Criminal Justice*, 2018, pp. 647-648; F. CAPONE, *The International Criminal Law Aspects of the Protection of Global Commons: The Case of Cultural Heritage*, in M. IOVANE, D. AMOROSO, F. PALOMBINO, G. ZARRA (eds), *The Protection of General Interests in Contemporary International Law*, Oxford, 2021, pp. 213-215, 228-238.

¹² *The Prosecutor v. Ahmad Al Faqi Al Mahdi, Reparations Order, Al Mahdi*, ICC-01/12-01/15, Trial Chamber VIII, 17 August 2017, paras. 106-107. See also F. CAPONE, *An Appraisal of the Al Mahdi Order on Reparations*, p. 653.

¹³ F. CAPONE, *An Appraisal of the Al Mahdi Order*, cit., pp. 651-653; M. LOSTAL, *Implementing Reparations in the Al Mahdi Case: A Story of Monumental Challenges in Timbuktu*, in *Journal of International Criminal Justice*, 2021, pp. 831-853; and M. LOSTAL, *Reparations for Cultural Heritage Destruction at the ICC and the Limits of Human Rights*, in F. GANTHERET, N. GUIBERT, S. STOLK (eds), *Arts and Human Rights: A Multidisciplinary Approach to Contemporary Issues*, Cheltenham, 2023, pp. 282-305.

¹⁴ W. SCHABAS, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, in *Case Western Reserve Journal of International Law*, 2017, pp. 75-102; M. A. DRUMBL, *From Timbuktu to The Hague and Beyond*, in *Journal of International Criminal Justice*, 2019, pp. 77-99.

¹⁵ M. FRULLI, *International Criminal Law and the Protection of Cultural Heritage*, in F. FRANCIONI and A.F. VRDOLJAK (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford, 2020, pp. 100-120; see also M. FRULLI, *Tutela dei beni culturali e obblighi di criminalizzazione*, in O. PORCHIA and M. VELLANO (eds), *Il diritto internazionale per la pace e nella guerra: sviluppi recenti e prospettive future. Liber Amicorum in onore di Edoardo Greppi*, Napoli-Torino, 2023, p. 220.

case: not only do they coexist, but they also mutually reinforce each other.¹⁶ This approach aspires to expand the notion of cultural heritage into the realm of human rights, even in the absence of explicit acknowledgment in legal texts.¹⁷

However, examining the limited number of subsequent cases (namely, the *Bosco Ntaganda* case and the recently rendered *Yekatom and Ngaïssona* judgment)¹⁸ - none addressing war crimes against cultural heritage in the same manner and with the same intensity as *Al Mahdi*¹⁹ and *Al Hassan* - reveals a troubling trend: the ICC has faced a notable regression, or, rather, an interpretative setback. This situation prompts a provocative consideration of whether we are witnessing a decline from the progressive advancements initiated immediately after the *Al Mahdi* “season” or “spirit” and the adoption of the peculiar Policy on Cultural Heritage issued by the Office of the Prosecutor (hereinafter “OTP”) in 2021.²⁰ While a cautious approach remains essential in the wake of the *Al Mahdi* context and after the adoption of the OTP's policy,²¹ it is crucial to analyze not just “if” the court has strayed from progressive perspectives - as demonstrated by the *Ntaganda*'s Appeals Chamber,²² and the heated debate surrounding the Prosecution grounds of appeal against the Trial Chamber,²³ and, finally, by the recent judgments on the *Al Hassan* case - but more importantly, to understand “how” this shift has occurred, the rationale behind the Court's change in direction, and the potential implications for future cases involving the destruction of cultural heritage.

This analysis will explore how the shift in the ICC's approach unfolds, supporting the notion that this change transcends mere legal interpretation, with direct consequences on the Court's capacity to tackle future cultural heritage crimes. Does this trajectory suggest that we may be entering a precarious path, one that could gradually evolve into a slippery slope with unintended and far-reaching consequences? Can the Court's stance be interpreted as a “worrying silence” or is it a mere “orthodox” reading of the Rome Statute, designed to guard against far-fetched and creative interpretations that might invalidate the stability of Article

¹⁶ M. FRULLI, *Tutela dei beni culturali*, cit., p. 219.

¹⁷ Y. DONDEERS, *Cultural Heritage and Human Rights*, in F. FRANCIONI and A. F. VRDOLJAK (eds), *The Oxford Handbook*, cit., pp. 379-406.

¹⁸ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-2784-Red, Trial Chamber V, Judgment, 24 July 2025; for a brief overview of the case, see *Case Information Sheet: Situation in the Central African Republic II, The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona ICC-01/14-01/18*, ICC-PIDS-CIS-CARII-03-021/25_Eng, The Hague, July 2025 (available at https://www.icc-cpi.int/sites/default/files/2025-07/yekatom-ngaissonaEn_0.pdf, accessed 24 August 2025).

¹⁹ See M. A. DRUMBL, *The International Criminal Court and Cultural Property: What Is the Crime?*, in C. FINKELSTEIN, D. GILLMAN, and F. ROSÉN (eds), *The Preservation of Art and Culture in Times of War*, Oxford, 2022, p. 260.

²⁰ OTP, *Policy on Cultural Heritage*, June 2021 (available at <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>, accessed 20 July 2025).

²¹ M. M. SADOWSKI, *Heritage Strikes Back: The Al Mahdi Case, ICC's Policy on Cultural Heritage and the Pushing of Law's Boundaries*, in *Undecidabilities and Law - The Coimbra Journal for Legal Studies*, 2022, pp. 114-115; J. POWDERLY, *Prosecuting Heritage Destruction*, in J. CUNO and T. G. WEISS (eds), *Cultural Heritage and Mass Atrocities*, Los Angeles, 2022, p. 444; K. WIERCZYŃSKA and A. JAKUBOWSKI, *The 2021 Policy on Cultural Heritage of the International Criminal Court: New Perspectives and Uncertainties of Criminal Justice*, in A. FABBRICOTTI (ed), *Intentional Destruction of Cultural Heritage and the Law*, London, 2024; M. S. WEINERT, *Crimes against cultural heritage: World-building at the International Criminal Court*, in *Review of International Studies*, 2025, pp. 1-16.

²² *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Judgment, 8 July 2019; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 A A2, Appeals Chamber, Judgment, 30 March 2021.

²³ For a complete overview, see R. ALCALA and S. RADIN, *Symposium Intro: The ICC Considers the Definition of “Attack”*, in *Lieber Institute West Point, Articles of War*, 27 October 2020.

8(2)(e)(iv)?²⁴ The *Al Hassan* case clearly illustrates a shift in the ICC's strategy, as its silence on this issue reflects not merely a deliberate choice to refrain from providing a consistent and reliable interpretation of Article 8(2)(e)(iv) – and, by extension, of Article 8(2)(b)(ix) concerning international armed conflicts – of the Rome Statute, but rather a deeper judicial discord and jurisprudential uncertainty regarding legal qualification. This pattern is further confirmed in the recent *Yekatom and Ngaïssona* judgment, which effectively continues and consolidates this tendency toward interpretative caution – or what might be described as reticence or lack of foresight – a longstanding and recurring theme throughout this article, likely to continue in future developments. The purpose is not only to trace the ICC's restrictive evolution but also to argue that this trend actively shapes prosecutorial priorities, pushing cultural heritage crimes to the sidelines in contemporary conflicts. The analysis will proceed in four parts. It will begin with a concise overview of the foundational jurisprudential framework governing the protection of cultural heritage, with particular attention to the ICC's early progressive stance in *Al Mahdi*, situated within a broader context shaped by instruments such as United Nations Security Council (hereinafter “UNSC”) Resolution 2347(2017). It will then turn to examine the Court's subsequent shift toward a more restrictive – or, at the very least, “orthodox” – interpretation of Article 8(2)(e)(iv) of the Rome Statute, as reflected in *Bosco Ntaganda* and *Al Hassan*, and to assess whether this orientation has evolved in the Trial Chamber V judgment in *Yekatom and Ngaïssona*, which constitutes the third section of the present research.²⁵ Finally, the discussion will reflect on the implications and prospects arising from this significant transformation, drawing on relevant insights from ongoing conflicts and discussions, also at the United Nations level.

2. Debunking the “myths”: “amid joys and hardships” of the UNSC Resolution 2347(2017) and the *Al Mahdi* “spirit”

Before undertaking an in-depth examination of the Court's recent jurisprudence and its key uncertainties, it is necessary to revisit the main stages before the formation of a monolithic silence or, at the very least, interpretative lassitude, concerning the legal interpretation of article 8(2)(e)(iv) and the conundrum regarding “directing attacks against protected objects”²⁶ – namely cultural heritage, adopting the terms finally used by the OTP in the 2021 Policy on Cultural Heritage.²⁷ The Court's case law developed within a complex and evolving legal landscape, in which actors not traditionally responsible for the protection

²⁴ A. JACHEC-NEALE, for instance, noted, in line with SCHABAS' vision, that: « The *Al Mahdi* set a dangerous precedent». See A. JACHEC-NEALE, *The Unintended Consequences of International Court Decisions*, in *Lieber Institute West Point, Articles of War*, 19 November 2020 (available at <https://lieber.westpoint.edu/articles-of-war/>, accessed 22 July 2025).

²⁵ The ICC convicted Yekatom to fifteen years of imprisonment and Ngaïssona to twelve years. See *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-2784-Red, Trial Chamber V, Judgment, cit., para. 4848.

²⁶ *Rome Statute of the International Criminal Court*, cit., Art. 8(2)(e)(iv): «[...] Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...] (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives [...]».

²⁷ OTP, *Policy on Cultural Heritage*, cit.

of cultural heritage - such as the United Nations Security Council - have begun to pursue more systematic objectives. Against this backdrop, international concern for the legal protection of cultural heritage intensified in the aftermath of the dramatic events in Mali, Syria, and Iraq.²⁸ The ICC's *Al Mahdi* judgment (2016), UNSC Resolution 2347 (2017), and the 2021 OTP Policy on Cultural Heritage are all situated within, and indeed emblematic of, this broader climate of legal transformation. These developments appeared to alleviate concerns about prosecutorial inertia in relation to crimes against cultural heritage. Before addressing the Court's most recent decisions on these crimes under Article 8(2)(e)(iv) - namely, the *Al Hassan* and *Yekatom and Ngaïssona* cases (June 2024 and July 2025) - this section aims to reconsider key achievements often cited in international cultural heritage law and in international criminal law. By starting with UNSC Resolution 2347(2017) and the earlier ICC decision in *Al Mahdi* (2016) - and focusing on their links - it is possible to grasp the legal background and current state. One can then assess if these instruments and precedents have truly enabled the emergence of a robust jurisprudential and legal environment.

The United Nations Security Council Resolution 2347(2017),²⁹ adopted on March 24, 2017, is a response to the growing concern within the international community about cultural heritage threats.³⁰ The UNSC Resolution 2347(2017) is noteworthy as it is the first resolution to be exclusively dedicated to the protection against the destruction and illicit trafficking of cultural property in armed conflict, notably by terrorist groups, adopting a perspective of general applicability.³¹ It is also worth mentioning that Resolution 2347(2017) has made a significant contribution in promoting cooperation between States and identifying threats to cultural heritage as an issue falling under the umbrella of international peace and security.³² The Security Council's terminology and operational choices in the text of Resolution 2347(2017) are of particular interest. Primarily, the Council urges United Nations Member States to implement "adequate steps" of a preventive nature to suppress crimes against cultural property in times of war, with heightened attention directed toward illegal activities perpetrated by criminal or terrorist groups.³³ To further bolster protection, States are requested to integrate "effective national measures" into their domestic legal systems. To prevent and counter trafficking in cultural property and related offenses, it is necessary to consider designating such activities that may benefit organized criminal or terrorist groups as serious crimes in accordance with Article 2(b) of the UN Convention against Transnational Organized Crime.³⁴ Furthermore, considerable emphasis is placed on United Nations peacekeeping operations to establish virtuous cooperation:³⁵ this initiative is undertaken at the request of national authorities and with the support of UNESCO; the

²⁸ *Ibidem*.

²⁹ UNSC Res. 2347, 2017, 24 March 2017. See K. HAUSLER, *Cultural heritage and the Security Council: Why Resolution 2347 matters*, in *QIL*, 2018, pp. 5-19.

³⁰ See L. MARINI, *Destruction of and Trafficking in Cultural Heritage in Situation of (Armed) Conflict - Notes on the International Legal System and Its Implementation*, in I. CARACCILO and U. MONTUORO (eds), *Preserving Cultural Heritage and National Identities for International Peace and Security*, Torino, 2019, p. 239 *et seq.*; M. FRIGO, *UN Security Council Approaches to the Global Safeguarding of Cultural Heritage: An Evolving Role in Preventing the Illicit Traffic of Cultural Objects*, in *id.*, p. 103 *et seq.*

³¹ M. FRIGO, *id.*, p. 114; S. URBINATI, *La Risoluzione 2347(2017): il Consiglio di Sicurezza e la difesa dei beni culturali in caso di conflitto armato. Molto rumore per nulla?!*, in E. BARONCINI (ed), *Il diritto internazionale e la protezione del patrimonio culturale mondiale*, Bologna, 2019, pp. 90-91.

³² *Ibidem*.

³³ UNSC Res. 2347, 2017, *cit.*, para. 8.

³⁴ *Ibidem*, para. 9.

³⁵ *Ibidem*, paras. 6, 19.

primary goals of the cooperation are to combat illegal excavation, illicit trafficking of cultural property from the sites of origin, as well as destruction and damage during conflict. The effectiveness of the measures outlined in Resolution 2347(2017) is exemplified by the Letter of Intent signed on November 6, 2017, by UNESCO Director-General Bokova and International Criminal Court Prosecutor Bensouda.³⁶ This document signifies a further enhancement in the collaborative efforts of the two actors, thereby underscoring the International Criminal Court's jurisdiction to ensure the prosecution of individuals perpetrating crimes against cultural property in instances where national courts demonstrate inaction. Moreover, the UNSC Resolution stipulates that Member States possess a fundamental responsibility to safeguard their cultural heritage, in accordance with international law.³⁷

In recent years, the International Criminal Court has exhibited a heightened sensitivity toward cases involving the deliberate destruction of cultural property during armed conflicts. The Court has unquestionably catalyzed innovation, shaping the evolution and practical influence of protection instruments that followed, most notably Resolution 2347(2017). A source of considerable debate for our analysis - is paragraph 4 of the UNSC Resolution: «[...] directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments may constitute, under certain circumstances and pursuant to international law a war crime and that perpetrators of such attacks must be brought to justice». It is certainly possible to note some similarities between the list of cultural property protected under Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute, which prohibit «intentional directing of attacks against such property» and the text of the UNSC Resolution. However, Resolution 2347(2017) adopts a more vague and nuanced formulation, particularly concerning the contours of what constitutes an “attack”. This ambiguity becomes apparent in the *Al Mahdi* case, which, as will be examined in detail below, epitomizes the difficulties surrounding this problematic legal qualification.

In discussing the *Al Mahdi* judgment, it is useful at this stage to undertake a brief digression to outline the facts and circumstances of the case. This will help to clarify the specific conduct addressed in the judgment and to explain why the classification of those acts as “attacks” has generated interpretative uncertainty. A more detailed examination of these issues, and of the broader challenges they raise within the ICC’s jurisprudence, will follow below. According to the allegations, Mr. Al Mahdi belonged to Ansar Eddine, a predominantly Tuareg movement affiliated with Al Qaeda in the Islamic Maghreb (AQIM), where he operated within the organizational framework established by the group’s leadership. Until September 2012, he is said to have led the Hesbah, an institution created in April 2012 to enforce public morality and suppress vice. He was further linked to the activities of the Islamic Court of Timbuktu, particularly in the implementation of its rulings. Al Mahdi stood accused of ordering the demolition of ten historic buildings in the ancient city of Timbuktu, including the door of a 15th-century mosque and nine mausoleums.³⁸ Following his admission of intentionally directing attacks against cultural property and his expression of remorse for his actions (while also stating that he had sought to limit the damage), Al Mahdi was sentenced by the Court to nine years’ imprisonment and ordered to pay compensation

³⁶ ICC, *The ICC Office of the Prosecutor and UNESCO sign Letter of Intent to strengthen Cooperation on the Protection of Cultural Heritage*, in ICC News 6 November 2017 (available at <https://www.icc-cpi.int/news/icc-office-prosecutor-and-unesco-sign-letter-intent-strengthen-cooperation-protection-cultural> accessed 22 May 2025).

³⁷ UNSC Res. 2347, 2017, cit., para. 5.

³⁸ ICC, *Case Information Sheet: Situation in the Republic of Mali*, cit.

for damages.³⁹ Historically, Al Mahdi was the first individual to be convicted by the International Criminal Court for the crime of conducting attacks against historical monuments, buildings used for worship, education, and the arts, as a war crime.⁴⁰

For this examination, it is imperative to note the Court's ruling, which is as follows: «The destruction of cultural heritage erases part of the heritage of all humankind. The Chamber finds it appropriate to acknowledge the suffering endured by the Malian community and the international community as a whole as a result of the destruction of the Protected Buildings - all but one of which were UNESCO World Heritage Sites».⁴¹ In this regard, the Court accepts the argument that destruction and attacks against cultural property in armed conflicts not only afflict local populations but also deprive the international community of a universal heritage.⁴² Moreover, according to the Court's reasoning, the universal value of cultural heritage and the human dimension must be considered during the assessment of the severity of attacks on cultural heritage.⁴³ The human dimension refers to the ideological, religious, and value-based attachment of local communities to the threatened cultural heritage; as a matter of fact, the Court noted the testimony of P-431, who stated that the destruction of the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu.⁴⁴

The Court's decision on the *Al Mahdi* case offers the opportunity to reflect on the functioning of individual criminal responsibility for crimes against cultural property (and, in this case, more specifically, intentional attacks), understood as war crimes. The conclusion that has been proposed appears to be corroborated by the evolutionary framework underlying the *Al Mahdi* ruling, which draws on Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia,⁴⁵ and which classifies the conduct committed by the accused under Articles 8(2)(e)(iv) and 25 of the Rome Statute.

However, this milestone of international criminal law may have some shadows: the Court's decision is fundamentally insufficient in terms of punishable conduct, particularly in light of the Al Mahdi decision. The ICC's whole scheme is based on the – not without controversy⁴⁶ – accusation against Al Mahdi of having carried out intentional attacks against cultural property; by following the critical approach advanced by some scholars, the destruction that occurred in Mali would not have been considered as part of an “attack”, which presupposes acts of violence against the adversary for offensive or defensive purposes, in line with the traditional conceptualization of international humanitarian law enshrined in

³⁹ *Ibidem*.

⁴⁰ M. STERIO, *Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case*, in *Case Western Reserve Journal of International Law*, 2017, pp. 63-73.

⁴¹ *The Prosecutor v. Ahmad Al Fagi Al Mahdi, Reparations Order, Al Mahdi*, cit., para. 53; see also S. STARRENBURG, *Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v Ahmad Al Fagi Al Mahdi*, in *EJIL: Talk!*, 25 August 2017 (available at <https://www.ejiltalk.org/who-is-the-victim-of-cultural-heritage-destruction-the-reparations-order-in-the-case-of-the-prosecutor-v-ahmad-al-fagi-al-mahdi/> accessed 20 April 2025).

⁴² *The Prosecutor v. Ahmad Al Fagi Al Mahdi, Reparations Order, Al Mahdi*, cit., paras. 17, 51 *et seq.*

⁴³ *Ibidem*, para. 22.

⁴⁴ *The Prosecutor v. Ahmad Al Fagi Al Mahdi*, ICC-01/12-01/15, Trial Hearing Transcript, paras. 89–90; see also S. PINTON, *The ICC Judgement in Al Mahdi: Heritage Communities and Restorative Justice in the International Criminal Protection of Cultural Heritage*, in *Seattle Journal for Social Justice*, 2020, p. 358 *et seq.*

⁴⁵ *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 25 May 1993, UN Doc S/RES/827.

⁴⁶ W. SCHABAS, *Al Mahdi*, cit.; see also A. JACHEC-NEALE, *The Unintended Consequences of International Court Decisions*, cit.

Article 49 of Additional Protocol I to the Geneva Conventions.⁴⁷ Rather, the conduct could be interpreted as a systematic and planned act of intentional destruction, falling outside the conduct of hostilities and the scope of the “attacks” - whether in defense or offense - as envisaged under this interpretation of Article 8(2)(e)(iv) of the Rome Statute.⁴⁸

What emerges from this comparison is the fragility of the conceptual framework on which the notion of “attacks” against cultural property currently rests. UNSC Resolution 2347(2017), by employing the terminology of “unlawful attacks against sites and buildings,” appears to oscillate between reinforcing the ICC’s construction and introducing elements of compromise. By avoiding the wording “intentionally directing attacks” contained in Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute, while at the same time referring to the ICC’s jurisdiction, the UNSC Resolution underscores both the influence of the Court’s approach and the persistent uncertainty surrounding the definitional contours of such crimes. Do these unlawful attacks refer to an act of violence perpetrated whether in offense or defense against an adversary, or can they be interpreted as valid in the immediate aftermath or in the realm of control of a territory? This lack of clarity, which is not remedied by other instruments such as the 1954 Hague Convention and its Protocols,⁴⁹ highlights the unstable foundations upon which the legal edifice of “attacks” against cultural property is built at the international criminal law layer and within the ICC jurisprudence.

Finally, while fully acknowledging the pivotal significance of the *Al Mahdi* case for the protection of cultural property against attacks in both international and non-international armed conflicts and for the adoption of landmark instruments, such as the UNSC Resolution 2347(2017), it is essential to temper - or at least contextualize - the revolutionary impact of its ruling. Before examining subsequent developments, one key point stands out: the judgment itself was exceptionally brief,⁵⁰ rapid, and almost lightning-like, and the absence of any appeal further limited the growth. As a result, it did not foster the emergence of a deeply reasoned or systematically developed jurisprudence capable of addressing the complex issues that promptly surfaced in other cases pending before the ICC. Thus, this section of the present research has already preliminarily highlighted some doubts, without in any way undermining the fundamental necessity of ensuring accountability for such crimes - quite the

⁴⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949*, cit., art. 49: «"Attacks" means acts of violence against the adversary, whether in offence or in defence. 2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party. 3. The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air. 4. The provisions of this Section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in Part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities».

⁴⁸ Concerning intentional destruction of cultural heritage, reference can be made to the interpretation given in the 2003 UNESCO Declaration. Further insights can be found in the document: see *UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*, UNESCO General Conference, 32nd, 17 October 2003.

⁴⁹ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 14 May 1954, entered into force 7 August 1956, 249 UNTS 240 (1954 Hague Convention); *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 14 May 1954, entered into force 7 August 1956, 249 UNTS 358 (First Protocol to the 1954 Hague Convention); *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 26 March 1999, entered into force 9 March 2004, 2253 UNTS 212 (Second Protocol to the 1954 Hague Convention).

⁵⁰ F. CAPONE, *An Appraisal of the Al Mahdi Order*, cit., pp. 647-648.

contrary. The perception that *Al Mahdi* represented an exemplary decision - one that undeniably contributed to strengthening the principle that crimes against cultural heritage must not go unpunished, while simultaneously reinforcing the ICC and UNSC operational role in this field - risks being substantially diluted by the disorderly treatment accorded to this precedent. The concern, therefore, is that *Al Mahdi* will remain a virtuous but isolated example, deprived of its capacity to shape a coherent jurisprudence, as later case law has revealed interpretative inconsistency and, above all, a clear judicial closure toward a creative reading of Article 8(2)(e)(iv). This closure could significantly curtail the continuation of the novel developments inaugurated during the extremely brief “*Al Mahdi* season”.

3. From an “Expansive” to a “Restrictive” Approach. Sudden Shifts in the Court’s Interpretation

An examination of the ICC’s jurisprudence on attacks against cultural heritage - beginning with the *Al Mahdi* case, moving through *Bosco Ntaganda*, and culminating in the Trial Chamber X judgment on *Al Hassan* in June 2024 and the *Yekatom and Ngaïssona* in July 2025⁵¹ - reveals a strikingly rapid transition from broad, creative and expansive interpretations to a more restrictive - or at least “orthodox” - reading of Article 8(2)(e)(iv) of the Rome Statute. One of the most contentious aspects, which has sparked significant criticism (as mentioned above), is the perennial issue⁵² of interpreting the concept of “attacks” in the conduct of hostilities. Yet, as outlined earlier, the instruments and precedents in this matter offer little decisive guidance in navigating this interpretative challenge.

In the *Al Mahdi* case, the term “attack” was construed broadly: the destruction of Timbuktu’s mausoleums, classified as a war crime, was deemed a clear violation of Article 8(2)(e)(iv), applicable to non-international armed conflicts, such as the one that occurred in Mali.⁵³ The Court’s progressive stance extended the notion of “attack” beyond active combat operations, implying that cultural heritage protection remains effective even in the absence of immediate and contingent conduct of hostilities. The aim here is not to engage in a theoretical debate on whether the situation in Timbuktu - under Ansar Eddine’s control - was intrinsically linked to an armed conflict and an active combat situation in Mali,⁵⁴ nor to examine whether the destruction of religious buildings could be framed as a crime against humanity.⁵⁵ Instead, the focus is on a critical shift in the Court’s approach: from considering attacks against cultural heritage as not necessarily contingent on the conduct of hostilities to

⁵¹ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Chamber X, Judgment, cit.; *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-2784-Red, Trial Chamber V, Judgment, cit.

⁵² See M. G. HALL, *The Perennial Question of the Scope of “Attack” in Conduct of Hostilities War Crimes: The Al Hassan Trial Chamber’s Failure to Answer*, in *Opinio Juris*, 19 July 2024 (available at <https://opiniojuris.org/2024/07/19/the-perennial-question-of-the-scope-of-attack-in-conduct-of-hostilities-war-crimes-the-al-hassan-trial-chambers-failure-to-answer/>, accessed 23 July 2025).

⁵³ *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Trial Chamber VIII, Judgment and Sentence, cit., para. 15.

⁵⁴ W. SCHABAS, *Al Mahdi*, cit., pp. 76-77; contra S. E. ESTERLING and M. JOHN-HOPKINS, *The Creation and Protection of History through the Prism of International Criminal Justice in Al Mahdi*, in *Journal of International Humanitarian Legal Studies*, 2018, p. 25; on this matter, see also M. M. SADOWSKI, *Heritage Strikes Back*, cit., pp. 109-111.

⁵⁵ P. ROSSI, *The “Al Mahdi” Trial Before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity*, in *Diritti Umani e Diritto Internazionale*, 2017, p. 92.

a more restrained stance. For the sake of completeness, it is worth recalling that in the *Katanga* case⁵⁶ the Trial Chamber II adopted the definition of “attack” consistent with and invoking Article 49(1) of Additional Protocol I to the Geneva Conventions, describing it as “acts of violence against the adversary, whether in offense or defense”.⁵⁷ As it has clearly borne out, this interpretation centers on violent acts directed against an opposing party in an armed conflict. However, cracks in the *Al Mahdi* expansive approach emerged almost immediately with the *Bosco Ntaganda* case. The ICC Appeals Chamber displayed a clear division regarding the scope of the term “attack”. While within the *Ntaganda* case the charges concerning attacks on protected objects - namely, a religious building, a Church in Sayo, and a hospital in Mongbwalu, in the Democratic Republic of the Congo - were somehow peripheral⁵⁸ - the Court nonetheless addressed the legal implications at hand. In the Appeals Judgment, Judges Morrison and Hofmański, in their separate opinions,⁵⁹ argued that the terms within the Rome Statute should maintain a consistent meaning unless explicitly stated otherwise, thus supporting a restrictive interpretation of “attacks”. Conversely, Judges Bossa, Eboe-Osuji, and Ibáñez Carranza, in their respective opinions,⁶⁰ advocated for a broader reading, resisting excessive temporal and geographical constraints that would dilute the term’s protective function.⁶¹ These diverging views underscore the absence of jurisprudential consensus. Therefore, it would be deceptive to regard the Appeals Chamber’s dismissal of the Prosecutor’s claims as definitively settling the issue.⁶²

Could the ICC’s caution stem from concerns that an overly progressive approach might undermine the principle of legality and excessively expand the scope of war crimes? This question gains prominence when assessing the Court’s interpretive trajectory - whether as an “evolution” or an “involution” - culminating in its restrictive stance on Article 8(2)(e)(iv) in cultural heritage destruction cases. The recent *Al Hassan* ruling, however, has failed to provide clarity. Rather than confronting the issue head-on, Trial Chamber X opted for avoidance: it neither addressed the longstanding interpretive debate on the meaning of “attack” under Article 8(2)(e)(iv) nor did it offer a substantive legal characterization of the acts of destruction. Instead, it dismissed the matter on evidentiary grounds, even asserting that: «the Chamber considers it unnecessary to undertake any legal characterisation of the

⁵⁶ *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 798.

⁵⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, entered into force 7 December 1978.

⁵⁸ Unlike *Al Mahdi*, where, for the first time, war crimes against cultural heritage were the sole focus. See K. WIERCZYŃSKA and A. JAKUBOWSKI, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, in *Chinese Journal of International Law*, 2017, p. 716; K. WIERCZYŃSKA and A. JAKUBOWSKI, *The Al Mahdi Case: From Punishing Perpetrators to Repairing Cultural Heritage Harm*, in A. M. CARSTENS and E. VARNER (eds), *Intersections in International Cultural Heritage Law, Cultural Heritage Law and Policy*, Oxford, 2020, pp. 133-156.

⁵⁹ *The Prosecutor v. Bosco Ntaganda, Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s appeal*, ICC-01/04-02/06-2666-Anx1, Appeals Chamber, Decision, 30 March 2021, paras. 43-44.

⁶⁰ *The Prosecutor v. Bosco Ntaganda, Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor’s appeal*, Appeals Chamber, Decision, 30 March 2021; *Partly concurring opinion of Judge Chile Eboe-Osuji*, ICC-01/04-02/06-2666-Anx5, Appeals Chamber, Decision, 30 March 2021; *Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal*, ICC-01/04-02/06-2666-Anx3, Appeals Chamber, Decision, 30 March 2021.

⁶¹ A. G. JAIN, *The Ntaganda Appeal Judgment and the Meaning of “Attack” in Conduct of Hostilities War Crimes*, in *EJIL: Talk!*, 2 April 2021 (available at: <https://www.ejiltalk.org/the-ntaganda-appeal-judgment-and-the-meaning-of-attack-in-conduct-of-hostilities-war-crimes/>, accessed 23 July 2025); M. G. HALL, *The Perennial Question of the Scope of “Attack”*, cit.

⁶² *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 A A2, Appeals Chamber, Judgment, cit.

charged crime under Count 7 or the related criminal responsibility of Mr Al Hassan under Article 25(3)(d) of the Statute». ⁶³ Of particular note - and, in some respects, highly critical of possible conciliatory interpretations ⁶⁴ - is the extensive footnote in Judge Akane's separate and partly dissenting opinion. ⁶⁵ While referencing Article 8(2)(e)(iv) of the Rome Statute, the judge reiterated that "attack" is defined as "acts of violence against the adversary, whether in offence or defense" in line with customary international law and the Statute's preparatory works. Judge Akane further noted that the destruction of the mausoleums in this case did not occur during active hostilities, thereby endorsing a restrictive interpretation of "attack" - one strictly tied to combat operations.

This view stands in stark contrast to the innovative legal reasoning in *Al Mahdi*. Under Akane's interpretation, the destruction of Timbuktu's mausoleums would only constitute an "attack" if directly embedded within active hostilities, a premise difficult to establish in this case, where Timbuktu was under the control of Ansar Eddine in the broader context of a non-international armed conflict. ⁶⁶ It is also worth noting that Judges Mindua and Prost did not directly engage with the issue in their separate opinions. ⁶⁷

Also, a somewhat contradictory aspect concerns the relationship between the Court's findings regarding Al Hassan's knowledge and moral involvement in the destructions, and the broader orientation of the OTP 2021 Policy on the "human" value and dimension of cultural heritage. ⁶⁸ The Court established that Mr. Al Hassan knew the historical importance of the mausoleums for the population of Timbuktu and that they were places of worship. Furthermore, he was aware of the planned demolition of the monuments before it was executed and understood the reasons behind their destruction. ⁶⁹ Reflecting on the demolition of the monuments alongside Al Mahdi several months later, Mr. Al Hassan «encouraged this and considered this an achievement. ⁷⁰ The Court concluded that Mr. Al Hassan did not bear responsibility for tasking the police forces to carry out the destruction of the mausoleums, by "limiting" himself to passing moral support. ⁷¹ The Chamber specifically considered that Mr. Al Hassan's passing salutation to Al Mahdi and Talha at the final demolition site near the Djingareyber mosque confirms his knowledge of the demolitions. ⁷² Does it still retain any meaningful relevance to Al Hassan's responsibility? Yet the underlying legal uncertainties persist, leaving unresolved the critical conceptual issues, alongside what constitutes an "attack" under Article 8(2)(e)(iv). ⁷³

⁶³ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Chamber X, Judgment, cit., para. 1055.

⁶⁴ M. G. HALL, *The Perennial Question of the Scope of "Attack"*, cit.

⁶⁵ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, *Separate and Partly Dissenting Opinion of Judge Tomoko Akane*, ICC-01/12-01/18-2594-OPI, Trial Chamber, 26 June 2024, para. 100, fn. 178.

⁶⁶ See M. M. SADOWSKI, *Heritage Strikes Back*, cit.

⁶⁷ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, *Separate and Partly Dissenting Opinion of Judge Antoine Kesia-Mbe Mindua*, ICC-01/12-01/18-2594-OPI3-tENG, Trial Chamber, 28 June 2024; *Separate and Partly Dissenting Opinion of Judge Kimberly Prost*, ICC-01/12-01/18-2594-OPI2, Trial Chamber, 26 June 2024.

⁶⁸ OTP, *Policy on Cultural Heritage*, cit., paras. 3-4 pp. 4-5).

⁶⁹ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Chamber X, Judgment, cit., para. 1050.

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*, para. 1055.

⁷² *Ibidem*.

⁷³ By providing moral encouragement to perpetrate the demolitions and endorsement of the acts, Al Hassan's conduct raises important questions regarding the interpretation of the individual criminal responsibility under

Does *Al Hassan* represent a failure to solve the ICC's doctrinal uncertainty on prosecuting cultural heritage destruction crimes? Does it signal the relegation of such cases to a secondary concern? Summarizing the jurisprudential impasse it is possible to outline a progressive scheme composed as follows: (i) an initial - contentious - broad reading of Article 8(2)(e)(iv), exemplified by the *Al Mahdi* decision, and the influence it exerted on the adoption of innovative legal instruments and policies; (ii) a shift toward caution, inaugurated by the Appeals Chamber's *Bosco Ntaganda* ruling in March 2021; (iii) the adoption of the Office of the Prosecutor's (OTP) Policy on Cultural Heritage in June 2021, that marked another significant step within the ICC Prosecutor's strategic agenda, initiated by ICC Prosecutor Bensouda in the final phase of her mandate; and (iv) the interpretive silence culminating in the unresolved questions left by the Trial Chamber's decision in *Al Hassan* in June 2024. One preliminary reflection emerges: if a strict interpretation constrains the prosecution of these crimes, the ICC's future stance on cultural heritage protection remains uncertain. Therefore, in light of the above considerations, a hypothesis could be suggested: the Court's more cautious approach may not indicate a strategic retreat, but rather a deliberate adherence to a limitation of the flexibility of Article 8(2)(e)(iv). Crucially, however, the jurisprudence to date has been both too limited in scope and too ephemeral to crystallize into a coherent line of authority, leaving the interpretative terrain fragmented and precarious.

4. Progress or Paralysis? The Trial Chamber V Judgment on the *Yekatom* and *Ngaïssona* case

At present, the ICC's Trial Chamber V has rendered judgment in the *Yekatom* and *Ngaïssona* case (July 2025), in which the accused faced charges, among others,⁷⁴ for war crimes under Article 8(2)(e)(iv) of the Rome Statute, specifically relating to attacks against protected objects in the Central African Republic. While the charges mirror the statutory framework applied in previous cases, the scale and context of the alleged destruction do not appear comparable either to the conviction in *Al Mahdi* or to the acquittal of *Al Hassan* on the same offense. It should be recalled once again - and in unequivocal terms, to dispel any possible ambiguity - that the present discussion does not advocate for a creative extension of jurisprudence or legal interpretation, e.g., by attributing to Al Hassan responsibility for crimes he did not commit or by disrupting the evidentiary thresholds.⁷⁵ Rather, the concern lies in

the Rome Statute. A critical reading could suggest a broader understanding, potentially protecting cultural heritage as a matter of overriding universal interest. It would be worthwhile to examine this question in greater depth. Given the profound gravity of the destruction and the crime, it may be appropriate to ask whether complicity and support - even if only moral or indirect, such as through endorsement - in cultural heritage destruction cases can be so readily downplayed.

⁷⁴ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-2784-Red, Trial Chamber V, Judgment, cit., para. 23 *et seq.*

⁷⁵ *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Appeals Chamber, 18 September 2024, para. 2. However, the Defence and the Prosecution discontinued their appeals against the guilty verdict. See *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Defence Notice of Discontinuance of Appeal against Trial Judgment rendered by Trial Chamber X on 26 June 2024, ICC-01/12-01/18, 17 December 2024; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Prosecution Notice of Discontinuance of its Appeal against the Trial Judgment of Trial Chamber X dated 26 June 2024, ICC-01/12-01/18, 17 December 2024. On July 2025, a panel of three judges of the Appeals Chamber completed the review concerning reduction of sentence from 10 ten years to twelve months. See *The Prosecutor*

the Court's continued inability to resolve fundamental questions regarding the legal interpretation and characterization of "attacks" and the requisite nexus with the existence of acts of violence against the adversary "whether in offence or defense". This unresolved interpretative tension risks undermining the Court's capacity to adjudicate future cases with clarity, as well as the preservation of the consistency of its jurisprudence. Moreover, upon revisiting prior jurisprudence, it becomes evident that the evidentiary thresholds established in *Al Hassan* were not inappropriately applied; the acquittal itself has been warranted on substantive grounds, notwithstanding the concerns previously expressed.

The critical points emerging from the *Yekatom and Ngaïssona* Trial Chamber V judgment will be examined in detail here, analyzed systematically point by point, and connected with the reflections developed so far, to assess their significance for the ICC's jurisprudence on attacks against cultural heritage. Most notably, it must be emphasized that Yekatom and Ngaïssona are the first individuals - following the landmark conviction in *Al Mahdi* for the destruction of mausoleums in Timbuktu - to have been found guilty by the ICC of war crimes under Article 8(2)(e)(iv), after a series of troubled and inconclusive decisions concerning similar factual patterns and legal issues. It must be assessed, however, whether the present judgment has provided the judges with an opportunity to clarify and systematize the unsettled interpretation of "attacks" and crimes against cultural heritage, or whether such an opportunity has, once again, been overlooked.

Regarding the specific counts adjudicated, Yekatom and Ngaïssona were convicted, among others, for the destruction of the Boeing mosque in December 2013, in the broader context of grave violations and persecution targeting the local Muslim population.⁷⁶ By contrast, Ngaïssona was acquitted on the charge relating to the destruction of the Bossangoa mosque,⁷⁷ arising from the 5 December 2013 attack on the town, as the Chamber was unable to determine responsibility due to insufficient evidence.⁷⁸ With respect to the destruction of the Boeing mosque, the Chamber carefully considered the distinction - also raised during witnesses' testimony - between an initial attack on the mosque and its subsequent destruction, carried out by civilians and *anti-Balaka* militias.⁷⁹

Beyond the details of this duality, however, the core issue for present purposes lies in the Court's reasoning. Trial Chamber V, after recalling the material elements of directing an attack against a building dedicated to religion under Article 8(2)(e)(iv),⁸⁰ consistently referred

v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Decision on the review concerning reduction of sentence of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18, Three Judges of the Appeals Chamber Appointed for the Review Concerning Reduction of Sentence, 23 July 2025. The case will only proceed to the reparations stage. See *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Order for Submissions on Reparations, ICC-01/12-01/18, Trial Chamber X, 13 December 2024.

⁷⁶ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-2784-Red, Trial Chamber V, Judgment, cit. para. 23, Count 6.

⁷⁷ *Ibidem*, Count 35.

⁷⁸ It is important to emphasize that only Ngaïssona was accused of destroying the Bossangoa Mosque. *Ibidem*, para. 2955: «[...] It further notes that there is no other evidence that supports P-2200's account as to the Anti-Balaka being responsible for the destruction of the central mosque. On the contrary, the Chamber notes that several witnesses testified to having heard that the civilian population of Bossangoa destroyed the mosque. Considering the evidence before the Chamber, it is unable to conclude who was responsible for the destruction of the central mosque of Bossangoa».

⁷⁹ *Ibidem*, para. 2624 *et seq.*

⁸⁰ *Ibidem*, para. 3810: «This crime requires that the following material elements be fulfilled: 1. The perpetrator directed an attack. 2. The object of the attack was one or more buildings dedicated to religion, education, art,

to its own jurisprudence, in accordance with established precedents, drawing upon previous cases addressing the same offence: *Al Mahdi*, *verbatim* «The jurisprudence of the Court is not settled as to when the ‘attack’ must have occurred. Trial Chamber VIII indicated that the first material element of Article 8(2)(e)(iv) of the Statute encompasses ‘any acts of violence against protected objects,’ without making any distinction as to whether the act was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group»⁸¹ *Ntaganda* and *Al Hassan*: «Other chambers - notably, Trial Chamber VI and Trial Chamber X - have considered that this war crime did require the attack to take place during the actual conduct of the hostilities».⁸²

Most revealing, however, is paragraph 3812 of the judgment, where the Chamber expressly recalled the Appeals Chamber’s position in *Ntaganda* (upholding Trial Chamber VI)⁸³ and conceded that, based on the Court’s findings: «there was no consensus as to how this term should be defined».⁸⁴ On the one hand, the Court candidly acknowledged its inability to resolve a legal conundrum of no small importance; on the other hand, given that the Boeing mosque was attacked and destroyed in the course of active hostilities, the Chamber considered it unnecessary to pronounce definitively on the broader interpretative controversy. In its own words: «the Chamber does not consider it necessary to address in this case whether, in order to qualify as a crime under Article 8(2)(e)(iv) of the Statute, an ‘attack’ must be directed during the actual conduct of the hostilities»⁸⁵

Why forgo such an opportunity? Even a brief engagement with the competing interpretative strands developed in *Al Mahdi* and *Ntaganda* could have contributed to systematizing a jurisprudence that remains unsettled. Given the scarcity of ICC cases addressing destruction of cultural heritage under Article 8(2)(e)(iv), a more courageous and forward-looking approach would have been desirable. While significant, the decision of Trial Chamber V is best regarded as a half-victory - not so much a step forward, but rather, a continuation of the interpretative ambiguity and lassitude this discussion has sought to highlight. The Chamber has, in effect, abdicated the responsibility to resolve the controversy, thereby foregoing an important opportunity for jurisprudential clarification.

5. Unpacking the Implications

The Court’s restrictive and fragmentary stance inevitably raises pressing concerns regarding ongoing conflicts involving intentional destruction, looting of cultural property,

science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives. 3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack».

⁸¹ *Ibidem*, para. 3812.

⁸² *Ibidem*.

⁸³ See *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 A A2, Appeals Chamber, Judgment, cit., paras. 1163-1169.

⁸⁴ *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, ICC-01/14-01/18-2784-Red, Trial Chamber V, Judgment, cit., para. 3813.

⁸⁵ *Ibidem*, para. 3814.

illicit trafficking, and targeting of cultural heritage. While the traumatic destruction of the Buddhas of Bamiyan in Afghanistan,⁸⁶ followed by the devastation witnessed in Syria and Iraq,⁸⁷ paved the way for a robust international response - culminating in the already comprehensively examined UN Security Council Resolution 2347(2017) - such efforts have nonetheless failed to prevent the continued and large-scale destruction of cultural heritage. Ukraine stands as an evident example, alongside Sudan, Lebanon, and Palestine.

A compelling perspective, however, emerges when considering the case of Ukraine.⁸⁸ Ukraine formally became a State Party to the Rome Statute of the International Criminal Court on 1 January 2025.⁸⁹ The extensive destruction of cultural heritage in Ukrainian territory and Russian-occupied regions, continuously documented and monitored by UNESCO,⁹⁰ raises the critical question of whether, in the future, perpetrators of crimes against cultural heritage will be effectively prosecuted, and how the Court will position itself in light of its current jurisprudential uncertainty. The significant challenges encountered in the cases mentioned above in establishing the “nexus” concerning the attacks against cultural property - coupled with the substantial evidentiary hurdles - could seriously undermine confidence in the Court's ability to adjudicate disputes on cultural heritage protection and may also weaken the effectiveness of international adjudication on these precise matters.⁹¹

The Policy on Cultural Heritage issued by the Office of the Prosecutor⁹² appears - albeit cautiously - to acknowledge the potential for prosecuting crimes against cultural heritage under the framework of crimes against humanity (Article 7, Rome Statute). Indeed, it explicitly commits to «explore and pursue all links between cultural heritage and crimes against humanity and charge crimes against or affecting cultural heritage as crimes against humanity whenever appropriate».⁹³ On the other hand, it does not thoroughly develop the

⁸⁶ F. FRANCIONI and F. LENZERINI, *The Destruction of the Buddhas of Bamiyan and International Law*, in *European Journal of International Law*, 2003, pp. 619-651; F. LENZERINI, *The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back*, in *Italian Yearbook of International Law*, 2003, pp. 131-145.

⁸⁷ M. FRIGO, *UN Security Council Approaches to the Global Safeguarding of Cultural Heritage: An Evolving Role in Preventing the Illicit Traffic of Cultural Objects*, in I. CARACCIOLO and U. MONTUORO (eds), *Preserving Cultural Heritage*, cit., p. 103 *et seq.*

⁸⁸ See L. KIRCHMAIR, and C. SCHÄFFER, *The War of Aggression Against Ukraine, Cultural Property and Genocide: Why it is Imperative to Take a Close Look at Cultural Property*, in *EJIL: Talk!*, 21 March 2022 (available at: <https://www.ejiltalk.org/the-war-of-aggression-against-ukraine-cultural-property-and-genocide-why-it-is-imperative-to-take-a-close-look-at-cultural-property/>, accessed 13 July 2025); J. POWDERLY and A. STRECKER, *Afterword: Heritage Destruction and the War on Ukraine*, in J. POWDERLY and A. STRECKER (eds), *Heritage Destruction, Human Rights and International Law*, Leiden, 2023, pp. 423-454; S. WHITE, *Heritage in War: International Criminal Responsibility for the Destruction of Cultural Heritage in Armed Conflict*, in G. MASTANDREA BONAVERI and M. M. SADOWSKI (eds), *Heritage in War and Peace*, Cham, 2024, pp. 267-285.

⁸⁹ ICC, *ICC welcomes Ukraine as a new State Party*, in *ICC News*, 2 January 2025 (available at <https://www.icc-cpi.int/news/icc-welcomes-ukraine-new-state-party>, accessed 14 April 2025).

⁹⁰ UNESCO, *Damaged Cultural Sites in Ukraine Verified by UNESCO*, in *UNESCO News*, 18 August 2025 (<https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco#:~:text=As%20of%2023%20January%202023,%2C%2019%20monuments%2C%2011%20libraries,> accessed 20 August 2025). Based on the latest assessment available: «As of 6 August 2025, UNESCO has verified damage to 508 sites since 24 February 2022 – 151 religious sites, 268 buildings of historical and/or artistic interest, 34 museums, 33 monuments, 18 libraries, 1 archive and 3 archaeological sites».

⁹¹ In line with the theorization offered by Y. SHANY, *Effectiveness of International Adjudication*, in *Max Planck Encyclopedia of International Procedural Law*, Oxford, 2019.

⁹² M. M. SADOWSKI, *Heritage Strikes Back*, cit.; K. WIERCZYŃSKA and A. JAKUBOWSKI, *The 2021 Policy on Cultural Heritage of the International Criminal Court*, cit.

⁹³ OTP, *Policy on Cultural Heritage*, cit., par. 61, p. 23.

argument that crimes against cultural heritage could amount to acts of genocide (Article 6, Rome Statute).⁹⁴ Therefore, the OTP Policy on Cultural Heritage remains a relatively weak instrument, performing as a set of prosecutorial guidelines rather than a substantive legal framework for prosecuting cultural heritage-related crimes.

In revisiting the discourse surrounding Ukraine, it is essential to highlight the informal meeting of the United Nations Security Council convened on July 15, 2022, by the Permanent Delegation of Albania to the United Nations, in collaboration with the Polish and Ukrainian delegations.⁹⁵ Utilizing the Arria Formula, this meeting was open to all Member States of the United Nations and aimed to address the profound destruction of Ukrainian cultural heritage resulting from Russian aggression. The proceedings of this meeting warrant attention for two principal reasons. First, the discussions encompassed a careful examination of verified data relating to the destruction and looting of Ukrainian cultural heritage. During the discourse, the terms “unlawful attacks” and “unlawful destructions” were described as prevailing tactics employed by the Russian military in its conduct of warfare, which, as argued by the parties, could encompass acts of “cultural erasure” and genocide.⁹⁶ Moreover, the Russian Federation faced direct accusations of engaging in the illicit smuggling and trafficking of movable cultural property from Ukrainian territory, ostensibly for financial gain. According to the Russian representatives, their military actions targeting Ukrainian cultural heritage were not intended to perpetrate deliberate acts of destruction or systematic looting of museum collections. Instead, they claimed to act in compliance with Article 4(1) of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954). The Russian Federation asserted that Ukraine had exploited its cultural property for military purposes, thus transgressing conventional norms and compelling the Russian military to intervene to prevent the potentially dangerous utilization of such heritage. As a result, the informal meeting of the Security Council on July 15, 2022, devolved into a predominantly political and highly polarized exchange. A subsequent informal meeting of the Security Council in May 2023, addressing the same topic, produced no significant outcomes.⁹⁷

Despite the reservations articulated regarding the effectiveness of the meeting in bolstering the protection and security of cultural heritage at a humanitarian level, set against the backdrop of polarizing terminological choices, the complexities inherent in today’s legal and international community discourse remain apparent. At the opening of the meeting, the ICC’s achievement in securing the first conviction for war crimes against cultural heritage in the *Al-Mahdi* case was recalled. In the context of the ongoing conflicts, is there a risk of

⁹⁴ K. WIERCZYŃSKA AND A. JAKUBOWSKI, *The 2021 Policy on Cultural Heritage of the International Criminal Court*, cit., pp. 381-384; on cultural genocide, see also P. G. FERRI, *Cultural Genocide*, in I. CARACCILO and U. MONTUORO (eds), *Preserving Cultural Heritage*, cit., p. 177 *et seq*; J. A. R. NAFZIGER, *The Responsibilities to Protect Cultural Heritage and Prevent Cultural Genocide*, in F. FRACIONI and A. F. VRDOLJAK (eds), *The Oxford Handbook*, cit., pp. 184-213.

⁹⁵ UNSC, *The Destruction of cultural heritage as a consequence of the Russian aggression against Ukraine*, Security Council Arria Formula meeting, New York, 15 July 2022; see also SECURITY COUNCIL REPORT, *Ukraine: Arria-Formula meeting*, in *What’s in Blue*, 14 July 2022 (available at <https://www.securitycouncilreport.org/whatsinblue/2022/07/ukraine-arria-formula-meeting-3.php> accessed 26 April 2025).

⁹⁶ *Ibidem*.

⁹⁷ UNSC, *Protection of Cultural Heritage in Armed Conflicts*, Security Council Arria Formula meeting, New York, 2 May 2023; see also SECURITY COUNCIL REPORT, *Arria-formula Meeting on the “Protection of Cultural Heritage in Armed Conflicts”*, in *What’s in Blue*, 2 May 2023 (available at <https://www.securitycouncilreport.org/whatsinblue/2023/05/arria-formula-meeting-on-the-protection-of-cultural-heritage-in-armed-conflicts.php> accessed 26 April 2025).

overreliance on past achievements? Perhaps. Addressing these questions will constitute a significant challenge.

6. Conclusion

The analysis sought to address the longstanding question of “how” this interpretive shift unfolded, the rationale behind the Court’s change in direction, and the potential consequences for future cases concerning the destruction of cultural heritage. To pursue this inquiry, the research aimed to reconstruct a “scheme” of the Court’s shifting positions - as well as its silences - relating them to other significant legal instruments that have undoubtedly reverberated throughout the ongoing debate.

The analysis of the ICC’s jurisprudence on attacks on cultural heritage reveals a persistent interpretative uncertainty that continues to undermine the Court’s capacity to adjudicate these crimes with clarity and predictability. The last *Yekatom and Ngaïssona* judgment ruled on by the Court demonstrates that crucial legal questions remain unresolved. The path forward must aim at definitively addressing these issues, reconciling the different provisions and interpretations.⁹⁸ A careful balancing approach could also respond to the emerging realities of contemporary conflicts, such as those in Sudan and Ukraine, where attacks on protected objects occur in highly complex and fluid operational environments. As a guiding and exemplary institution in the prosecution of crimes against the cultural heritage, the ICC should exclude blind reliance on established precedents; given the limited progress in the adjudication of crimes against humanity or genocide in this domain,⁹⁹ a positive step would, at a minimum, consist of systematically clarifying the legal framework for attacks against protected objects. Also, a concern may arise that protection could be restricted solely to objects deemed of ‘outstanding universal value’, particularly considering that the only relevant precedent before the Trial Chamber V judgment of July 2025 is the *Al Mahdi* case. Solving this interpretative lacuna would not only enhance the Court’s legitimacy and coherence but also provide crucial guidance. It remains to be seen what grounds of appeal might be raised concerning the Trial Chamber’s decision in the *Yekatom and Ngaïssona* case. In light of the context examined, it is clear that the ICC’s strict commitment to a conservative interpretation of “attacks” may create a *façade* of certainty, yet simultaneously restricts the capacity of justice to respond to cases characterized by significant dispute and complexity and stands in stark contrast to the 2021 OTP’s policy approach.

The current destructions in Ukraine and Sudan¹⁰⁰ raise serious concerns about the - potential? - “deprioritization” of cultural heritage protection at the ICC level. Amidst this

⁹⁸ As convincingly emphasized by E. KATZ, M. STERIO and J. WORBOYS, “Attacks” Against Hospitals and Cultural Property: Broad in Time, Broad in Substance, in *Lieber Institute West Point, Articles of War*, 17 November 2020 (available at <https://lieber.westpoint.edu/attacks-against-hospitals-cultural-property-broad/>, accessed 12 July 2025).

⁹⁹ OTP, *Policy on Cultural Heritage*, cit., paras. 78-88, pp. 30-34.

¹⁰⁰ As for the Ukrainian cultural heritage situation, see UNESCO, *Damaged cultural sites in Ukraine verified by UNESCO*, 2025 (available at <https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>, accessed 14 July 2025); As for Sudan, see SUDAN HERITAGE PROTECTION INITIATIVE (SHPI), *The Third Report: Cultural Heritage Situations in Sudan*, 2024 (available at <https://www.heritageforpeace.org/wp-content/uploads/2025/04/THE-THIRD-REPORT-CULTURAL-HERITAGE-SITUATIONS-IN-SUDAN.pdf>, accessed: 2 May 2025).

profound uncertainty - or, more precisely, judicial avoidance further confirmed by the Trial Chamber V judgement on the *Yekatom* and *Ngaïssona* case - key questions regarding the ICC's approach to rulings on the destruction of cultural heritage remain inadequately addressed. This has led to growing concerns about interpretative ambiguities, particularly concerning the definition of “attacks”, the evidentiary thresholds, and the problem that, for instance, the “pillage” of cultural heritage does not constitute an attack, as highlighted in the recent Policy Planning Initiative by the Public International Law and Policy Group on Ukraine.¹⁰¹ Should this trend continue, the Court's prominence and stability in adjudicating such matters may erode, further weakening the accountability of perpetrators and diminishing both the legal and symbolic weight of these crimes within international criminal law.

¹⁰¹ PUBLIC INTERNATIONAL LAW & POLICY GROUP and DAVIS POLK & WARDWELL LPP, *Prosecuting War Crimes Against Cultural Property in Ukraine*, 2025, pp. 16-18 (available at https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/678142a0e6d9c6463a6ea282/1736524449217/PIILPG+Recommendations+for+prosecuting+cultural+property+crimes+_for+public.pdf, accessed 3 May 2025): «These fine distinctions are worth considering in the context of Ukrainian prosecutions as Russian defendants may try to draw differences in an attempt to avoid guilty verdicts».