

r a s h í d

Research, Assessment and Safeguarding of the Heritage of Iraq in Danger



The ICC Office of the Prosecutor's
Draft Policy on Cultural Heritage

Analysis and Comment

About us

RASHID International is a worldwide network of archaeologists and cultural heritage experts dedicated to safeguarding and promoting the cultural heritage of Iraq, ancient Mesopotamia. We are committed to developing the history and archaeology of Iraqi cultures, for we believe that understanding the past is key to addressing the present and to building a prosperous future.

Much of Iraq's heritage has been lost forever. Militant groups have destroyed mosques, churches and shrines, smashed artifacts, bulldozed archaeological sites and illegally trafficked antiquities on an almost industrial scale.

Iraqi cultural heritage has suffered grievous and in many cases irreversible harm. To assist our Iraqi colleagues, we collect and share information, research and expert knowledge, work to raise public awareness, and both develop and execute strategies to protect heritage sites and other cultural property through international cooperation, advocacy and technical assistance.

RASHID International is registered as a non-profit organisation in Germany and enjoys charitable tax-exempt status under German law. We are an organisation in *special consultative status* with the United Nations Economic and Social Council since 2019.

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Cover Image

Nergal Gate, Nineveh (Iraq). Destroyed by Daesh during their occupation of Mosul.

Photo by Professor Dr. Rafal Kolinski. Used with permission.

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1 Executive Summary

On 23 March 2021 the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) published a ‘Draft Policy on Cultural Heritage’ (hereinafter ‘Draft Policy on Cultural Heritage’) dated 22 March 2021.¹ Following its publication the OTP opened a round of external consultations and requested that comments on the policy be submitted by 16 April 2021.

We find the Draft Policy on Cultural Heritage to be, in general, an excellent document, both well-crafted in a technical legal sense and detailing a strong and reasonable strategy to prosecute crimes against cultural heritage.

In Section 2 we highlight positive aspects of the Draft Policy on Cultural Heritage. The OTP’s cooperation with civil society, as expressed through an expert consultation in 2017, the ability to comment on the Draft Policy in the present external consultation and the strategic mention of civil society are most welcome. The explicit link between cultural heritage and human rights will be a boon to the OTP and analysts of international criminal law. We commend that the OTP acknowledges that groups and the international community can be victims of crimes against cultural heritage. One of the Draft Policy’s greatest strengths is its holistic definition of cultural heritage, which transcends the traditional focus on physical property and is better able to capture the complexity of culture. We note with appreciation the OTP’s intent to consider the ‘broadest possible scope of criminality’² and its willingness to conduct a cultural analysis of all of the Rome Statute’s provisions. We support the OTP’s interpretation that war crimes do not include a ‘great importance’ criterion. We strongly encourage the OTP’s consideration of crimes against cultural heritage as possible evidence of the special intent to commit genocide.

In Section 3 we discuss several issues that we feel require further attention by the OTP. We greatly appreciate the OTP’s efforts to add linked citations to open access materials and recommend that it consider citing scholarship with Digital Object Identifiers (DOI). The ‘fundamental rights’ basis of the crime of persecution should be understood to include all human rights, if grave violations have occurred, in line with the jurisprudence of the ICTY. We provide some additional context on heritage crimes and recommend that the OTP also investigate the illicit trade in antiquities, either as an accessory form of pillage or as a crime against humanity in its own right, with the Islamic State as an example. To assist in this effort we discuss the application of forensic traceable liquids. We further recommend consideration of jurisdiction based on the active personality principle to prosecute transnational actors. The listing system of the 1954 Hague Convention and its Protocols may prove useful in analyzing aggravating factors and command responsibility. The indictment practice of the ICTY is collected and presented for use by the OTP.

Based on Sections 2 and 3 we provide a number of recommendations in Section 4 and conclude with ideas for further reading in Section 5.

¹ Office of the Prosecutor, Draft Policy on Cultural Heritage, 22 March 2021, <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1579>>.

² OTP, Draft Policy on Cultural Heritage, para 30.

2 Positive Aspects

2.1 Cooperation with Civil Society

We commend the OTP for its strong stance and support of civil society participation in the administration of justice, particularly in the elaboration of the Draft Policy on Cultural Heritage, which included round table consultations with an external group of experts in 2017, the present external consultation and has been set down explicitly as a matter of strategy in the Draft Policy on Cultural Heritage itself.³

We are pleased to note specifically that the OTP is interested in working with Blue Shield International,⁴ an organization which we hold in the highest regard.

We would like to use this opportunity to offer the OTP and the Court our full assistance in carrying out its mission. The focus of RASHID International may be limited to Iraq, but our scholars have broad research interests and technical skills that transcend national and intellectual boundaries.

RASHID International unites some of the most skilled researchers and practitioners in the fields of archaeology and cultural heritage protection and would be pleased to make its knowledge and network available to the Court and the OTP in the interests of promoting the administration of justice. RASHID International is registered as a non-profit organisation in Germany and enjoys charitable tax-exempt status under German law. We are an organisation in *special consultative status* with the United Nations Economic and Social Council since 2019.

We welcome any and all inquiries at legal@rashid-international.org and will process all requests made by the OTP and the Court as priority matters.

2.2 Human Rights Link

The Draft Policy on Cultural Heritage reads:

28. The Office considers that attacks on cultural heritage may violate human rights. They destroy conditions that allow people — irrespective of association with national, ethnical, racial, or religious groups, without discrimination, to access, participate in and contribute to cultural life. In recent times, both during armed conflict and in peacetime, objects of cultural value have been damaged, desecrated, repurposed, or stolen, frequently with the aim of harming the people to whom they are intrinsically linked. The protection of both tangible and intangible cultural heritage therefore finds its reflection in international human rights norms and protections of human rights related to cultural heritage, in particular, the right of access to and enjoyment of all forms of cultural

³ OTP, Draft Policy on Cultural Heritage, paras 21, 94, 99 and note 149.

⁴ OTP, Draft Policy on Cultural Heritage, notes 138, 149

heritage, including the right to take part in cultural life, the right of minorities to enjoy their own culture and the right of indigenous peoples to self-determination and cultural heritage. The associated rights affected include freedom of expression, freedom of thought, conscience and religion, the right to education, economic rights, and the right to development.⁵

In its Draft Policy on Cultural Heritage the OTP provides clear acknowledgement of the link between cultural heritage and human rights, a position we strongly support. Traditional human rights analysis has long viewed culture and cultural heritage as the nemesis of human rights, an approach which, in its absoluteness, has had an aggregate negative effect on the protection and promotion of human rights, as certain matters were excluded from human rights protection without closer review.

The paradigm of individual human rights is as powerful and important to human welfare as ever, but certain elements of human dignity, especially the relationship of individuals with their wider society and their social past, can not be adequately protected by individual human rights alone. Human rights analysis, and in consequence international criminal law, needs to become more aware of the social and group dimension of individual rights and the fact that certain matters affecting a wide range of individuals can only be adequately protected by individual rights exercised in association with others and specific human rights exercised by chosen representatives at the group level.⁶

International law historically has focused on States as the main actors and representatives of human groups, often with the tacit understanding that nations are the only groups that truly matter. However, the composition of States does not always provide all identifiable and cohesive groups, especially minorities and indigenous peoples, with appropriate representation at the national level. To maintain international peace and security, the international system prioritizes stability by necessity. To prevent State fragility the founding of additional States to secure the rights of minorities and indigenous peoples is difficult and only feasible in extreme cases.

This ages-old problem in international relations can be ameliorated by extending the tried and true protection of human rights law and international criminal law to minorities, indigenous peoples and other identifiable sub-national groups. In this manner, group interests, particularly regarding the maintenance and protection of cultural heritage and group identity, can be acknowledged and transparently litigated against powerful actors under the rule of law.

International criminal law and the International Criminal Court's ability to provide justice in cases of severe violations of human rights are important pillars of the protection of international human rights and the modern rule of law. Through the Draft Policy's acknowledgement of cultural heritage and cultural rights as worthy of

⁵ OTP, Draft Policy on Cultural Heritage, para 28.

⁶ See also CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc E/C.12/GC/21, para 9.

protection and its efforts during the Al-Mahdi case⁷ the OTP has taken important steps in the right direction.

2.3 Acknowledgement of Victimhood

The Draft Policy on Cultural Heritage reads:

17. The Office further 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.⁸

We welcome the efforts of the OTP to state clearly that crimes against cultural heritage affect both human groups and 'an essential interest of all humankind and the entire international community'.⁹ For too long cultural heritage crimes have been considered 'victimless' and as a consequence have gone unpunished in spite of the irreversible damage they cause to members of human groups and humanity as a whole.

Notable in this regard is also the intent of the OTP to consider the 'broadest possible scope of criminality'.¹⁰ Other crimes that do not make specific mention of culture do have more clearly defined human victims and adding to the examination of these crimes a cultural analysis and the respect for cultural heritage will make it clearer to both the Court and the wider international community that yes, indeed, crimes against cultural heritage have victims. Already implemented in the Al-Mahdi case,¹¹ the idea of rendering criminals against culture liable and accountable for their crimes in a proportionate manner is of fundamental importance.

We would like to add that there exist recorded cases of deaths in relation to looting, although the available data is limited. For example, 25 people died in Egypt while engaging in illegal excavations, including an eleven-year-old boy, while in 2016, two site guards were killed during an attack on the archaeological site of Dayr al-Barsha, also in Egypt.¹² The most well-known instance of murder connected to looting was

⁷ ICC, Prosecutor v Al-Mahdi (Judgment and Sentence) ICC-01/12-01/15-171 (27 December 2016).

⁸ OTP, Draft Policy on Cultural Heritage, para 17.

⁹ OTP, Draft Policy on Cultural Heritage, para 17.

¹⁰ OTP, Draft Policy on Cultural Heritage, para 30.

¹¹ ICC, Prosecutor v Al-Mahdi (Judgment and Sentence) ICC-01/12-01/15-171 (27 December 2016).

¹² Neil Brodie et al, *Illicit Trade in Cultural Goods in Europe: Characteristics, Criminal Justice Responses and an Analysis of the Applicability of Technologies in the Combat against the Trade*, Final Report (European Commission 2019), p. 81.

the interrogation and beheading of renowned Syrian archaeologist Khaled al-Asaad by Islamic State militants, who ‘hung his mutilated body on a column in a main square of the historic site because he apparently refused to reveal where valuable artefacts had been moved for safekeeping’.¹³

2.4 Holistic Definition of Cultural Heritage

The Draft Policy on Cultural Heritage reads:

15. Specifically in this context, the Office broadly construes the term ‘cultural heritage’, to extend beyond cultural property and incorporate both a products and processes. It denotes a community’s sense of identity and belonging, and involves cultural resources, in both their tangible and intangible forms. Cultural heritage refers not only to physical forms of heritage, such as material objects and artefacts (including digital artefacts), but also to the practices and attributes of a group or society, that are inherited from past generations, maintained in the present, and bestowed upon future generations for benefit and continuity.

16. In particular, therefore, the Office will understand cultural heritage potentially to include monuments (such as architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings, and other combinations of features of cultural value); buildings or groups of buildings (which, because of their architecture, homogeneity or place in the landscape, are of cultural value); sites (human works), moveable objects (such as works of art, sculpture, collections, or other moveable property of cultural value), intangible cultural heritage (such as the practices, representations, expressions, knowledge, and skills that communities, groups, and in some cases individuals, recognise as part of their cultural heritage, together with the instruments, objects, artefacts, and cultural spaces associated therewith); and natural heritage (natural sites of cultural value, including certain landscapes or physical, biological, or geological formations).¹⁴

One of the Draft Policy’s greatest strengths is its holistic definition of cultural heritage, transcending the narrow focus on ‘cultural property’ of the 1954 Hague Convention¹⁵ and its two Protocols¹⁶ or ‘cultural objects’ of the 1995 UNIDROIT

¹³ Kareem Shaheen and Ian Black, *Beheaded Syrian scholar Refused to Lead ISIS to Hidden Palmyra Antiquities* (The Guardian, 19 August 2015) <<https://www.theguardian.com/world/2015/aug/18/isis-beheads-archaeologist-syria>>

¹⁴ OTP, Draft Policy on Cultural Heritage, para 15–16.

¹⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215.

¹⁶ Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215; 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 172.

Convention¹⁷. The priority of the purely physical has been the bedrock of many international instruments to date.

We strongly support this holistic definition applied by the OTP as it conceptually returns to the comprehensive vision of cultural heritage underlying the first international legal document entirely dedicated to the protection of culture — the 1935 *Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments* (Roerich Pact).¹⁸ The Roerich Pact, still in force and referenced in Article 36 of the 1954 Hague Convention, grants protection and neutrality inspired by the Red Cross to ‘historic monuments, museums, scientific, artistic, educational and cultural institutions’ (Article 1 of the Roerich Pact) and their personnel both in times of peace and in war.

Including all the above categories, Roerich aimed at protecting not only their tangible forms, but, long before the creation of UNESCO, called for the protection of intangible results of the work of the above institutions that need to be transmitted to future generations and other nations:

Culture belongs to no one man, group, nation or era. It is the mutual property of all mankind and the heritage of generations. It is the constructive creation of human endeavor. It transcends all obstacles, prejudices and in tolerances. It is the highest perception of Beauty and Knowledge. Without Culture there is no truth, no unity, no peace.¹⁹

This is further supported by the 2016 International Committee of the Red Cross report ‘People on War’, which documented that 72% of the 17,000 people polled agreed it was wrong to attack religious and historical monuments,²⁰ showing high levels of international awareness about the irreparable loss of cultural heritage that such attacks cause.

¹⁷ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 2421 UNTS 457.

¹⁸ Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact) (adopted 15 April 1935, entered into force 26 August 1935) 167 LNTS 289.

¹⁹ Nicholas Roerich, cited in Peter Barenboim and Naeem Siddiqi (eds), *Bruges, the Bridge between Civilizations* (Grid Belgium 2010), p. 48.

²⁰ ICRC, *People on War: Perspectives from 16 Countries* (5 December 2016) <<https://www.icrc.org/en/publication/people-war-perspectives-16-countries>>.

2.5 Relation of Culture and International Criminal Law

The Draft Policy on Cultural Heritage reads:

30. The Office applies a holistic approach to the consideration of crimes against or affecting cultural heritage at all stages of its operations. They may constitute crimes under the Statute or otherwise be relevant, for example, in the assessment of gravity, which takes into account the scale, nature, manner of commission and impact of the crimes; in the assessment of the contextual elements of the crimes; as evidence in establishing the intent or motivation of the perpetrators; and during sentencing. The Office aims at considering the broadest possible scope of criminality, taking guidance from both the specific and general provisions of the Statute while recalling the principle of legality requirements. This will enable it to present the multifaceted nature and impact of crimes against or affecting cultural heritage, both tangible and intangible.²¹

We are especially pleased to note that the OTP has given much thought to applying a holistic approach to the relation between culture and international criminal law. A narrow reading of the Rome Statute that gave attention only to provisions that contain an explicit textual reference to ‘culture’ or ‘cultural heritage’ would not serve the administration of justice. The OTP’s clear statement that ‘crimes against and affecting cultural heritage are a pervasive feature of the atrocities within the Court’s jurisdiction’²² is most welcome.

Many international criminal acts committed have cultural elements, cultural motivations and many-faceted culture-related dimensions that must be taken into account to understand the full extent of the criminality under review. The Shoah, the genocide committed by the Nazis against the Jews, is perhaps the most infamous example of the wide range of actions that criminals will take to destroy a human group, many of which targeted Jewish cultural heritage and religion in a manner that did not always include obvious international crimes.²³ Raphael Lemkin, the creator of the term ‘genocide’, documented many of these non-lethal policies in his extensive book *Axis Rule in Occupied Europe (1944)*. It is noteworthy that Lemkin himself took a far more holistic view of genocide than the later 1948 Genocide Convention²⁴. He wrote:

New conceptions require new terms. By ‘genocide’ we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is

²¹ OTP, Draft Policy on Cultural Heritage, para 30.

²² OTP, Draft Policy on Cultural Heritage, para 2.

²³ This is setting aside the fact that international criminal justice received its first thorough codification during the International Military Tribunal at Nuremberg.

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as tyrannicide, homicide, infanticide, etc. Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.²⁵ (emphasis in original)

2.6 War Crimes: Value Criterion

The Draft Policy on Cultural Heritage reads:

43. In prosecuting crimes under articles 8(2)(b)(ix) and 8(2)(e)(iv), the Office will seek to build upon the rich body of practice developed by the ICTY. In particular, the Office recalls the landmark conviction of Pavle Strugar for the shelling of Dubrovnik, a UNESCO World Heritage site, in violation of the customary international law reflections of articles 27 and 56 of the 1907 Hague Regulations. However, while naturally, attacks against cultural heritage of this distinction are particularly grave, the ICTY did not ‘require that the cultural property be of “great importance”’ for such attacks to be unlawful.

The OTP has stated in the Draft Policy on Cultural Heritage that Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute contain no additional ‘value’ criterion — such as the ‘great importance’ criterion mentioned in Article 1 of the 1954 Hague Convention — as a prerequisite of criminality.²⁶ We believe this to be the correct and only legally defensible approach to the interpretation of Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute.

The phrasing of Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute is quite different from Article 1 of the 1954 Hague Convention and rather clear in that it prohibits:

²⁵ Raphael Lemkin, *Axis Rule in Occupied Europe* (Carnegie Endowment for International Peace 1944), p. 79.

²⁶ OTP, Draft Policy on Cultural Heritage, paras 43–44.

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

In these provisions there is no textual mention of ‘great importance’ or of any other importance threshold. A specific dedication to a protected class of objects is sufficient. Furthermore, the chapeau of Article 1 of the 1954 Hague Convention is quite clear in that it is specifically intended to define the term ‘cultural property’ and to be a definition ‘[f]or the purposes of the present Convention’ alone. Even if the *travaux préparatoires* were to indicate otherwise, the ordinary meaning is the primary means of interpretation and supersedes the draft materials according to widely accepted customary international law as reflected in Articles 31 and 32 VCLT²⁷.

A key difference is also that Article 1 of the 1954 Hague Convention can be applied to ‘movable or immovable property’, whereas the war crimes in the Rome Statute only protect buildings. Logically one would expect that, if ‘cultural property’ within the meaning of Article 1 of the 1954 Hague Convention were meant by Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute, then its protection should also extend to movable items, which it clearly does not.

Had the drafters of the Rome Statute wished to define cultural heritage within Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute in the same manner as in the 1954 Hague Convention, they could have done so and used the terminology ‘cultural property’. That they did not speaks volumes.

In conclusion, we fully support the OTP in its interpretation of Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute.

2.7 Genocide: Heritage Destruction as Evidence of Special Intent

The Draft Policy on Cultural Heritage reads:

78. Crimes against cultural heritage occurring simultaneously with other acts targeting protected groups may provide evidence of specific intent (*dolus specialis*) of genocide. While attacks on cultural heritage do not per se constitute underlying acts of genocide — because acts of genocide are limited to those seeking the physical or biological destruction of a group — the targeting of a group’s cultural heritage may constitute evidence of the perpetrator’s intent to destroy that group.²⁸

We commend the OTP for explicitly stating its willingness to evaluate crimes against cultural heritage as possible evidence of the special intent to commit genocide and

²⁷ Vienna Convention on the Law of Treaties (adopted 22 May 1969, opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

²⁸ OTP, Draft Policy on Cultural Heritage, para 78.

strongly encourage assessing cases under this paradigm. This interpretation is in line with the jurisprudence of the Federal Courts of Germany, the European Court of Human Rights (ECtHR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ) and should be pursued vigorously.

RASHID International has explored the relationship between genocide and heritage destruction in detail elsewhere and wishes to recommend the following publications to the OTP:

- Sean Fobbe (ed), *Destroying the Soul of the Yazidis: Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis* (RASHID International/Yazda/EAMENA 2019) <<https://doi.org/10.5281/zenodo.3826125>>, pp 44–48.
- Sean Fobbe et al, *Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis* (2021) Asian Yearbook of Human Rights and Humanitarian Law. Forthcoming in September 2021.

3 Issues Requiring Further Attention

3.1 Linked Open Data

The Draft Policy on Cultural Heritage showcases excellent legal citation work. We especially appreciate that the OTP has gone the extra mile and drawn inspiration from linked open data to add hyperlinks to cited open access resources.

To build on this effort we would like to make the OTP aware of and recommend the Digital Object Identifier (DOI) system, per which scholarly publications are assigned unique digital identifiers that serve double duty as resolvable hyperlinks.²⁹ For example, the DOI ‘10.5281/zenodo.3826125’ uniquely identifies the 2019 RASHID International report *Destroying the Soul of the Yazidis: Cultural Heritage Destruction during the Islamic State’s Genocide against the Yazidis* and may also be used as a link like so:

<https://doi.org/10.5281/zenodo.3826125>

DOIs are intended to serve as the backbone of a system of stable long-term citation and are especially well-suited to the use in documents that benefit from professionally linked and stable citations, such as indictments in long-running criminal trials, court decisions and policy documents.

For example, the Draft Policy on Cultural Heritage cites the 2017 RASHID International report *The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights*, which is also available via the Digital Object Identifier <https://doi.org/10.5281/zenodo.3835894>. Citing the Digital Object Identifier could ensure the availability of the citation even if the United Nations restructures its web presence.

The accuracy of the citation and the availability of the report itself is, in our case, guaranteed by the DOI Foundation and CERN (an international organization dedicated to high-energy physics and the birthplace of the World Wide Web) for the entirety of its existence.³⁰ In uploading our research to the scholarly repository of CERN we cede control over its availability and ensure that it remains accessible for decades, even if RASHID International should dissolve or be unable to maintain its own web presence.

All publications of RASHID International are made available with individual stable DOI citations and are collected in our open access repository at:

<https://zenodo.org/communities/rashid-international/>

²⁹ DOI Foundation, *Factsheet: Key Facts on Digital Object Identifier System*, <<https://www.doi.org/factsheets/DOIKeyFacts.html>>

³⁰ CERN, About Zenodo, <<https://about.zenodo.org/>>

3.2 Persecution and Fundamental Rights

The Draft Policy on Cultural Heritage reads:

74. Crimes against or affecting cultural heritage can, alone or cumulatively with other acts, deprive persons of their fundamental rights, as required by article 7(1)(h) of the Statute, for persecution. These include, but are not limited to, the right to self-determination, which entails the right of peoples to ‘freely pursue their [...] cultural development’, the prohibition of discrimination and the right to religion in case attacks affect religious or sacred sites. If tangible cultural heritage is in private possession, the right to property can be infringed upon. Violations of the right to life, freedom from torture, inhumane and degrading treatment and other rights, can lead to the destruction of intangible cultural heritage, if they are committed on a large-scale or are directed against specific persons of importance for the community.³¹

We commend the OTP for taking the stance that ‘[c]rimes against or affecting cultural heritage can, alone or cumulatively with other acts, deprive persons of their fundamental rights’.³² This is in line with prevailing opinion in international law, for the International Military Tribunal at Nuremberg (IMT Nuremberg), the ICTY and the International Law Commission (ILC) viewed ‘the destruction of religious buildings as a clear case of persecution as a crime against humanity’.³³

We do, however, note that the OTP argues that specific human rights (e.g. the right to religion or the right to self-determination) are ‘fundamental’ in nature, from which would logically follow that there must also exist a list of human rights that is not fundamental in nature.³⁴ We strongly oppose this distinction between fundamental and non-fundamental human rights, which, additionally, is not in line with the jurisprudence of the ICTY.

For one, this interpretation of Article 7 (2) (g) of the Rome Statute would needlessly limit the human rights which could be called upon in service of prosecutions for the crime of persecution to a list of those which an international court has previously labelled ‘fundamental’. Especially those rights which are less often the subject of international litigation are naturally under-represented in such a list. Furthermore, this would endanger the widely accepted principle that human rights are ‘universal, indivisible and interdependent and interrelated’.³⁵

Instead we propose grounding this paragraph in the jurisprudence of the ICTY (both Trial and Appeals Chambers have weighed in on the issue), which ruled that violations of human rights represent a violation of ‘fundamental rights’ when these acts

³¹ OTP, Draft Policy on Cultural Heritage, para 74.

³² OTP, Draft Policy on Cultural Heritage, para 74.

³³ ICTY, *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T (26 February 2001), para 206.

³⁴ OTP, Draft Policy on Cultural Heritage, notes 92–97.

³⁵ UN World Conference on Human Rights (1993), Vienna Declaration and Programme of Action, para 5.

are ‘of an equal gravity or severity to the other acts enumerated [in the provisions concerning crimes against humanity]’³⁶. There are no separate lists of fundamental rights and human rights — the gravity of the violation is the defining characteristic of the crime of persecution.³⁷

3.3 Illicit Trade in Antiquities

The Draft Policy on Cultural Heritage reads:

57. The chaos of armed conflict is frequently associated with the appropriation of property for personal gain. This can have significant consequences for cultural heritage. For example, following the invasion of Iraq and the fall of Baghdad in 2003, it was estimated that thousands of irreplaceable artefacts were looted from the National Museum. Recent years have continued to see a lively trade in ‘conflict antiquities’. Such conduct may be organised, officially authorised and sanctioned, or sporadic and/or opportunistic. To date, no international criminal tribunal has yet prosecuted the systematic pillaging of cultural property. In deciding whether to pursue cases based principally on pillaging, the Office will take particular account of circumstances such as: the context surrounding the pillaging, the consequences for the victims, the number of persons impacted by the loss, and the value and unique meaning of the stolen property, including its cultural value.³⁸

The appropriation of property for private or personal use (pillage) is included in the Rome Statute as one of the instances of war crimes under Articles 8(2)(b)(xvi) and 8(2)(e)(v), while the general prohibition of pillage is mainstreamed through an extensive number of international legal instruments.³⁹ Significantly, the crime of pillage is ‘distinguished (...) by the requirement for the perpetrator to intend the appropriation for their “private or personal use”’.⁴⁰ This aspect is of fundamental importance as it illustrates the particular harm which this crime seeks to punish, namely ‘personal enrichment with a nexus to armed conflict, [which] can never be justified by military necessity’⁴¹ and should be condemned as such.

Unfortunately, as the OTP rightly notes, systematic pillage of cultural property has never been prosecuted before an international criminal tribunal.⁴² In the framework of the Draft Policy on Cultural Heritage, the OTP takes an important step forward in recognizing the seriousness of this crime and the significant consequences it can

³⁶ ICTY, *Prosecutor v Kupreškić et al* (Judgment) IT-95-16-T (14 January 2000), para. 619; repeated in ICTY, *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004), para 138.

³⁷ *Prosecutor v Brđanin* (Judgment) IT-99-36-T (1 September 2004), para 1031.

³⁸ OTP, Draft Policy on Cultural Heritage, para 57.

³⁹ OTP, Draft Policy on Cultural Heritage, note 56.

⁴⁰ OTP, Draft Policy on Cultural Heritage, para 58.

⁴¹ OTP, Draft Policy on Cultural Heritage, para 58.

⁴² OTP, Draft Policy on Cultural Heritage, para 57.

have for cultural heritage of a people and humanity as a whole. We hope that actions will follow words and that the International Criminal Court will be the first international criminal tribunal to see a successful prosecution of systematic pillage of cultural heritage.

In addition to the above, we recommend that the Office look not only to the act of pillage itself but also analyze the detrimental effect of the illicit trade in pillaged and looted objects as independent crimes against cultural heritage, with a view to assessing their human rights implications and criminality under the Rome Statute. Middlemen, financiers and purchasers are often the true driving forces and beneficiaries of pillage. These secretive actors in some cases jointly commit a crime (Article 25 (3)(a) Rome Statute), order, solicit or induce pillage (Article 25 (3)(b) Rome Statute), aid or abet the crime (Article 25 (3)(c) Rome Statute) and sometimes could be considered to be contributing in another manner (Article 25 (3)(d) Rome Statute). In specific cases it might also be possible to directly prosecute middlemen, financiers and certain purchasers as committing the crime of persecution, as we outline in Section 3.3.5.

3.3.1 Context

It has been widely documented that the trade in looted antiquities has flourished in recent decades, frequently leaving behind vast ‘lunar’ landscapes in archaeologically and historically rich countries torn by conflicts. These actions ‘can be organized, officially authorized and sanctioned, or sporadic and/or opportunistic’.⁴³ The looting occurs in numerous source countries (Iraq, Afghanistan, Egypt, Syria, Yemen, to name but a few), destroys the archaeological context and often damages the objects themselves.⁴⁴

For relatively small amounts of money,⁴⁵ looted objects are sold to professional dealers and middlemen who transport the goods towards transit countries or final destinations, while objects themselves arrive on the market with a long criminal record (violation of domestic export legislation, theft, fraud, counterfeiting, corruption, clear linkages with tax evasion and money laundering have also been evidenced over the past years).⁴⁶

⁴³ OTP, Draft Policy on Cultural Heritage, para 58.

⁴⁴ Simon Mackenzie and Penny Green, *Introduction: A Context for the Engagement of Criminology and Archaeology*, in Simon Mackenzie and Penny Green (eds), *Criminology and Archaeology: Studies in Looted Antiquities* (Hart Publishing 2009) p. 1.

⁴⁵ As compared to the final market prices for the artefacts, immediate pillagers receive not more than 1% of the total value, see Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: The Illicit Trade in Cultural Material*, (The McDonald Institute for Archaeological Research 2000) <<https://traffickingculture.org/app/uploads/2012/07/stealinghistory.pdf>> p. 13; Peter B Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, *International Journal of Cultural Property* (2013) 20(2), 113-153. DOI: 10.1017/S0940739113000015.

⁴⁶ Alesia Koush, *The Illegal Antiquities’ Traffic as a Form of Transnational Organized Crime*, Bruges Political Research Papers (College of Europe 2011) <<http://aei.pitt.edu/33458/>> p. 6.; Neil Brodie, *An American Tax Evader in London* (Market of Mass Destruction Blog, 31 December 2020) <<https://marketmassdestruction.com/2020/12/>>; World Customs Or-

3.3.2 Statistical Data and Financial Value

The proceeds are aimed at personal enrichment of the stakeholders involved and, even though it is impossible to provide reliable numerical data on the overall financial value of the illicit trade in cultural goods or its portion originating from conflict zones, ‘specialists do agree that this is one of the world’s biggest illegal enterprises’.⁴⁷ The lack of statistical data on the precise magnitude of this illegal trade does not, however, diminish its gravity and impact on local, national, regional and global cultural heritage.

3.3.3 Terrorism Financing

Many conflict areas, such as Iraq, Syria, Yemen, Libya and others, suffer from unprecedented looting of their archaeological heritage. Many of these territories are controlled by militant and terror groups. The interconnection between the trade in antiquities, drugs and arms trafficking and financing of terror organizations, such as Daesh, Taliban, Hezbollah and similar, has been frequently reported.⁴⁸ In its Resolution 2199 (2015), the United Nations Security Council also declared that looted and smuggled cultural heritage items from Iraq and Syria are used to support ISIL, ANF and other entities associated with Al-Qaida.⁴⁹

Furthermore, the ongoing Jaume Bagot case sets an important international legal precedent in terms of how the illegal trade in antiquities is treated. Jaume Bagot, an internationally renowned antiquities dealer from Spain, and his partner Oriol Carreras Palomar are accused of trading in Greek and Roman archaeological objects plundered in 2014 and 2015 from the cities of Albaida, Apollonia and Cyrene in Libya when the latter ones were controlled by Islamist militant groups, in the context of an ongoing military conflict. The formal charges against the two dealers include participation in terrorism financing, belonging to a criminal organization, dealing in stolen goods, concealment of contraband and document fraud/forgery for facilitating the sale of illicit antiquities. The Bagot case perfectly illustrates that the illegal trade in cultural goods is not only a serious transnational organized crime, but is also directly linked to terrorism financing.

ganization, <<http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/cultural-heritage-programme.aspx>>

⁴⁷ World Customs Organization, <<http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/cultural-heritage-programme.aspx>>

⁴⁸ L. Shelley, *Exploring the Financial Nexus of Terrorism, Drug Trafficking, and Organized Crime*, Statement, Subcommittee on Terrorism and Illicit Finance, US House Committee on Financial Services, 2128 RHOB, Washington DC, 20 March 2018; see also the documentary ‘Spotlight: Blood Antiques’ (LinkTV 2009); Hala Jaber and George Arbuthnott, *Syrians Loot Roman Treasures to Buy Guns* (The Times, 5 May 2013), <<https://www.thetimes.co.uk/article/syrians-loot-roman-treasures-to-buy-guns-q5z9fgzs9t0>>; Russell D Howard, Marc D Elliot and Jonathan R. Prohov, *IS and Cultural Genocide: Antiquities Trafficking in the Terrorist State* (Joint Special Operations University Press 2016) JSOU Report 16-11, <https://jsou.libguides.com/ld.php?content_id=51792012> p. 3.; FR Greenland, *Inside ISIS’ Looted Antiquities Trade* (The Conversation, 31 May 2016) <<https://theconversation.com/inside-isis-looted-antiquities-trade-59287>>.

⁴⁹ United Nations Security Council, Resolution 2199, 12 February 2015, UN Doc S/RES/2199.

Lynda Albertson, CEO of the Association for Research into Crimes against Art (ARCA), writes:

[W]hile much of our evidence of where the proceeds of transnational artefact crime finish is condemned by the market as being overly anecdotal, what we see clearly is from what regions illicit contraband flows. From there we can extrapolate that illicit antiquities originating in countries of conflict, from zones where terrorists or militants have a controlling stake territorially, are by extension, a viable revenue stream for terrorism.⁵⁰

3.3.4 The Circumstances of Pillage

The Draft Policy mentions a number of circumstances that need to be taken into account by the OTP in determining whether to pursue cases based principally on the pillage of cultural heritage.⁵¹ Below we provide a brief commentary on each set of circumstances and their particular relevance in the context of the illicit trade:

a) The context surrounding the pillaging. In both international and non-international conflict, the context that surrounds pillaging and looting of cultural heritage is one of extreme human loss. These conditions stimulate the desperate search for any source of income for sustaining one's own family and loved ones. This desperation results in very low compensation for even attractive archaeological finds. The profits, however, grow exponentially along the trafficking chain in the hands of middlemen and financiers, to which the OTP should pay special attention.

These conditions open up a multitude of opportunities for uncontrolled ransacking and looting, to which cultural and archaeological heritage often falls victim. In both cases, the context surrounding the pillaging in a conflict zone is by default aggravated by the element of personal enrichment with a nexus to armed conflict. This consideration should also be borne in mind when pursuing actors closer to the destination point of the trafficking chain. Unfortunately, the international market in archaeological artefacts continues to flourish, as the burden of proof lies with prosecutors and obtaining damning evidence is a challenge. Despite these difficulties, we provide an option in Section 3.4 to do so based on forensic traceable liquids. These difficulties are exponentially greater when a case concerns freshly looted archaeological artefacts that have never been recorded or registered.

b) The consequences for the victims are irreversible. Approximately 95% of the information related to an artifact is lost when it is improperly excavated. Once archaeological pieces are illegally excavated and covertly sold through channels of intermediaries and dealers, their traces are lost forever, except in rare cases of fortune. In spite of the often heard admonition by traders that the legal trade in antiquities helps save antiquities in conflict zones by selling them to 'proper private

⁵⁰ Lynda Albertson, *Illegal Chains which Mirror Legal Ones and Function in the Penumbra of the Legal Ones*, Art Crime Blog of the Association for Research into Crimes Against Art, 30 March 2018, <<https://art-crime.blogspot.com/2018/03/illegal-chains-which-mirror-legal-ones.html>>.

⁵¹ OTP, Draft Policy on Cultural Heritage, para 57.

hands', pieces sold on the market with no or false provenance become anonymous and disconnected from their contexts of origin, communities of belonging and the country they were found in. The local population and scholars are forever deprived of pieces of culture, history, knowledge and identity, which constitute fundamental elements of human dignity and human rights, all of which are already heavily compromised in a conflict zone.

c) The number of persons impacted by the loss, should, at a minimum, be considered as the totality of the local population that share a genuine connection to the culture in question. In many cases the scope of impact should be extended to humankind as a whole. The OTP has underlined the value of any cultural heritage to our shared sense of humanity.⁵² To reinforce this point we recall that the Preamble of the 1954 Hague Convention states:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection⁵³

3.3.5 Trafficking Culture as a Crime Against Humanity

The OTP has identified a number of human rights that are implicated when objects of cultural heritage are 'damaged, desecrated, repurposed or stolen, both in peace and conflict times',⁵⁴ for example:

the right to access to and enjoyment of all forms of cultural heritage, including the right to take part in cultural life, the right of minorities to enjoy their own culture and the right of indigenous peoples to self-determination and cultural heritage, the right to freedom of expression, freedom of thought, conscience and religion, the right to education, economic rights, and the right to development.⁵⁵

As we outlined in Section 3.2 we hold that all human rights, including the right to participate in cultural life, can be fundamental rights if they are violated to a degree that is equal to the gravity of other crimes against humanity. Prima facie this would mean that pillage, theft and illicit trafficking of cultural objects may also be subsumed under the heading of persecution, if all other conditions are met. The human rights approach applied by the OTP to the crimes against and affecting cultural heritage should also be extended to the crime of pillage, which is the source of the international illicit trade in archaeological artefacts.

⁵² OTP, Draft Policy on Cultural Heritage, para 3.

⁵³ 1954 Hague Convention, Preamble, Second and Third Recital.

⁵⁴ OTP, Draft Policy on Cultural Heritage, para 28.

⁵⁵ OTP, Draft Policy on Cultural Heritage, para 28.

While this may seem surprising at first, the Islamic State and other militants have made rather clear their intention to systematically destroy the cultural heritage, including movable heritage, of communities they have targeted in order to further their own ideology and demonstrate their cultural superiority.

The International Military Tribunal at Nuremberg, the ICTY and the International Law Commission (ILC) viewed ‘the destruction of religious buildings as a clear case of persecution as a crime against humanity’.⁵⁶ If the destruction of immovable cultural heritage can be the basis for the crime of persecution, so can the destruction of movable cultural heritage. Pillage and theft in most cases even equal destruction, as archaeological experts agree that approximately 95% of scientific and cultural information is lost when artifacts are improperly excavated. Where theft, pillage and trafficking are part of a widespread or systematic attack on a civilian population, such as conducted in Iraq and Syria by the Islamic State, they could conceivably be prosecuted as the crime of persecution.

Resolution 33/20 of the Human Rights Council also affirmed that ‘organized looting, smuggling, theft and illicit trafficking in cultural property could undermine the full enjoyment of cultural rights, and are contrary to international law and which may, in some instances, generate funds for the financing of terrorism’.⁵⁷

It is important that the OTP, if it wishes to take this stance, not only examine the conduct of persons physically involved in the direct acts of pillage, but also look to the middlemen, the financiers and the buyers. We are aware that the evidentiary challenges are immense, but this should not preclude investigating these avenues with an open mind to ensure that the OTP indeed pursues the ‘broadest possible scope of criminality’⁵⁸.

3.4 Forensic Traceable Liquids

We would like to make the OTP aware of certain technological advancements, specifically the use of high-tech forensic traceable liquids for the protection of antiquities and other valuable movable cultural property. Forensic traceable liquids are a recent — but well-tested — class of substances which can be applied to inorganic materials providing them with a ‘chemical fingerprint’ to ensure their provenance can be established without doubt even in cases of theft or pillage. Tracer technology for organic materials is currently being developed.

The University of Reading has played a major role researching measures involving innovative and unique chemical codes for artifacts that can only be seen under an ultraviolet black light. Current technology ‘causes no damage to stone, pottery, metal or glass and it can withstand explosive blasts, harsh solvents and extreme

⁵⁶ ICTY, *Prosecutor v Kordić and Čerkez* (Judgment) IT-95-14/2-T (26 February 2001), para 206.

⁵⁷ UN Human Rights Council, Resolution 33/20, 6 October 2016, UN Doc A/RES/33/20.

⁵⁸ OTP, Draft Policy on Cultural Heritage, para 30.

environmental conditions'.⁵⁹

Professor Roger Matthews, President of RASHID International and Professor at the University of Reading, together with Mr Ali Al-Makhzoomi (Project Administrator), Dr Amira Edan (Director of the Iraq Museum) and Mr Hashim Hama Abdullah (Director of the Slemani Museum) recently led an initiative that protected 270,000 objects with forensic traceable liquids in Iraq (206,000 objects in the Iraq Museum in Baghdad and 67,000 in Slemani Museum, Sulaimani/Kurdistan Region of Iraq).⁶⁰ He said:

The items in the museum collections we worked with are priceless, in particular as regards the immense cultural value they offer to Iraq.

This initiative effectively gives objects their own chemical fingerprint, allowing them to be traced if they fall into the wrong hands. It provides law enforcement agencies with the necessary evidence to arrest and prosecute those found in illegal possession of artefacts.⁶¹

This means that, in the event of a repeat of the 2003 situation in Iraq mentioned by the OTP,⁶² there would be a realistic chance to recover marked objects. We are aware of several projects in other Middle Eastern countries based on the same technology. Additional initiatives in Iraq and elsewhere are currently in the planning stages and will extend the protection of tracer technology to many more objects.

The use of forensic traceable liquids introduces risk into the criminal supply chain, aims to facilitate the repatriation of objects back to their homelands and, most importantly, creates a powerful deterrent to those in the First World who trade in dubious or unprovenanced historic artefacts.⁶³

Premier police agencies such as the FBI and Scotland Yard are capable of conducting appropriate forensic examinations and preparing evidence based on forensic traceable liquid technologies for use in court proceedings. We recommend that the OTP reach out to national police agencies with a view to sharing technical expertise on the use of forensic traceable liquid technology in prosecutions involving the theft, pillage or trafficking of cultural objects.

⁵⁹ University of Reading, Press Release, 29 April 2020 <<https://www.reading.ac.uk/news-and-events/releases/PR840554.aspx>>.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² OTP, Draft Policy on Cultural Heritage, para 57.

⁶³ Cultural Protection Fund Evaluation Report, CR-894-18 *Protecting Iraqi Cultural Heritage: Deterring Antiquities Looting and Trafficking* (British Council, Department for Digital, Culture, Media and Sport 2020) <<https://www.czap.org/protecting-iraqi-cultural-heritage>>

3.5 Return of Collected Digital Evidence

The Draft Policy on Cultural Heritage reads:

102. Another challenge pertains to the storage and preservation of evidence. It may not always be possible for the Office to physically collect identified evidence with regard to crimes against or affecting cultural property, although the preservation of such evidence is essential. Furthermore, removing cultural heritage for collection and preservation at the seat of the Court will often be impossible, as the close connection of a community with its cultural heritage might mandate that an item remains with that community. Consequentially, in addition to general methods of storing of evidence available at the seat of the Court, the Office may use the most advanced and innovative technology and preservation methods available. It may work with local, regional, and international partners as necessary to reconcile the need for collection, storage, and preservation of evidence with the views, customs, culture and religion of affected communities.⁶⁴

The OTP has stated that it is looking to collect and store evidence with the use of ‘the most advanced and innovative technology and preservation methods available’.⁶⁵ While this effort will be primarily conducted with a view to making use of such evidence during trials, we would also like to highlight the role that it can play in restorative justice.

Following the destruction of physical sites and objects any digital documentation of the original state of the site or object may be of great value to the local population, but also to the international community and researchers. In many cases, such as where oral history has been destroyed via the murder of its human custodians or a site was not adequately researched prior to its destruction, the evidence collected by the OTP may be the only record in existence.

We would request that the OTP give thought to establishing a process by which the gathered digital evidence is transmitted to the affected community as part of the international support to the community in their hour of need, perhaps involving the Trust Fund for Victims. Ideally this process would trigger automatically and proactively as soon as such evidence has been presented at trial or the trial has concluded and there is no risk of obstructing the administration of justice.

⁶⁴ OTP, Draft Policy on Cultural Heritage, para 102.

⁶⁵ OTP, Draft Policy on Cultural Heritage, para 102.

3.6 Active Personality Principle (Jurisdiction)

While the OTP has stated it will seek to explore ‘broadest possible scope of criminality’⁶⁶, it would appear that this is limited to substantive criminal law and general operational procedures. We would ask the OTP to consider explicitly extending this principle to jurisdictional analysis, in order to ‘investigate and prosecute those most responsible for crimes that fall under the Court’s jurisdiction’⁶⁷.

It is without question that jurisdictional issues are one of the thorniest problems facing the Court and the OTP, particularly where situations under review involve powerful States. This has often led to the OTP prioritizing situations in which the Court’s jurisdiction is either beyond doubt due to territorial links, State referral or is explicitly conferred by the UN Security Council. However, there are situations in which it is imperative to also consider the full ramifications of the active personality principle enshrined in Article 12 (2)(b) of the Rome Statute, per which the Prosecutor can exercise jurisdiction where ‘[t]he State of which the person accused of the crime is a national’ is Party to the Rome Statute.

This jurisdictional avenue is especially important in the prosecution of transnational organized crime networks, such as adherents of the Islamic State or actors in the illicit trade in antiquities. For many of these very serious crimes no territorial jurisdiction can be established (either as a matter of fact or as a matter of law) and no Security Council referral will be forthcoming. Nonetheless, the prosecution of, for example, Islamic State actors should be a priority for the OTP and all jurisdictional options should be explored in the interests of justice. For a selection of heinous acts committed by the Islamic State we refer the interested reader to Section 5 and our range of publications, which document such crimes in detail.

3.7 Listing as an Aggravating Factor

As we discussed above in Section 2.6, the OTP has stated that Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute contain no ‘value’ criterion, such as the ‘great importance’ criterion mentioned in Article 1 of the 1954 Hague Convention and we support this conclusion.⁶⁸ We further note with appreciation that the OTP will take cultural significance into account as follows:

46. On the other hand, both the degree of harm to the protected object and its cultural significance should be taken into account in assessing the gravity of the crime, relevant to sentencing but also potentially to the admissibility of the case under article 17(1)(d) of the Statute. In this context, the Prosecution notes that, while interruptions to the function of a protected object within the context of its society may constitute an important aspect of the harm caused, the gravity is not always *solely*

⁶⁶ OTP, Draft Policy on Cultural Heritage, para 30.

⁶⁷ OTP, Draft Policy on Cultural Heritage, para 30.

⁶⁸ OTP, Draft Policy on Cultural Heritage, paras 43–44.

limited to such anthropocentric concerns. As such, and consistent with the established framework of international law, attacks on objects which qualify as cultural property in the meaning of the 1954 Hague Convention and 1977 Additional Protocols, or even as world heritage in the sense of the World Heritage Convention, should be regarded as very serious *irrespective* of the regard in which may be held by their immediate society at the material time.⁶⁹

The World Heritage List is perhaps the most famous indicator of cultural significance known to the international community. There are, however, other international lists that the OTP should make note of, specifically the *International Register of Cultural Property under Special Protection*⁷⁰ and the *International List of Cultural Property under Enhanced Protection*,⁷¹ both of which are maintained by UNESCO. Special Protection is granted to ‘immovable cultural property of very great importance’ as per Article 8 (1) 1954 Hague Convention and Enhanced Protection is granted to ‘cultural heritage of the greatest importance for humanity’ (and therefore potentially also to movable heritage), as per Article 10 (a) 1999 Second Protocol to the 1954 Hague Convention. Enhanced Protection is the humanitarian-law analogue to World Heritage status.⁷²

This three-tier system of ‘great importance’ (cultural property), ‘very great importance’ (Special Protection) and ‘greatest importance’ (Enhanced Protection) may provide a useful *prima facie* assessment of the cultural significance of a site. It may also provide the Prosecution with arguments regarding command responsibility, as an attack based on military necessity may only be ordered by commanders of a certain rank, which increases with higher levels of protection. For example, an attack against sites under Enhanced Protection may only be ordered ‘at the highest operational level of command’, Article 13 (2)(c)(i) 1999 Second Protocol.

We believe these three tiers and the two international lists merit explicit mention in the Draft Policy on Cultural Heritage, as they are little known outside of expert circles and it would be wise to provide staff of the OTP with notice of their existence.

⁶⁹ OTP, Draft Policy on Cultural Heritage, para 46.

⁷⁰ International Register of Cultural Property under Special Protection <<http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Register2015EN.pdf>>

⁷¹ International List of Cultural Property under Enhanced Protection <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Enhanced-Protection-List-2019_Eng_04.pdf>

⁷² Sean Fobbe, *How to Protect Outstanding Cultural Heritage from the Ravages of War? Utilize the System of Enhanced Protection under the 1999 Second Protocol to the 1954 Hague Convention* (Antiquities Coalition Think Tank 2019) <<http://doi.org/10.5281/zenodo.3822202>>

3.8 Indictments before the ICTY

While the jurisprudence of international courts is, of course, of primary concern for the OTP, we also highly recommend reviewing the work of the Prosecutor's Office at the ICTY, as cultural crimes formed a powerful facet of the situation in former Yugoslavia. While we are certain that the OTP has already considered this angle, the Draft Policy on Cultural Heritage does not contain the word 'indictment' even once and should perhaps contain mention of prior indictments to assist junior prosecutors in finding all relevant materials.

Particularly the link between cultural heritage destruction and persecution has often been explored by the ICTY's Prosecutor. The following citations might be of use to the OTP in enhancing the Draft Policy (ordered chronologically):

- ICTY, Prosecutor v Blaškić (Second Amended Indictment) IT-95-14 (25 April 1997), para 6.3.
- ICTY, Prosecutor v Kordić and Čerkez (Amended Indictment) IT-95-14/2 (30 September 1998), para 37(k).
- ICTY, Prosecutor v Vasiljević (Amended Indictment) IT-98-32-PT (12 July 2001), paras 9, 40.
- ICTY, Prosecutor v Naletilić and Martinović (Second Amended Indictment) IT- 98-34-PT (28 September 2001), paras 34(c), 56.
- ICTY, Prosecutor v Krajišnik and Plavšić (Consolidated Amended Indictment) IT-00-39 and 40-PT (7 March 2002), para 19(k) and Schedule D.
- ICTY, Prosecutor v Stakić (Fourth Amended Indictment) IT-97-24-PT (10 April 2002), para 54 (3)(b).
- ICTY, Prosecutor v Slobodan Milošević (Amended Indictment 'Bosnia and Herzegovina') IT-02-54-T (22 November 2002), paras 35(j), 42.
- ICTY, Prosecutor v Brđanin (Sixth Amended Indictment) IT-99-36-T (9 December 2003), para 47(3)(b).
- ICTY, Prosecutor v Šainović et al (Third Amended Joinder Indictment) IT-05-87-PT (21 June 2006), paras 76, 77(d).
- ICTY, Prosecutor v Prlić et al (Second Amended Indictment) IT-04-74-T (11 June 2008), paras 39(c), 229.
- ICTY, Prosecutor v Karadžić (Prosecution's Marked-Up Indictment) IT-95-5/18-PT (19 October 2009), para 53.
- ICTY, Prosecutor v Mladić (Fourth Amended Indictment) IT-09-92-PT (16 December 2011), para 52.

4 Recommendations

1. Maintain Linked Open Data (e.g. hyperlinked citations) features and extend them to additional documents in the future.
2. Make use of the Digital Object Identifier (DOI) system to include stable long-term citations to academic scholarship in court documents.⁷³ DOIs are always resolvable as links via <https://www.doi.org>.
3. Clearly state that all human rights can be fundamental rights if violated to a sufficient degree and ground this in the jurisprudence of the ICTY.
4. Consider prosecuting widespread or systematic pillage and trafficking of cultural heritage as the crime of persecution.
5. Reach out to national police agencies (especially the FBI and Scotland Yard) with a view to sharing technical expertise on the use of forensic traceable liquid technology in prosecutions involving the theft or pillage of antiquities.
6. Design and implement a policy for returning digital records of cultural heritage assembled as trial evidence to the communities affected in line with principles of restorative justice.
7. Explore the *active personality principle* in Article 12 (2)(b) of the Rome Statute to bring persons to justice, particularly Islamic State actors and traders of illicit antiquities, who have committed crimes in the territory of States that are not Party to the Rome Statute or in cases where a territorial link can not be established due to evidentiary hurdles.
8. Consider listed status in the *International Register of Cultural Property under Special Protection* or the *International List of Cultural Property under Enhanced Protection* as an aggravating factor and explicitly mention these two legal measures to raise their visibility.
9. Give regard to the three-tier system of General Protection, Special Protection and Enhanced Protection under the 1954 Hague Convention and its two Protocols. Consider the rank requirements for each level when assessing command responsibility.
10. Incorporate references to indictments produced by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia in the Draft Policy on Cultural Heritage.

⁷³ DOI Foundation, *Factsheet: Key Facts on Digital Object Identifier System*, <https://www.doi.org/factsheets/DOIKeyFacts.html>

5 Further Reading

- Roger Matthews et al, *Heritage and Cultural Healing: Iraq in a post-Daesh Era* (2019) *International Journal of Heritage Studies*, 26 (2), pp 120–141 <<http://doi.org/10.1080/13527258.2019.1608585>>.
- Sean Fobbe (ed), *Destroying the Soul of the Yazidis: Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis* (RASHID International/Yazda/EAMENA 2019) <<http://doi.org/10.5281/zenodo.3826125>>.
- Sean Fobbe et al, *Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis* (2021) *Asian Yearbook of Human Rights and Humanitarian Law*. Forthcoming in September 2021.
- Roger Matthews et al, *Protecting Iraqi Cultural Heritage: Deterring Antiquities Looting and Trafficking*, Cultural Protection Fund Evaluation Report CR-894-18, (British Council and UK Department for Digital, Culture, Media and Sport 2020) <<https://www.czap.org/protecting-iraqi-cultural-heritage>>.
- Sean Fobbe, *How to Protect Outstanding Cultural Heritage from the Ravages of War? Utilize the System of Enhanced Protection under the 1999 Second Protocol to the 1954 Hague Convention* (Antiquities Coalition Think Tank 2019) <<http://doi.org/10.5281/zenodo.3822202>>
- Karel Nováček et al, *The Intentional Destruction of Cultural Heritage in Iraq as a Violation of Human Rights* (RASHID International 2017), <<http://doi.org/10.5281/zenodo.3835895>>
- Sean Fobbe, Mónica Palmero Fernández and Roger Matthews, *Third Cycle of the Universal Periodic Review: Concerning the Republic of Iraq*, (RASHID International 2019) <<http://doi.org/10.5281/zenodo.3871825>>.
- Roger Matthews et al, *The Implementation of Cultural Rights in Iraq* (RASHID International 2018) <<http://doi.org/10.5281/zenodo.3871029>>.
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Note: A revised version of the 2019 RASHID International report *Destroying the Soul of the Yazidis: Cultural Heritage Destruction during the Islamic State's Genocide against the Yazidis* has been accepted for publication by the peer-reviewed *Asian Yearbook of Human Rights and Humanitarian Law*. The Yearbook is edited by Professor Javaid Rehman, the current UN Special Rapporteur on the human rights situation in the Islamic Republic of Iran.