Cour
Pénale
Internationale

International
Criminal
Court

Le Bureau du Procureur
The Office of the Prosecutor

Policy on Cultural Heritage

June 2021

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Executive summary

1. The International Criminal Court ("ICC" or the "Court") was founded on the recognition "that all peoples are united by common bonds, their cultures pieced together in a shared heritage and concern'', and "that this delicate mosaic may be shattered at any time".[1] The Rome Statute ("Statute") confers upon the Court jurisdiction over crimes against or affecting cultural heritage,[2] complementing international law governing the protection of cultural heritage and associated human rights.[3] The protection of cultural heritage has been a long-standing concern of the international community, and is reflected in the governing instruments of the International Military Tribunals at Nuremberg,[4] the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),[5] and the Extraordinary Chambers in the Courts of Cambodia,[6] all of which have jurisdiction over particular crimes related to cultural heritage, specifically cultural property.

2. The concern for the protection of cultural heritage expressed in these and other international instruments has proven well founded: crimes against and affecting cultural heritage are a pervasive feature of the atrocities within the Court's jurisdiction. Wilful attacks on cultural heritage constitute a centuries-old practice that remains a feature of modern conflict. Recent examples include the targeting of historical monuments in Syria and Iraq, in particular those with strong symbolic and interreligious meaning; attacks directed against mausoleums of saints and mosques in Timbuktu, Mali, and the destruction at the alleged hands of "Da'esh" (ISIS) of two cultural sites on the United Nations Educational, Scientific and Cultural Organization's ("UNESCO''s) tentative list (the Assyrian capital cities of Nimrud and Nineveh). These all drew global attention to cultural heritage crimes,[7] as did the destruction of the ancient city of Palmyra and its surrounding areas.

3. The Office of the Prosecutor ("OTP" or the "Office") recognises cultural heritage as a broad concept which incorporates both tangible and intangible expressions

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[1] Statute, Preamble, para. 1.
[2] Statute, arts. 8(2)(b)(ix), 8(2)(e)(iv).
[3] *See, e.g.*, 1977 Additional Protocol I, art. 53; 1977 Additional Protocol II, art. 16; Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention ("1954 Hague Convention"), art. 4; 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("1999 Second Protocol"), art. 15.
[4] Charter of the International Military Tribunal ("IMT Charter"), art. 6(b).
[5] ICTY Statute, art. 3(d).
[6] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 7.
[7] 'The intentional destruction of cultural heritage in Iraq as a violation of human rights', Submission for the UN Special Rapporteur in the field of cultural rights, *Research Assessment & Safeguarding of the Heritage of Iraq in danger*, p. 7.

of human life. Crimes against or affecting cultural heritage have an impact on our shared sense of humanity and the daily lives of local populations. The Office is committed to addressing these crimes when they come under the Court's jurisdiction.

4. The Office notes that cultural heritage constitutes a unique and important testimony of the culture and identities of peoples, and that the degradation and destruction of cultural heritage — whether tangible or intangible — constitutes a loss to the affected communities, as well as to the international community as a whole.

5. The Office seeks to address alleged crimes against or affecting cultural heritage in all stages of its work: preliminary examination, investigation, prosecution, and — when so invited — reparations. Wherever evidence permits, the Office will seek to include charges for crimes directed at cultural heritage, and will also seek to pursue and highlight evidence in situations affecting cultural heritage.

6. Recognising the importance of investigating and prosecuting crimes against or affecting cultural heritage and to highlight the seriousness of these crimes, the Office first brought charges relating to cultural property in the *Al Mahdi* case in the Situation of Mali in September 2015. In September 2016, Mr Ahmad al-Faqi al Mahdi was convicted of the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments following his own admission of guilt. This case, focusing solely on crimes against cultural heritage, was symbolic, and sent a strong message that the intentional targeting of cultural heritage is a serious crime and should be duly punished, since it affects both the local community and the international community as a whole.

7. Where culture touches on aspects of the Office's undertakings, the Office is committed to acting with respect for cultural rights, recognising the many diverse cultures with which it interfaces in the course of its work. In this regard, the Office recalls that the Statute must be applied and interpreted consistently with international law, notably including human rights law, in accordance with article 21(3) of the Statute. Universal human rights principles will therefore guide the Office's activities concerning cultural heritage at all times.[8]

[8] See; *Report of the Special Rapporteur in the field of cultural rights*, 3 February 2016, UN Doc. A/HRC/31/59, para. 27 ("It is perhaps useful at this juncture to recall what cultural rights are not. They are not tantamount to cultural relativism. They are not an excuse for violations of other human rights. They do not justify discrimination or violence. They are not a licence to impose identities or practices on others or to exclude them from either in violation of international law. They are firmly embedded in the universal human rights framework."). *See also* UNESCO Universal Declaration on Cultural Diversity (2001), art. 2.

8. The Office recognises the particular difficulties associated with investigating crimes against or affecting cultural heritage, including issues relating to access to evidence. Consequently, to address the difficulties encountered in assessing the precise condition of the affected cultural heritage, the Office will look to diverse evidentiary sources. Furthermore, in its presentations of documentary evidence, the Office will look to videos and photographs, and explore the use of available technology, such as satellite imagery, 360°-presentation software, and 3-D imagery, to assist in the presentation of evidence. Where appropriate, the Court will also use evidence from local experts in affected communities, who act as depositories of knowledge on cultural heritage.

9. The Office further recognises that it can play a role in galvanising and supporting efforts to document and preserve cultural heritage at risk of destruction, and that it can benefit greatly from the efforts of those who are involved in protecting and promoting cultural heritage. The Office will seek to be an active member of this network, and may benefit from innovative practices that harness the latest technology to safeguard our shared past and to realise synergies across this community of practice. This may also assist in ensuring that the best-available evidence is preserved, should such sites become the subject of future investigations.

10. Noting that the ICC is complementary to national jurisdiction, as part of a shared effort further to address the impunity gap, the Office will continue to provide support and encouragement to national proceedings to hold individuals accountable for crimes against or affecting cultural heritage.[9]

11. In order to increase awareness of crimes against or affecting cultural heritage, the Office's public information activities will highlight the impact of cultural heritage destruction, especially on affected communities, and the way in which such destruction impedes the enjoyment of a range of human rights by the local communities. The Office will continue to develop its ability to communicate effectively with its stakeholders, with the victims and affected communities, and the general public.

12. The Office will seek to ensure that it has the necessary institutional capacity to conduct preliminary examinations, investigations and prosecutions of crimes against or affecting cultural heritage more effectively.

[9] As appropriate, the Office will also seek to support the efforts of local cultural rights defenders, including by investigating and prosecuting crimes committed against them, where such crimes fall within the Statute. *See further* *Report of the Special Rapporteur in the field of cultural rights*, 3 February 2016, UN Doc. A/HRC/31/59, paras. 73, 75.

13. The Office will monitor the implementation of this Policy.

Scope of the Policy

14. The two provisions of the Statute that are most directly applicable to attacks on cultural heritage are the war crimes set out in articles 8(2)(b)(ix) and 8(2)(e)(iv), which apply to international and non-international armed conflicts respectively. Among other objects, they proscribe intentionally directing attacks in armed conflict against certain types of buildings and monuments which fall within the (broader) definition of "cultural property". However, since "cultural property" itself only touches on the tangible aspects of human culture, these provisions still reflect only part of the protection which may be afforded by the crimes in the Statute to cultural heritage, as conceived in this Policy. Indeed, attacks against or affecting cultural heritage may constitute or relate to numerous other crimes under the Statute. The term "cultural heritage" thus more properly reflects the rich corpus of human achievement that the Statute and international law seek to protect. As such, this Policy utilises the more expansive term "cultural heritage" in order better to address the numerous ways in which attacks against or affecting cultural heritage may constitute or relate to diverse crimes within the jurisdiction of the Court, thereby enhancing the protection afforded to such aspects of human heritage.

15. Specifically in this context, the Office broadly construes the term "cultural heritage" to extend beyond cultural property and to incorporate both products and processes. This term 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 as including monuments, religious or secular (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 are of cultural value, either because of their architecture, homogeneity or place in the landscape, or because of their content, in the case of museums, archives or libraries; sites (manmade works) and movable objects (such as works of art, sculpture, collections, manuscripts, books, records or other movable property of cultural value); underwater cultural heritage, including shipwrecks and underwater archaeological sites; 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 natural or cultivated landscapes and physical, biological, or geological formations).

17. The Office further views cultural heritage as the bedrock of cultural identities, 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 the entire international community.[10] 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.

18. In its 2016 *Policy Paper on Case Selection and Prioritisation*, the Office committed itself to "paying particular attention to attacks against cultural, religious, historical and other protected objects",[11] in recognition that crimes against or affecting cultural heritage may lead to the deterioration or disappearance of any item of the cultural or natural heritage or constitute harmful impoverishment of the heritage of all nations of the world.[12] The Office emphasises that it can only address harm to cultural heritage insofar as it constitutes, or is relevant to, crimes within the Court's jurisdiction, notwithstanding other existing international obligations related to cultural heritage.

Objectives of the Policy

19. This Policy is intended to enhance the protection of cultural heritage by the Office, both through its publication and implementation in the Office's activities, and, as appropriate, by raising awareness of these issues with external partners, and through the Office being an active member of the community of practice dedicated to the protection of cultural heritage. Furthermore, the Office stresses that the Court's activities concerning cultural heritage must be exercised in a manner that comports with international law, the international law of armed conflict, and human rights law, which is in conformity with article 21, including paragraph (3), of the Statute specifically.

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[10] *See* 1954 Hague Convention, Preamble; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 14 November 1970, Preamble; Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972 ("1972 World Heritage Convention"), Preamble.

[11] *See* Policy Paper on Case Selection and Prioritisation, para. 46.

[12] 1972 World Heritage Convention, Preamble. *See also* Policy Paper on Case Selection and Prioritisation, para. 46.

20. The main objectives of this Policy are to:

(i) provide clarity and guidance to OTP staff in the application and interpretation of the Statute and the Rules of Procedure and Evidence ("RPE" or "Rules") at all stages of the Office's work in order effectively to investigate and prosecute crimes against or affecting cultural heritage;
(ii) help strengthen the protection and the prevention of harm to cultural heritage;
(iii) promote the work of, and to support, partners, including States, with a view to creating networks and synergies to coordinate efforts to protect cultural heritage, and to prevent and prosecute related crimes globally;
(iv) contribute, through its implementation, to the ongoing development of international jurisprudence regarding crimes against or affecting cultural heritage; and
(v) raise awareness regarding the importance of the protection of cultural heritage, including by supporting genuine national proceedings.

21. The Office stresses the importance of collaboration with external partners and experts in this field, as appropriate, to address crimes against or affecting cultural heritage. The Office has thus developed this Policy through a consultative process involving both staff and external actors, including UNESCO, the United Nations ("UN") Special Rapporteur in the field of cultural rights, and independent experts and scholars in the field.[13] This Policy incorporates input from experts, representatives of States, international organisations and civil society.

22. The Office publishes its policies in the interests of transparency, clarity, and predictability in the application of the legal framework.

23. This Policy focuses on strategic approaches of the Office and is subject to revision. It does not detail guidelines, procedures or standards for operations. This Policy does not give rise to legal rights.

[13] On 6 November 2017, the Prosecutor, Fatou Bensouda, and the then Director-General of UNESCO, Irina Bokova, signed a Letter of Intent formalising the collaboration between the Office of the Prosecutor and UNESCO, recognising that "an effective strategy to address the destruction of cultural heritage requires a multi-faceted and collaborative approach": 'The ICC Office of the Prosecutor and UNESCO sign Letter of Intent to strengthen Cooperation on the Protection of Cultural Heritage', 6 November 2017. On 10 July 2017, an Expert Consultations meeting was held at the seat of the Court.

I. General policy

24. The Office pays particular attention to the investigation and prosecution of crimes against or affecting cultural heritage. It endeavours to contribute to the prevention of these crimes by holding persons accountable, and, in so doing, by raising awareness of the importance of the preservation and protection of cultural heritage.

25. The Office respects, and is sensitive to, culture in all its richness and diversity, provided that such cultural practices "are not inconsistent with this Statute and with international law and internationally recognized norms and standards".[14] It recognises the impact of crimes against or affecting cultural heritage of distinct groups which place considerable value upon their heritage and can be deeply affected by such crimes. Equally, the destruction of cultural heritage has an impact on the international community as a whole. The Office will endeavour to examine the commission of such crimes with a view to investigating and prosecuting their perpetrators wherever such crimes occur, provided that the jurisdictional and admissibility preconditions are met.

26. Crimes against or affecting cultural heritage may be multifaceted in nature and be motivated by various reasons; they can have varying impacts on victims or groups of victims, including spiritually, economically, educationally, and by gravely undermining their enjoyment of a range of human rights, including cultural rights. The Office aims to identify these links during its analysis, investigations and prosecutions, and the impact — including any intergenerational impact — thereof.[15]

27. The victims of crimes against or affecting cultural heritage may include persons affected both directly and indirectly. They may also include legal entities that are direct victims of such crimes.[16] The impact of an attack on cultural heritage may transcend the socio-geographical space it occupies, resulting in a global impact.[17]

28. The Office considers that attacks on cultural heritage may violate not only international humanitarian law but human rights as well. Such attacks destroy conditions that allow people, irrespective of association with national, ethnical,

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[14] Statute, arts. 21(1)(c), 21(3).
[15] *See* ICC-01/12-01/15-214-AnxI-Red3 ("*Al Mahdi* Expert Report by the UN Special Rapporteur on Cultural Rights), p. 5.
[16] ICC RPE, rule 85. *See also* ICC-01/04-01/06-1119 ("*Lubanga* Decision on Victims' Participation"), para. 89.
[17] ICC-01/12-01/15-236 ("*Al Mahdi* Reparations Order"), para. 10. *See also* Committee on Economic, Social and Cultural Rights, *General Comment No. 21: right of everyone to take part in cultural life*, 21 December 2009.

racial, or religious groups, without discrimination, to access, participate in and contribute to cultural life. In recent times, both during armed conflict and in peace time, 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 rules on the protection of cultural property in international humanitarian law;[18] and in international human rights norms and protections of human rights related to cultural heritage,[19] in particular the right of 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.[20] 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.[21]

29. The Office will, in the analysis of crimes against or affecting cultural heritage, apply a child-sensitive[22] and gender-intuitive approach[23] that appreciates that certain types or aspects of cultural heritage may be targeted specifically because they hold a special value to a specific group, such as a particular sex, gender or age group. This would be in accordance with CEDAW (the UN Convention on the Elimination of All Forms of Discrimination against Women), which guarantees non-discrimination in all aspects of cultural life.[24]

30. The Office applies a holistic approach to the consideration of crimes against or affecting cultural heritage at all stages of its operations. These 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 their contextual elements; as evidence in establishing the intent or motivation of the perpetrators; and during

[18] *See*, *e.g.*, 1907 Hague Regulations, arts. 27, 56; 1977 Additional Protocol I, art. 53; 1977 Additional Protocol II, art. 16; 1954 Hague Convention, arts. 1, 4; 1999 Second Protocol, arts. 6, 15. Similar rules are also found in customary international humanitarian law.
[19] *See also* Statute, art. 21(3) (the application and interpretation of law must be in accordance with internationally recognised human rights).
[20] *See* Universal Declaration of Human Rights ("UDHR"), art. 27(1). *See also* International Covenant on Economic, Social and Cultural Rights ("ICESCR"), art. 15(1)(a); Report by the Special Rapporteur in the field of cultural rights, UN. Doc. A/71/317 (2016), para. 14.
[21] UDHR, articles 18, 26-27; International Covenant for Civil and Political Rights ("ICCPR"), arts. 18-19. *See also* Convention on the Rights of the Child, arts. 28-29; European Convention on Human Rights, arts. 9-10; and Protocol 1, arts. 1-2; American Convention on Human Rights, arts. 12-13, 26; ICESCR, arts. 13, 15; Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36, 22 March 2010.
[22] *See* Policy on Children.
[23] *See* Policy Paper on Sexual and Gender-Based Crimes.
[24] *See* Convention on the Elimination of Discrimination Against Women, art. 13(c). Convention on the Elimination of All Forms of Discrimination Against Women: https://www.legal-tools.org/doc/i0wehj/.

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.

31. The Office promotes co-operation in relation to the prevention of crimes against or affecting cultural heritage. It also encourages complementarity efforts, including by providing support to national authorities investigating these crimes, as appropriate.[25]

32. The Office will provide training to its staff on the investigation and prosecution of crimes against or affecting cultural heritage and raise their awareness of the complexities of the issues and the various facets in which the destruction of cultural heritage may manifest itself.

II. Regulatory framework

33. The Office's consideration of crimes against or affecting cultural heritage occurs within a prescribed regulatory framework, *viz*., the Statute, the Elements of Crimes, and the Rules. Although none of the crimes detailed therein explicitly refers to the destruction of cultural heritage or cultural property in such terms, there are several crimes that can be applied to such acts as set out herein.

34. Where appropriate, the Court may rely on applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict (article 21 of the Statute). Although the crimes set out in the Statute should be interpreted first and foremost on their own terms, a number of principles and rules of international law may assist in relation to cultural heritage, including those set out in the 1954 Hague Convention, the 1954 First Protocol, the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 World Heritage Convention, the 1999 Second Protocol, the 2003 UNESCO Convention, the Convention for the Safeguarding of Intangible Cultural Heritage,[26] and the core instruments of international humanitarian law (particularly the 1899 and 1907 Hague Regulations, the 1949 Geneva Conventions, and the 1977 Additional Protocols).[27]

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[25] *See* Policy Paper on Case Selection and Prioritisation, para. 7.
[26] *See* 2003 Intangible Heritage Convention.
[27] *See also* UN Declaration on the Rights of Indigenous Peoples on cultural heritage: https://www.legal-tools.org/doc/pan5w8/; https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/a)GeneralCommentNo3Thenat

35. The Court may further apply general principles of law derived from national laws or legal systems of the world, including, where appropriate, the national laws of States that would normally exercise jurisdiction over the crimes, provided that those principles are not inconsistent with the Statute, international law, or internationally recognised norms and standards.[28] These general principles may potentially assist in multiple ways relevant to cultural heritage, including in determining what qualifies as cultural heritage and informing recommendations as to the means and modalities of reparations for victims of crimes which affect cultural heritage.

36. Article 21(3) of the Statute is particularly relevant to the Office's work as regards crimes against or affecting cultural heritage. It mandates that both the application and interpretation of the Statute must be consistent with internationally recognised human rights and "without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".

37. The Statute confers upon the Court jurisdiction over various crimes against or affecting cultural heritage, where these constitute or form part of war crimes, crimes against humanity, genocide, or the crime of aggression. The Office will ensure that a robust approach is applied in the investigation and prosecution of crimes against or affecting cultural heritage to give full effect to the provisions enunciated within the Statute, the Elements of Crimes, and the Rules.

38. Consequently, the Office will:

(i) Apply and interpret the Statute consistently with the sources of law set out in article 21, including those relating to cultural heritage and to internationally recognised human rights;
(ii) Consider and evaluate the impact of crimes against or affecting cultural heritage on the exercise of internationally recognised human rights;
(iii) Seek to gain insight into crimes against or affecting various forms of cultural heritage, including any links between them, and how they may — individually or collectively — play a role in complex forms of criminality; and
(iv) Undertake its work in a manner that is culturally sensitive and respects the role that cultural heritage plays for both local communities and

ureofStatesParties'obligations(article2,para1)(1990).aspx. *See also* references to cultural heritage in the UN Declaration on the Rights of Indigenous Peoples, including articles 5, 8, 11, 14(3), 15 and 31.
[28] Statute, art. 21(1).

humanity, provided that such cultural heritage is consistent with internationally recognised human rights.[29]

39. The following analysis highlights the provisions in the Statute which may be relevant to the protection of cultural heritage. The Policy endeavours to address various ways in which cultural heritage could be affected by the crimes within the jurisdiction of the Court. However, the Office notes that the two provisions which are most directly applicable to cultural heritage (and which have already been applied in several cases to have come before the Court) are the war crimes in articles 8(2)(b)(ix) and 8(2)(e)(iv) concerning certain cultural property.

a) War crimes: article 8

40. Crimes against or affecting cultural heritage are often committed in the context of an international or non-international armed conflict. Indeed, some of the first international protective measures for cultural property developed from international humanitarian law, such as the 1899 and 1907 Hague Regulations. *Ad hoc* tribunals such as the ICTY reinforced these norms with criminal prosecutions.

41. War crimes fall under the Court's jurisdiction pursuant to article 8 of the Statute, and at present may offer the most straightforward means to address intentional harm to cultural heritage, not least since it is well established that these crimes not only address violence to the person but also to property.[30] In this regard, relevant war crimes under article 8 fall into five broad categories: the directing of attacks against certain protected objects; the directing of attacks against civilian objects; the destruction or seizure of property (of all kinds) belonging to certain persons; the appropriation of property for private or personal use (pillage); and other crimes which may nonetheless indirectly relate to cultural heritage. Only the first of these categories deals specifically with crimes committed against some forms of cultural property, but the provisions contained in all the categories are potentially relevant to the protection of cultural heritage more broadly, as this may form the context to the conduct in question, or may be adversely affected as a result of such conduct.

[29] *See* Statute, art. 21.

[30] *But see* ICC-02/04-01/15-1762-Red ("*Ongwen* TJ"), para. 2733 (noting that the underlying act of persecution as a crime against humanity may be satisfied by severe deprivation, contrary to international law, of the right to private property). The ICTY has extensively prosecuted attacks on cultural property as an underlying act of persecution, such as in *Brđanin* and *Stakić* (primarily mosques and churches), and *Šainović* and *Đorđević* (Kosovo Albanian cultural monuments and sacred sites).

i. Directing attacks against protected objects: articles 8(2)(b)(ix) and 8(2)(e)(iv)

42. Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute directly protect certain types of cultural property, in international and non-international armed conflicts respectively, through a specific prohibition of intentionally directing attacks against certain buildings, provided they are not military objectives. Specially protected buildings include, relevantly, buildings dedicated to religion, education, art, science, or charitable purposes, and historic monuments.[31] Articles 8(2)(b)(ix) and 8(2)(e)(iv) represent "a more specific crime addressing attacks against cultural property as a subset of civilian objects, reflecting the recognition that cultural property has significance additional to other civilian objects".[32] Accordingly, when appropriate, these crimes may be charged in preference to other potentially applicable crimes in order to express the particular nature of the criminality.

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 which was reinvigorated 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 attacks against cultural heritage of this distinction are naturally particularly grave,[33] the ICTY did not "require that the cultural property be of 'great importance'" for such attacks to be unlawful.[34]

44. The ICTY's approach is consistent with the plain terms of articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute, which describe the specially protected objects using the broad terminology of the 1907 Hague Regulations, and do not include the more

[31] Borrowing in part the approach of the 1972 World Heritage Convention, in article 1, "monuments" may be defined broadly as "architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features". Consistent with the other objects protected in articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute, however, there is no requirement for a monument to be "of outstanding universal value".

[32] *See* S. Brammertz *et al.*, 'Attacks against cultural heritage as a weapon of war: prosecutions at the ICTY', [2016] 14(5) *Journal of International Criminal Justice* 1143 ("Brammertz *et al.*"), pp. 1152-1153.

[33] *See*, *e.g.*, *Jokić* SJ, paras. 51-53.

[34] Brammertz *et al.*, pp. 1153-1154 (citing *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgment, IT-95-14/2-A, 17 December 2004, para. 92). In this fashion, the *Kordić* Appeal Judgment overrules any contrary dicta from Trial Chambers that the ICTY's jurisdiction under article 3(d) of its Statute was limited to property protected by the 1954 Hague Convention and/or the 1977 Additional Protocols: *Strugar* TJ, paras. 307, 312, 327 (requiring that the property constituted the "cultural or spiritual heritage of peoples", which it did on the facts); *Jokić* SJ, para. 67 (declining to aggravate sentence based on the protection of property under the World Heritage Convention because "this special status of the Old Town has already been taken into consideration in the definition and evaluation of the gravity of the crime").

restrictive qualifications included in the 1954 Hague Convention and the 1977 Additional Protocols (heritage of a "people").[35]

45. Likewise, the ICTY's recognition that customary international law prohibits intentional harm to specially protected objects — regardless of the degree to which they are controlled by a party to the conflict — is consistent with the approach of the Court in *Al Mahdi*. This took the view that "attack" under articles 8(2)(b)(ix) and 8(2)(e)(iv) had a special meaning, including acts directed against protected objects under the control of a party to the conflict, and not merely those under the control of the adverse party. In this way, it would seem that "attack" for the purpose of articles 8(2)(b)(ix) and 8(2)(e)(iv) may be defined differently from other 'conduct of hostilities' offences in articles 8(2)(b) and (e). While the *Ntaganda* Trial Chamber declined to follow *Al Mahdi* on this point,[36] and this led to a wide-ranging judicial discussion among members of the *Ntaganda* Appeals Chamber, the Appeal Judgment ultimately contains no majority overturning the legal principles recognised in *Al Mahdi*.[37] While respectful of the judicial opinions which have been rendered, the Office therefore remains of the view that *Al Mahdi* was correctly decided. In the ordinary exercise of its mandate, and subject to judicial guidance, it will seek to clarify the law further in this respect.

46. Furthermore, articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute in fact exceed the degree of protection recognised by the ICTY, in that there is no requirement for proof of actual damage once an attack has been directed against a protected object contrary to articles 8(2)(b)(ix) and 8(2)(e)(iv).[38] The term "directing an attack" implies that it is sufficient that the act was launched against a protected building.[39] The occurrence of actual damage is not required.

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[35] While the *Ntaganda* Trial Chamber suggested that the "special status" of a protected object may be relevant in assessing the legal framework under articles 8(2)(b)(ix) and 8(2)(e)(iv), this was appealed against by the Office: ICC-01/04-02/06-2359 ("*Ntaganda* TJ"), para. 1136 (fn. 3147). The Appeals Chamber did not rule whether or not the Trial Chamber was correct, even though a majority of the Appeals Chamber considered for other reasons that the Trial Chamber had erred: *see generally* ICC-01/04-02/06-2666-Red A A2 ("*Ntaganda* AJ"), paras. 1163-1169. Nor, in any event, does doubting the approach of the *Ntaganda* Trial Chamber on this issue imply that the gradations in status of 'cultural' objects are not potentially valuable within the broader framework of international law, especially given the various obligations associated with the protection of cultural property and cultural heritage, beyond armed conflict; it merely says that they are not relevant as such to *liability* under articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute. They may, of course, be relevant to the *gravity* of such offences: *see below*, para. 47.

[36] *See* *Ntaganda* TJ, para. 1136.

[37] *See generally* *Ntaganda* AJ, paras. 1163-1164, 1169; ICC-01/04-02/06-2666-Anx1 ("Separate Opinion of Judges Morrison and Hofmański"); ICC-01/04-02/06-2666-Anx5-Corr ("Partly Concurring Opinion of Judge Eboe-Osuji"), paras. 103-137; ICC-01/04-02/06-2666-Anx4 ("Separate Opinion of Judge Bossa"). The dissenting opinion of Judge Ibañez Carranza is contained in the body of the main judgment: *Ntaganda* AJ, paras. 1165-1168.

[38] *Compare* *Strugar* TJ, paras. 308, 312.

[39] *See* ICC-01/12-01/15-84-Red ("*Al Mahdi* Confirmation Decision"), para. 43. *See also* Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 237.

47. Both the degree of harm to the protected object and its cultural significance should, however, be taken into account in assessing the gravity of the crime, as this relates not only 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* 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, may be regarded as particularly serious, *irrespective* of the regard in which such objects may be held by their immediate society at the material time.

ii. Other forms of unlawful attack: articles 8(2)(b)(ii) and 8(2)(b)(iv)

48. Articles 8(2)(b)(ix) and 8(2)(e)(iv) are deemed *lex specialis*, because they prohibit the intentional directing of attacks against certain kinds of civilian objects which in some cases constitute cultural property.[40] It follows that any tangible cultural property or heritage which does *not* constitute a building dedicated to religion, education, art, science, or charitable purposes, or a historic monument, may still be a civilian object, and consequently it may be a crime under article 8(2)(b)(ii) of the Statute — the *lex generalis* — intentionally to direct an attack against it.[41]

49. Furthermore, even if such an object is only incidentally damaged as a consequence of an attack, this may still be a crime under article 8(2)(b)(iv) if the perpetrator knew that this damage would be clearly excessive in relation to the concrete and direct overall military advantage anticipated — in other words, that the damage would be disproportionate.[42] This will be assessed, among other considerations, in light of the cultural significance of the object in question.[43]

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[40] *See* *Strugar* TJ, para. 302.

[41] A civilian object is any object which is "not a military objective": 1977 Additional Protocol I, art. 52(1). A "military objective" is any object which, by its nature, location, purpose, or use, makes an effective contribution to military action and whose total or partial destruction, capture, or neutralisation, in the circumstances at the time, offers a definite military advantage: 1977 Additional Protocol I, art. 52(2).

[42] Article 8(2)(b)(iv) of the Statute is worded differently from its analogue in treaty and customary international humanitarian law: *see, e.g.*, 1977 Additional Protocol I, art. 51(5)(b). The Office does not consider that the wording of article 8(2)(b)(iv) necessarily serves to heighten the applicable threshold. However, in any event, article 10 of the Statute establishes that article 8(2)(b)(iv), among other provisions, does not limit or prejudice in any way existing or developing rules of international law for purposes other than the Statute.

[43] *See, e.g.*, R. O'Keefe *et al.*, *Protection of Cultural Property: Military Manual* (Paris and San Remo: UNESCO and International Institute of Humanitarian Law, 2016), para. 114. ("As applied to cultural property, this proportionality calculus involves qualitative as much as quantitative considerations. The measure of incidental damage to be caused to cultural property is a question not just of cubic metres but also, crucially, of the cultural value of the object, building or site […] Since elements of this cultural

50. Since articles 8(2)(b)(ii) and (iv) are general 'conduct of hostilities' offences, and irrespective of the question as to the proper interpretation of articles 8(2)(b)(ix) and 8(2)(e)(iv),[44] the targeted object cannot be under the control of the party to the conflict to which the perpetrator is affiliated.[45]

51. It is also noteworthy that articles 8(2)(b)(ii) and (iv), which apply to international armed conflicts, have no counterparts in the Statute in article 8(2)(e), which applies to non-international armed conflict. This apparent jurisdictional lacuna is unfortunate and unexplained, since it is beyond question that the customary international law of non-international armed conflict likewise acknowledges the crimes of intentionally directing attacks against civilian objects and intentionally launching disproportionate attacks.[46] It is not yet clear whether similar conduct in non-international armed conflict might be permissibly charged under article 8(2)(e)(i), which generally punishes intentionally directing attacks against civilians and the civilian population, and which must be interpreted within the established framework of international law.[47]

iii. Destruction or appropriation of property as a grave breach of the Geneva Conventions, and destruction or seizure of property of the adverse party to the conflict: articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii)

52. Relevant conduct against cultural property may also be charged through articles 8(2)(a)(iv), 8(2)(b)(xiii) or 8(2)(e)(xii) of the Statute. Moreover, these crimes are not specific to cultural property, but instead reflect the general prohibition of destroying or appropriating *any* property, provided it may be considered to be protected under applicable law.[48] In particular, these crimes may be relevant to

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heritage are very often irreplaceable, only the promise of very considerable concrete and direct military advantage, in many cases overwhelming, will in practice be enough.") This document may be regarded as reflecting customary international law: Dissenting Opinions of Judge Pocar, *Prosecutor v. Prlić et al.*, Appeal Judgment, Volume III, IT-04-74-A, 29 November 2017 ("*Prlić* AJ, Dissenting Opinion of Judge Pocar"), para. 16.

[44] *See above*, para. 45.

[45] *See* 1977 Additional Protocol I, art. 49(1) (defining an "attack" as an "act[] of violence against the adversary, whether in offence or in defence").

[46] *See, e.g.*, ICRC, *Customary International Humanitarian Law*, rules 7 (concerning attacks on civilian objects in both international and non-international armed conflict), 14 (concerning disproportionate attacks in both international and non-international armed conflict), and 156 (criminal responsibility for serious violations of international humanitarian law in both international and non-international armed conflict).

[47] *See* ICC-01/04-02/06-1962 OA5 ("*Ntaganda* Jurisdiction AJ"), paras. 53-54.

[48] The ICTY also charged the widespread destruction of religious and similar buildings, as part of campaigns of 'ethnic cleansing', on the basis of the same international treaties underlying articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii) of the Statute — such as the 1907 Hague Regulations, Geneva Convention IV, and Additional Protocol I — but often did so as an underlying act of persecution, a crime against humanity. In this context, it did not apply an 'adverse party' requirement: *see, e.g.*, *Prosecutor v. Karadžić*, Public Redacted Version of Judgement Issued on 24 March 2016, IT-95-5/18-T, 24 March 2016, paras. 530-534. *See also* 1907 Hague Regulations, art. 56.

the destruction of movable cultural property, which may be more difficult to charge under other crimes, as well as to appropriations which are not for private or personal use (for example, for property which is requisitioned or seized by a party to the conflict rather than for personal gain, but contrary to international law), and are therefore not covered by the crime of pillage.

53. In international armed conflict, article 8(2)(a)(iv) applies to "protected" property under the Geneva Conventions (principally, all real or personal property in occupied territory),[49] and article 8(2)(b)(xiii) applies to "the enemy's property".[50] Similarly, in non-international armed conflict, article 8(2)(e)(xii) applies to the property of the "adversary". This does not only mean persons who have actively allied themselves with the adverse party to the conflict (relative to the perpetrator), such as through membership of the adverse party's armed forces, but also those whom the perpetrator merely perceives to be affiliated to the adverse party.[51]

54. For the purpose of article 8(2)(a)(iv), the destruction or appropriation must have been "extensive and carried out wantonly". This requirement is to be assessed on a case-by-case basis[52] — and may, in some circumstances, even be satisfied by a single act[53] — but does not, in any event, apply to article 8(2)(b)(xiii), which may be residually applicable. Nor does any such requirement apply in non-international armed conflict, under article 8(2)(e)(xii).

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[49] *See, e.g.*, Geneva Convention IV, art. 53. Probably less relevantly, *see also, e.g.*, Geneva Convention I, arts. 19 (fixed medical establishments and mobile medical units of the Medical Service), 20 (hospital ships), 34 (aid societies), and 36 (medical aircraft); Geneva Convention II, arts. 37 (medical and religious personnel) and 39 (medical aircraft); Geneva Convention III, art. 18 (prisoners of war); Geneva Convention IV, arts. 18 (hospitals) and 21-22 (hospital transport).

[50] *See also* K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge/Geneva: CUP/ICRC, 2002), pp. 251, 485; International Law Association Study Group on the Conduct of Hostilities in the 21st Century, 'The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare,' [2017] 93 *International Law Studies* 322 ("ILA Study Group Report"), p. 347.

[51] *See Ongwen* TJ, para. 2776 ("With regard to the destruction of property belonging to persons who had no stated or apparent allegiance to a party involved in the conflict, the Chamber notes that it may be established that these persons or entities were 'adverse', or considered as such by the perpetrators, for example, by showing that they were not aligned to or supportive of the perpetrators' party or its objectives").

[52] *See* K. Dörmann, 'Article 8 – para. 2(a)', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, 3rd ed. (München/Oxford/Baden Baden: C. H. Beck/Hart/Nomos, 2016), p. 341-342 (marginal note. 121).

[53] *See, e.g.*, *Prosecutor v. Blaškić*, Trial Judgment, IT-95-14-T, 3 March 2000 ("*Blaškić* TJ"), para. 157; Pictet (ed.), *Commentary on the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1958, p. 601 and accompanying footnote (recalling that "an isolated incident would not be enough" but that the intentional "bombing of a single civilian hospital", for example, would satisfy the requirement).

55. For all three crimes — that is, those falling under articles 8(2)(a)(iv), 8(2)(b)(xiii), and 8(2)(e)(xii) — it is necessary for the Prosecution to prove that the destruction or appropriation was not justified by military necessity. In accordance with the established framework of international law, this standard may vary slightly, according to the particular provision charged and the circumstances, including the nature of the object destroyed or appropriated.[54] But generally it requires an "overall assessment" of the perpetrator's behaviour, entailing consideration of a variety of factors,[55] to conclude that the perpetrator had "no other option" in the circumstances than to destroy or appropriate the object.[56]

56. To the extent that these three crimes condition the destruction of protected property on military necessity, they may reflect certain limits on the destructive consequences of hostilities. It is well established, for instance, that cultural property meeting the requirements of the 1954 Hague Convention and/or the 1999 Second Protocol may only be exposed to certain forms of dangerous or potentially destructive conduct when military necessity so requires,[57] and this may in certain circumstances be relevant to charges brought under articles 8(2)(a)(iv), 8(2)(b)(xiii), and 8(2)(e)(xii). Nor may it always be assumed that the status of an object as a military objective necessarily establishes that it is not protected under international law,[58] or that its destruction is justified by military necessity.[59]

57. For example, in *Prlić*, the majority of the ICTY Appeals Chamber declined to enter a conviction for the wanton destruction of the Old Bridge at Mostar because in circumstances where it constituted a military objective, attacking it could not be considered as not being justified by military necessity.[60] But Judge Pocar, dissenting, recalled that "[t]he notion of justified by military necessity is distinct

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[54] *See, e.g.*, 1907 Hague Regulations, art. 23(g); Geneva Convention IV, arts. 53, 147; 1954 Hague Convention, art. 4(2); 1999 Second Protocol, art. 6. *See further* *Prlić* AJ, Dissenting Opinion of Judge Pocar, para. 15. *See also* *Cultural rights: note by the Secretary-General*, 9 August 2016, UN Doc. A/71/317 (transmitting to the UN General Assembly the report by the Special Rapporteur in the field of cultural rights), para. 64. ("Given the threat of irreversible and grave impact on the enjoyment of cultural rights, parties to conflicts as well as national and international criminal courts should recognize any military necessity exception to the ban on targeting cultural property or using it in ways that put it at risk as being indeed highly exceptional and as not constituting a readily available discretionary loophole.")

[55] M. E. Cross, 'Military necessity', in D. Djukić and N. Pons (eds.), *Companion to International Humanitarian Law* (Leiden: Brill, 2018) ("Cross"), pp. 498-499 (referring to "factors such as the relationship between the relevant conduct and the legitimate aims of party to the conflict to which the actor belongs; the actor's knowledge and capabilities; and the existence of reasonable alternatives").

[56] *See, e.g.*, *Ntaganda* TJ, para. 1164; ICC-01/04-01/07-3436-tENG ("*Katanga* TJ"), para. 894.

[57] *See* 1954 Hague Convention, arts. 4(2), 11(2); 1999 Second Protocol, art. 6.

[58] *See* Elements of Crimes, arts. 8(2)(b)(xiii) and 8(2)(e)(xii), element 3. The Office notes the existence of some jurisprudence apparently taking a contrary view: *Ongwen* TJ, para. 2777; *Katanga* TJ, para. 893. *See also* ILA Study Group Report, pp. 347-349.

[59] *See also* *Ntaganda* TJ, para. 1165.

[60] *Prosecutor v. Prlić et al.*, Appeal Judgment, Volume I, IT-04-74-A, 29 November 2017, para. 411.

from and more stringent than that of a military objective", and entails, among other considerations, that "a disproportionate attack is *per se* unlawful and therefore cannot be justified by military necessity".[61] He did not address the likelihood that he would have reached the same conclusion had the attack complied with the principles of distinction, proportionality, and precaution. Yet he stressed that, in his view, the "remarkable cultural significance" of the Old Bridge meant that both the military necessity and military objective analyses should have been applied more stringently than for objects which do not constitute protected cultural property.[62]

iv. Pillage: articles 8(2)(b)(xvi) and 8(2)(e)(v)

58. 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.[63] Recent years have continued to see a lively trade in 'conflict antiquities'.[64] Such conduct may be organised, officially authorised and sanctioned, or sporadic and/or opportunistic. In suitable cases, and where the evidence is sufficient, the Office will give active consideration to prosecuting 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 affected by the loss, and the value and unique meaning of the stolen property, including its cultural value.

59. The prohibition of pillage, sometimes also known as plunder, is very well established.[65] At the ICC, under articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Statute, pillage is distinguished from other crimes, such as the appropriation or seizure of property, by the requirement for the perpetrator to intend the appropriation

[61] *Prlić* AJ, Dissenting Opinion of Judge Pocar, paras. 8-9. *See further* paras. 10-11 (on the circumstances which, in his view, rendered the attack disproportionate).
[62] *Prlić* AJ, Dissenting Opinion of Judge Pocar, paras. 12-17.
[63] *See, e.g.*, Human Rights Watch, 'Liberation and looting in Iraq', 13 April 2003, available at https://www.hrw.org/news/2003/04/13/liberation-and-looting-iraq-0; C. Barker, 'Fifteen years after looting, thousands of artefacts are still missing from Iraq's national museum', 9 April 2018, available at https://theconversation.com/fifteen-years-after-looting-thousands-of-artefacts-are-still-missing-from-iraqs-national-museum-93949.
[64] *See, e.g.*, F. R. Greenland, 'Inside ISIS' looted antiquities trade', *The Conversation*, 31 May 2016, available at https://theconversation.com/inside-isis-looted-antiquities-trade-59287.
[65] *See, e.g.*, ICRC, *Customary International Humanitarian Law*, rule 40; 1907 Hague Regulations, arts. 28, 47; IMT Charter, art. 6(b); Geneva Convention IV, art. 33; 1977 Additional Protocol II, art. 4(2)(g); 1954 Hague Convention, art. 4(3); ICTY Statute, art. 3(e). *See further* *Prosecutor v. Blaškić*, Appeal Judgment, IT-95-14-A, 29 July 2004 ("*Blaškić* AJ"), para. 148; *Prosecutor v. Delalić et al.*, Trial Judgment, IT-96-21-T, 16 November 1998 ("*Delalić* TJ"), para. 315.

for their "private or personal use".[66] This not only distinguishes such appropriations from those which may be permitted under international humanitarian law, but also illustrates the particular harm which the crime seeks to punish — personal enrichment, with a nexus to armed conflict. As a matter of principle, such conduct can never be justified by military necessity, and consequently, this need not be disproved if the requisite specific intent is shown.[67] There is no requirement for appropriations to occur on a large scale,[68] although this may, of course, be relevant in the assessment of the gravity of the offence.

v. Other war crimes

60. The Office recognises that many other war crimes may potentially engage with cultural heritage, either in the harm caused or by the means with which they are carried out, or both. In particular:

(i) Deportation or forcible transfer is likely to affect the ability of an individual to access their cultural heritage, especially in its tangible forms. Indeed, these crimes may sometimes be carried out with precisely that ulterior motive. Correspondingly, the direct or indirect transfer of parts of an Occupying Power's civilian population into occupied territory may affect the cultural heritage of the people in that place. Whenever the facts so indicate, the Office will highlight these concerns in its submissions.

(ii) The concept of "outrages upon personal dignity" may require a particularly sensitive assessment of the victim's cultural heritage[69] in order to gauge with accuracy the harm actually caused. While outrages must objectively meet a certain threshold of gravity — that is, their effect on dignity must be "real and serious", "humiliating or degrading"[70] — the required harm to the victim may well be achieved by acts which are situated in a particular cultural context, or which impede the victim's

[66] There is some basis to suggest that this element is more restrictive than similar offences in customary international law: *see*, *e.g.*, SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Judgment, 20 June 2007, para. 754; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Judgment, 2 August 2007, para. 160. If this is the case, then article 10 of the Statute provides that articles 8(2)(b)(xvi) and 8(2)(e)(v) do not limit or prejudice in any way existing or developing rules of international law for purposes other than the Statute.
[67] *Ntaganda* TJ, para. 1030. *See also* ICC-01/05-01/08-3343 ("*Bemba* TJ"), para. 124; *Ongwen* TJ, para. 2767.
[68] *Ongwen* TJ, para. 2764; *Ntaganda* TJ, para. 1044. *But see Bemba* TJ, para. 117; *Katanga* TJ, para. 909.
[69] See ICC Elements of Crimes, art. 8(2)(b)(xxi), element 1, footnote 49 (specifically stating the need to take into account relevant aspects of the cultural background of the victim).
[70] *See* ICC-01/04-01/07-717 ("*Katanga* Confirmation Decision"), para. 369; *Prosecutor v. Kunarac et al.*, Trial Judgment, IT-96-23&23-1, 22 February 2001 ("*Kunarac* TJ"), para. 501; *Prosecutor v. Aleksovski*, Trial Judgment, IT-95-14/1-T, 25 June 1999, para. 56.

future ability to access their cultural heritage.[71] Importantly, in the context of this crime, the affected "persons" also include dead persons.[72] Consequently, the desecration of a corpse in a manner that violates the deceased person's cultural burial practices may constitute an outrage upon personal dignity.

(iii) Many forms of sexual or gender-based crimes may be designed to affect the cultural heritage of a community.[73] For example, individuals may be targeted for sexual slavery, or subjected to the crime of forced pregnancy, because of their shared cultural heritage, or because of their personal importance to the cultural heritage of that group, e.g., as religious or spiritual leaders.[74] When supported by the facts, the Office will highlight the crime's relationship to cultural heritage in the charging instruments.[75]

b) Crimes against humanity: article 7

61. Crimes against or affecting cultural heritage are often committed in the context of an attack against a civilian population. They may themselves amount to crimes against humanity,[76] or other acts amounting to crimes against humanity may have adverse consequences for cultural heritage. The Office will seek 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.

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[71] This may include, for example, forcing victims to dance naked on a table: *Kunarac* TJ, paras. 766-774. Forcing a person to eat in a manner inconsistent with their cultural dietary practices may also rise to this threshold: *see, e.g.*, *Case 002/02* (Judgement), ECCC, Case File No. 002/19-09-2007/ECCC/TC, 16 November 2018 ("*Case 002/02* TJ") paras. 3238 and 3245 (referring to members of the Cham people being forced to eat pork, although not, in that case, finding such action as an outrage upon personal dignity as such).

[72] ICC Elements of Crimes, art. 8(2)(b)(xxi), fn. 49; art. 8(2)(c)(ii), fn. 57 (emphasis added).

[73] For example, an individual may be subjected to acts of a sexual nature with the ulterior motive of offending that individual's cultural heritage.

[74] Cultural heritage may also be an integral part of a sexual and gender-based crime ("SGBC") charge under articles 7(1)(g) and 7(1)(h) of the Statute, insofar as the victims are targeted for their membership of a specific group with a shared cultural heritage.

[75] In *Katanga*, the Pre-Trial Chamber held that "sexual slavery also encompasses situations where women and girls are forced into 'marriage', domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors. Forms of sexual slavery can, for example, be practices such as the detention of women in 'rape camps' or 'comfort stations', forced temporary 'marriages' to soldiers and other practices involving the treatment of women as chattel, and as such, violations of the peremptory norm prohibiting slavery.": *Katanga* Confirmation Decision, para. 431. Such a situation may be similar to the facts presented in *Akayesu*, where Tutsi women were specifically targeted for sexual violence: *Prosecutor v. Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998 ("*Akayesu* TJ"), para. 731.

[76] The Nuremberg Trials recognised that unlawful destruction and plunder of cultural property constituted not only war crimes on a wide scale, but also crimes against humanity. *See* Nuremburg Tribunal, Nuremberg Judgment, 41 American Journal of International Law, pp. 172, 249 (1947).

i. Contextual elements: article 7(1)

62. The contextual elements of crimes against humanity require the Office to demonstrate that (i) an attack against the civilian population was committed, (ii) the attack was pursuant to, or in furtherance of, a State or organisational policy, and (iii) the attack was widespread or systematic.[77] Acts damaging cultural heritage can play a role in establishing all three contextual elements.

ii. Attack against a civilian population

63. The civilian population must be the primary, as opposed to an incidental, target of the attack.[78] Means and methods adopted to carry out the attack as well as its discriminatory nature are indicators that the attack was directed against a civilian population.[79]

64. Evidence of crimes against cultural heritage committed during the attack may suggest that the civilian population was the primary target of the attack, given the collective importance of cultural heritage for civilian communities as such. Further, crimes against cultural heritage may also suggest that the attack was of a discriminatory nature,[80] an indicator that it was directed against a civilian population.[81]

iii. State or organisational policy

65. The attack on a civilian population must be committed pursuant to, or in furtherance of, a State or organisational policy.[82] Such policy need not be bureaucratic or formalised, and may be implicit.[83] Ultimately, it may be inferred from the manner in which the relevant acts occur.[84] While the core of the analysis remains the manner in which acts under article 7(1) constituting the attack are carried out, evidence of destruction of cultural heritage — irrespective of its legal characterisation — may further assist. In fact, while no particular motive is

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[77] Statute, arts. 7(1), 7(2)(a).
[78] *Katanga* TJ, para. 1104; *Ongwen* TJ, para. 2675.
[79] *Katanga* TJ, para. 1104; *Ntaganda* TJ, para. 668.
[80] *See, e.g.*, *Prosecutor v. Stanišić and Simatović*, Trial Judgment, Volume I, IT-03-69-T, 30 May 2013, para. 1250 (including the destruction of worship places as a discriminatory act); *Prosecutor v. Đorđević*, Trial Judgment, IT-05-87/1, 23 February 2011, paras. 1810, 2151 (stating that the destruction of worship places as symbols of Kosovo Albanian heritage and identity was committed with persecutory intent, which manifested itself in the attack, as religious buildings were destroyed because of their religious and cultural significance).
[81] *Katanga* TJ, para. 1104; *Ntaganda* TJ, para. 668.
[82] Statute, art. 7(2)(a).
[83] *See, e.g.*, ICC-01/05-01/08-424 ("*Bemba* Confirmation Decision"), para. 81; *Katanga* Confirmation Decision, para. 396; ICC-02/11-01/11-656-Red ("*Gbagbo* Confirmation Decision"), para. 215; *Katanga* TJ, paras. 1108, 1110.
[84] *Katanga* TJ, para. 1109; *Bemba* TJ, para. 160.

required to establish a policy, evidence of an underlying motivation can reinforce a link between acts constituting the attack, and thus indicate the existence of a policy.[85] Acts against cultural heritage committed during the attack — whether they qualify as article 7(1) acts or not — can evidence a discriminatory motive, which in turn points to the existence of a policy.

iv. Widespread or systematic

66. An attack must be widespread or systematic. The term "widespread" connotes the large-scale nature of the attack and the number of targeted persons,[86] while "systematic" reflects its organised nature.[87] Where the acts constitute a pattern of acts against cultural heritage, this may indicate its systematic nature in that they may evince a certain level of organisation and rationale. Furthermore, when assessing the widespread nature of an attack, the Office will take due regard of the fact that crimes against or affecting cultural heritage often produce a multiplicity of victims, as they cause harm throughout affected communities and humanity as a whole, as such evidence of repeated acts against cultural heritage in connection with the attack may further show its widespread nature.

v. Extermination: article 7(1)(b)

67. Extermination — the mass killing of members of the civilian population — may be committed by means including inflicting conditions of life calculated to bring about the destruction of part of a population.[88] Crimes against or affecting cultural heritage can be part of this scheme, since they can lower a group's morale, change power dynamics, and weaken resistance, thereby facilitating mass killing.

68. Further, when the survival and cultural heritage of members of a group are intricately linked to, and depend upon, their territory, including certain natural formations, attacks that make the territory uninhabitable may be both acts against cultural heritage and acts of extermination.[89] In fact, such actions may

[85] *Ongwen* TJ, para. 2679; *Katanga* TJ, paras. 1108, 1113.
[86] *Ongwen* TJ, para. 2681.
[87] *Ongwen* TJ, para. 2682.
[88] Statute, art. 7(2)(b).
[89] The HRC recognised that State action leading to the degradation of land, and consequently to the inability of the local population to continue its traditional forms of raising livestock, "substantively compromised the way of life and culture of the author, as a member of the community": *Ángela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, para. 7.7. *See also* HRC, *General Comment 23*, para. 7. The IACtHR found that "depriving indigenous communities of access to their ancestral territory expose(s) them to precarious and infrahuman living conditions, to greater vulnerability to diseases and epidemics, and subject them to situations of extreme lack of protection": *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia* ("Operation Genesis Case"), para. 354. *See also Yakye Axa Indigenous Community v. Paraguay* ("*Yakye Axa v. Paraguay*"), paras. 164 ff., 203.

amount to the intentional deprivation of access to food or, when traditional forms of health care are affected, to medicine, calculated to bring about the destruction of part of the population.[90]

vi. Deportation or forcible transfer of population: article 7(1)(d)

69. Deportation or forcible transfer may be committed by expulsion or other coercive acts.[91] These include physical force, but also the threat of force or coercion, such as that caused by fear of violence, duress, psychological oppression or abuse of power, or taking advantage of a coercive environment.[92]

70. Crimes against or affecting cultural heritage, when part of a wider scheme, can cause such duress or fear of violence, qualifying as coercive acts causing forced displacement.[93] For example, a concerted effort to suppress the culture of a community under occupation can lead to a deep sense of insecurity and repression, causing some members of the community to flee elsewhere to practise their culture freely. The destruction or appropriation of cultural heritage can not only cause persons to flee, but can also entrench the impact of displacement crimes by dissuading the displaced population from returning. Where cultural heritage coincides with, or is closely related to, natural formations, an attack on or affecting this cultural heritage might physically force people to leave if the land becomes uninhabitable. Moreover, forced displacement often has devastating effects on a group's cultural heritage.[94] Lack of access to sacred sites and the population's resultant inability to perform traditional burial rituals can make it impossible for some communities to keep their religion alive.[95] The destruction of family and social structures, which often accompany forced displacement, can make it impossible to carry on with certain traditions and to pass them on to future generations.[96] The Office will thus keep in mind that the removal of certain persons from a community can have a disastrous effect on that community's cultural heritage — for example, in the case of religious or spiritual leaders.[97] In addition, sacred or otherwise heritage

[90] The African Commission on Human and Peoples' Rights held that severe environmental degradation, among other things, severely affected the life of an indigenous community as a whole and threatened their survival: *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, 27 May 2002, para. 66 f.
[91] ICC-01/19-27 ("*Bangladesh/Myanmar* Article 15(4) Decision"), para. 52.
[92] ICC Elements of Crimes, art. 7(1)(d), element 1, fn. 12.
[93] *See Al Mahdi* Reparations Order, para. 85 (holding that attacks on cultural heritage caused some persons to flee Timbuktu).
[94] Operation Genesis Case, para. 354; IACtHR, *Case of the Río Negro Massacres v. Guatemala* ("*Río Negro Massacres v. Guatemala*"), paras. 153 ff.; *Yakye Axa v. Paraguay*, para. 203.
[95] *See* UN General Assembly, Resolution 72/258 (26 January 2021) (promoting a culture of peace and tolerance to safeguard religious sites).
[96] *See also Río Negro Massacres v. Guatemala*, paras. 153 ff.
[97] See para. 79 for a detailed explanation of related crimes.

sites abandoned by forcibly displaced populations may be exposed to further destruction.

vii. Torture: article 7(1)(f)

71. In proving torture under article 7(1)(f) of the Statute, the Office must show that the alleged perpetrator inflicted severe physical or mental pain or suffering on a person in his or her custody or under his or her control. By analogy, as the Court found in *Al Mahdi*, the destruction of cultural heritage caused severe mental suffering.[98] The Office considers that if the victim is in the custody or under the control of the perpetrators, crimes against or affecting cultural heritage – whether in isolation or together with other acts – can amount to the infliction of mental pain or suffering of sufficient severity to qualify as the crime against humanity of torture. Given that crimes against or affecting cultural heritage are often discriminatory in nature, the Office will also bear in mind that a discriminatory component may aggravate the severity of the pain or suffering inflicted.[99] Furthermore, the severity of the treatment inflicted must be assessed *inter alia* against the religious, social and cultural context of the perpetrator and victim. Cultural heritage often provides, or forms part of, coping mechanisms after severe trauma. Therefore, damage to such heritage can aggravate mental suffering — for example, if victims are unable properly to bury their loved ones in accordance with their traditions.[100]

viii. Sexual and gender-based crimes: articles 7(1)(g) and 7(1)(h)

72. Sexual and gender-based crimes charged under both articles 7(1)(g) and 7(1)(h) of the Statute may also be pertinent to cultural heritage insofar as the victims are targeted for their membership of a group with a shared cultural heritage or because of their personal importance to the cultural heritage of that group, e.g., as religious or spiritual leaders. It has, for instance, been recognised that murder and violence specifically committed against the women of a community could produce a cultural vacuum, because these women are the oral transmitters of the community's culture, and the crimes were committed in order to ensure the loss of its oral cultural knowledge.[101] When this is the case, the Office will highlight the crime's relationship to cultural heritage in the charging instruments.

[98] *Al Mahdi* Reparations Order, paras. 84 ff.
[99] *R.B. v. Hungary*, 64602/14, para. 45.
[100] *Massacres of El Mozote and nearby places v. El Salvador*, paras. 172, 203 ff.
[101] *Plan de Sánchez Massacre v. Guatemala*, Reparations Judgment, 19 November 2004 ("*Plan de Sánchez Massacre* Reparations Judgment"), paras. 49(12), 77(e).

ix. Persecution: article 7(1)(h)

73. Crimes against or affecting cultural heritage may, on their own or in combination with other actions, amount to persecution under article 7(1)(h).[102] For example, in *Al Hassan*, the Chamber identified "the following categories of acts infringing individual liberties: prohibition of traditional and cultural practices (such as the wearing of talismans or amulets and the practice of magic and witchcraft), prohibition of religious and cultural practices (such as prayers at mausoleums and tomb sites, as well as the manner of praying and the celebration of religious holidays), control of freedoms related to education (prohibition of co-education in the classroom, closure of secular public schools and the imposition of an education based on the vision of religion as well as the ideology of the Ansar Dine/AQIM organisation), the imposition of restrictions on freedom of association and movement (prohibition of public gatherings, and prohibition for unmarried and unrelated men and women to circulate together)".[103]

74. Considering the importance of cultural heritage to the identity of an entire community, crimes against or affecting cultural heritage are often committed as part of a persecutory campaign on political, religious, ethnic or other grounds, such as gender, age, or birth.[104] Shared cultural heritage will usually include at least one defining feature of a persecuted group and can be used by the perpetrators to identify that group, which may include the elderly, the disabled, women and children. Attacks against or affecting cultural heritage can be considered a strong indicator of the persecutory nature of an attack, and, when supported by the facts, will be highlighted as such by the Office in charging instruments.

75. Crimes against or affecting cultural heritage can, alone or cumulatively with other acts,[105] 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,[106] which entails the right of peoples to "freely pursue their […] cultural development",[107] the prohibition of discrimination,[108] and the

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[102] *See* Statute, art. 7(2)(g); ICC Elements of Crimes, art. 7(1)(h), element 1.
[103] *See*, ICC-01/12-01/18-461-Corr-Red ("*Al Hassan* Confirmation Decision"), para. 683; the French version of the *Al Hassan* confirmation decision.
[104] Under articles 7(1)(h) and 21(3) of the Statute, the Office may also charge persecution on "other grounds that are universally recognized as impermissible under international law": Policy on Children, p. 24.
[105] *Al Hassan* Confirmation Decision, para. 672.
[106] For classification as a fundamental human right, *see Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, para. 144.
[107] ICCPR, art. 1(1); ICESCR, art. 1(1).
[108] The principle of non-discrimination is considered "basic": HRC, General Comment 18, paras. 1 ff.

right to freedom of religion or belief, if attacks affect religious or sacred sites.[109] If tangible cultural heritage is also a private possession, the right to property may also be infringed.[110] Violations of the right to life, freedom from torture, inhumane and degrading treatment, the right to self-determination 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 to the community.[111]

x. Other inhumane acts: article 7(1)(k)

76. Crimes against or affecting cultural heritage could also amount to other prohibited acts which are not specifically enumerated in article 7(1) of the Statute. Specifically, crimes against or affecting cultural heritage that cause great suffering or serious injury to the mental and physical health of the victim could constitute "other inhumane acts" under article 7(1)(k) of the Statute if they are similar in nature and gravity to other acts listed in article 7(1) of the Statute. Acts of forcible circumcision or penile amputation amount to such inhumane acts.[112] In the context of cultural heritage, for example, it might be relevant to prosecute certain property offences as "other inhumane acts" if the effect of this conduct establishes that it is of a similar nature and gravity as the enumerated acts.[113] The nexus between the inhumane act and the great suffering or serious injury to the mental or physical health of the victim must be proven by the Prosecution.[114]

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[109] The right to religion is considered fundamental: HRC, General Comment 22, para. 1.
[110] The fundamental nature of the right to property was confirmed in ICC-01/04-02/06-309 ("*Ntaganda* Confirmation Decision"), para. 58; *Al Hassan* Confirmation Decision, paras. 664, 684.
[111] *See, e.g.*, *Río Negro Massacres v. Guatemala*, paras. 153 ff. For the classification of those rights as fundamental, *see Al Hassan* Confirmation Decision, para. 664; *Bangladesh/Myanmar* Article 15(4) Decision, para. 101. *See also Report of the Special Rapporteur in the field of cultural rights*, 3 February 2016, UN Doc. A/HRC/31/59.
[112] *See, e.g.*, ICC-01/09-02/11-382-Red ("*Kenyatta* Confirmation Decision"), para. 269 (acts of forcible circumcision and penile amputation amount to such inhumane acts).
[113] *See Kenyatta* Confirmation Decision, para. 269 ("… other inhumane acts is a residual category within the system of article 7(1) of the Statute. […] [T]he language of the relevant statutory provision and the Elements of Crimes, as well as the fundamental principles of criminal law, make it plain that this residual category of crimes against humanity must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity."). At the ICTY, the Trial Chamber held that the infliction of serious injury and great suffering, both physically and mentally, on civilians constituted an "other inhumane act": *Blaškić* TJ, paras. 237-238. For an act to be an "other inhumane act", it "must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity": *Prosecutor v. Kordić and Čerkez*, Trial Judgement, IT-95-14/2-T, 26 February 2001, para. 269 (quoting *Prosecutor v. Tadić*, Trial Judgement, IT-94-1-T, 7 May 1997, para. 729). *See also Prosecutor v. Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999 ("*Kayishema* TJ"), para. 151. Article 5(i) of the ICTY Statute and article 3(i) of the ICTR Statute do not contain the Rome Statute element "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".
[114] *Kayishema* TJ, para. 151.

xi. Additional underlying acts under article 7(1)

77. The Office will examine other acts prohibited by article 7(1) such as murder, enslavement, deprivation of liberty, or enforced disappearance in relation to their adverse effect on cultural heritage. Such an adverse effect can be assumed if a large number of persons from a group is subject to such treatment, or the acts are committed against persons of a particular importance to that group's cultural heritage.

c) Genocide: article 6

78. Crimes against or affecting cultural heritage frequently occur in connection with genocide, which may be effected by killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group, when committed with the requisite intent. Article 6 encompasses acts that form part of a "manifest pattern".[115] Acts that are directed specifically against a group's cultural heritage may assist to demonstrate the specific intent and the manifest pattern as required under article 6. They may also, on their own, either inflict serious mental harm, and reinforce the seriousness of acts charged as genocide under article 6(b) to (d), or indeed serve as aggravating circumstances for genocide convictions. The Office will highlight these as appropriate during its submissions in court.

i. Specific intent

79. Crimes against cultural heritage occurring simultaneously with other acts targeting protected groups may provide evidence of the specific intent (*dolus specialis*) required for genocide.[116] While attacks on cultural heritage do not *per se*

[115] *See* ICC Elements of Crimes, art. 6(a). The "manifest pattern" requirement is not found in customary international law or the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). *See* ICC-02/05-01/09-73 OA ("*Bashir* Arrest Warrant AJ"), paras. 32-33. It is noted that Raphael Lemkin's original understanding of genocide specifically included and highlighted cultural aspects. *See, e.g., Axis Rule in Occupied Europe*, 1944, p. 79. ("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." (emphasis added.))

[116] *Prosecutor v. Krstić*, Appeal Judgment, IT.-98-33-A, 19 April 2004 ("*Krstić* AJ"), para. 20. *See also, e.g., A-G Israel v. Eichmann*, (1968) 36 ILR 18 (District Court, Jerusalem), para. 25 (under the Convention, a special intention is requisite for its commission, an intention that is not required for the commission of a 'crime against humanity'.); *Akayesu* TJ, paras. 497, 516; Report of the Special Rapporteur

constitute underlying acts of genocide — because acts of genocide are limited to those seeking the physical or biological destruction of a group[117] — the targeting of a group's cultural heritage may constitute evidence of the perpetrator's intent to destroy that group. The International Court of Justice ("ICJ") has stated that:

> Where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of intent to physically destroy the group.[118]

80. This includes, for example, attacks on buildings that hold cultural significance for the targeted group, which occur simultaneously with biological or physical means directed at the targeted group. The former may also be evidence of specific intent to destroy the targeted group. Violence targeting prominent individuals who are emblematic of the overall group, or are essential to its survival, such as persons holding particular cultural importance to, or leadership of, the group, may itself constitute an act of genocide, as well as evidence of a specific intent to destroy a substantial part of the group.[119]

ii. Causing serious bodily or mental harm to members of the group: article 6(b)

81. Inhuman treatment, torture, rape, sexual abuse and deportation are among the acts that can cause serious bodily or mental harm, one of the enumerated means by which genocide can be committed.[120] In particular, sexual and gender-based crimes may play "an integral part of the process of destruction", and may contribute specifically to the destruction not only of the specific victims of sexual and gender-based crimes, but also to their constituent group.[121] The Office also notes that a group's shared cultural heritage may specifically motivate sexual and gender-based genocide, and sexual and gender-based crimes may be

in the field of cultural rights, A/HRC/31/59, 3 February 2016, para. 64 ("[t]he intentional destruction of cultural and religious property and symbols can also be considered as evidence of intent to destroy a group within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide").

[117] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep. 4 ("*Bosnia v. Serbia and Montenegro* (Genocide Convention) Case"), para. 344; *Krstić* AJ, paras. 25-26; *Prosecutor v. Krstić*, Trial Judgment, IT-98-33-T, 2 August 2001 ("*Krstić* TJ"), paras. 550, 580.

[118] *Bosnia v. Serbia and Montenegro* (Genocide Convention) Case, para. 344 (endorsing the observation in *Krstić* TJ, para. 580).

[119] Although there has been, as yet, no conviction for genocide on the sole basis of selective targeting of a protected group's leadership, international jurisprudence does establish that selected targeting can provide evidence of genocidal intent, or may even constitute genocide. *See, e.g.*, *Prosecutor v. Tolimir*, Appeal Judgment, IT-05-88/2-A, 8 April 2015, para. 263; *Krstić* AJ, para. 12; *Prosecutor v. Jelisić*, Trial Judgment, IT-95-10-T, 14 December 1999, para. 82.

[120] *Krstić* TJ, para. 513.

[121] *Akayesu* TJ, para. 731.

motivated in part to offend the victim group's cultural heritage.[122] The Office will highlight these in its submissions, in particular during sentencing, as circumstances that may aggravate genocide convictions.

82. Further, attacks on cultural heritage *per se* can cause serious mental harm to members of a group.[123] The Court confirmed in *Al Mahdi* that victims of crimes against or affecting cultural heritage suffer mental pain and anguish, and it cited examples of the victims' expression of the pain and trauma they experienced, such as: "I have never suffered so deeply in my life […] Mentally, I was devastated. I felt humiliated by the destruction. I am still suffering […] I am still affected mentally."[124] The Office will also draw on attacks against cultural heritage occurring in connection with other physical or biological acts, in proving or showing the gravity of genocide charges based on article 6(b).

iii. Inflicting conditions of life calculated to bring about the group's physical destruction: article 6(c)

83. Genocide may encompass acts that "deliberately inflict […] on the group conditions of life calculated to bring about its physical destruction".[125] These include all circumstances or measures which will lead to a slow death, or methods of destruction by which the perpetrator does not immediately kill the members of the group, but which ultimately seek their physical destruction.[126] Often, such measures may target persons or objects, such as traditional lands, that are also of significant cultural importance. The combination of, *inter alia,* the violent appropriation of traditional lands and forced displacement can erode and destroy a people's cultural heritage while also being calculated to bring about its physical destruction. In its application for an arrest warrant in the *Al Bashir* case, the Prosecution emphasised the importance of the land to the targeted group, and alleged that "[t]he displacement has weakened traditional leadership

[122] For example, a Trial Chamber at the International Criminal Tribunal for Rwanda ("ICTR") found that Tutsi women were specifically targeted for rape and sexual violence in a manner that rose to the level of genocide: *Akayesu* TJ, para. 731.
[123] For example, in *Al Mahdi*, it was considered that the mental pain caused by the attacks on the sites, in particular the ancestral burial sites, was so great that it necessitated both individual and collective reparations: *Al Mahdi* Reparations Order, paras. 89-90.
[124] *Al Mahdi* Reparations Order, para. 85. *See also* para. 89.
[125] Statute, art. 6(c).
[126] These include: subjecting a group to a subsistence diet; systematic expulsion from homes; lack of proper essential medical services, housing, clothing, hygiene below minimum requirements; and rape: *see, e.g.*, *Akayesu* TJ, para. 506; *Kayishema* TJ, paras. 115-116; *Prosecutor v. Brđanin*, Trial Judgment, IT-99-36-T, 1 September 2004, para. 691. "Slow death" methods directed specifically at cultural heritage may include, but are not limited to, forcible imposition of a diet that does not conform with a group's religious practices, or the denial of medical services that comports with the practised cultural heritage of the targeted group. For an example of this, *see Case 002/02* TJ, paras. 3238, 3245 (finding that the Cham had been forced to abide by the same dietary regime as the Khmer, including eating pork).

structures which were based on land rights."[127] Usurpation of land may be considered the last blow.[128] In a similar vein, the Inter-American Court of Human Rights ("IACtHR") has recognised that the massacre of the Mayan indigenous community and the land operations that led to the genocidal extermination of complete Mayan communities, as well as the destruction of their homes, livestock, crops, and other elements of subsistence not only violated their right to life but also their right to ethnic or cultural identity, and the right to express and disseminate their culture.[129] These facts were recognised as having gravely affected the members of the targeted community in their identity and values.[130]

84. The IACtHR has also recognised that [events impairing the physical existence of a group, and also targeting its collective integrity and identity, also lead to] "the violation of cultural rights, the repression of the culture and the symbols of identity, the prohibition to perform religious rites or ceremonies, impeded the reproduction of social relations, the formation of family relationships, the facilitation of financial practices, and fragmented the sense of belonging to a group".[131] In these ways, acts imposing conditions of life calculated to bring about a group's physical destruction that also target or affect cultural heritage as part of a genocidal campaign inflict ruinous conditions of life on a group.

85. The Office will highlight in its submissions, in particular concerning sentencing and reparations, such aggravating circumstances whenever any conditions of life calculated to cause a group's physical destruction also have a specific connection to the targeted group's cultural heritage.[132]

iv. Prevention of births: article 6(d)

86. In addition to acts which physically prevent births within a group,[133] the Office recognises that perpetrators may also achieve the prevention of births within a group through mass rape, where a child's membership of the group is premised on the father's identity.[134] Recognising that prevention of births has a physical

[127] ICC-02/05-157-AnxA ("*Darfur* Arrest Warrant Application"), para. 391 ("any new leadership in the camps is being targeted, thus actually destroying one of the basic foundations of the group").
[128] *See* *Darfur* Arrest Warrant Application, para. 179.
[129] *See*, *e.g.*, *Plan de Sánchez Massacre* Merits Judgment, para. 42(7); and, Separate Opinion of Judge A.A. Cançado-Trindade, para. 2 (quoting the application of the IAtCHR), 5 (citing the Report of the Historical Clarification Commission, *Guatemala – Memoria del Silencio*, tomo III, Guatemala, CEH, 1999, pp. 316-318, 358, 375-376, 393, 410, 416-423).
[130] *Plan de Sánchez Massacre* Merits Judgment, para. 51.
[131] *Plan de Sánchez Massacre* Reparations Judgment, para. 82 (quoting Report of the Historical Clarification Commission, *Guatemala – Memoria del Silencio*, tomo *III*, Guatemala, CEH, 1999, p. 181, paras. 2887-2888).
[132] *See*, *e.g.*, *Plan de Sánchez Massacre* Reparations Judgment, paras. 82-87.
[133] Such measures are not limited to the physical prevention of births, but may extend to prevention of birth through mental means: *Akayesu* TJ, para. 508.
[134] *Akayesu* TJ, para. 507. In this case, the rapes were carried out with the intent of having women "give birth to a child who will consequently not belong to its mother's group".

and biological effect on a group's survival, whenever bringing this charge, as well as in its sentencing and reparations submissions, the Office will also emphasise this act's effect on the future cultural life of the group.

v. Forcibly transferring children of the group to another group: article 6(e)

87. The Office recognises that children are the conduit of cultural heritage to future generations. If children are forcibly removed from a group, this will constitute an underlying act of genocide that is likely to have a profound effect on the access to, practice of, and continuation of a group's cultural heritage. In relation to the children themselves, the forcible transfer may create a severe dislocation from their cultural heritage.

88. Whenever charging genocide, the Office will ensure that its case accurately encapsulates all aspects of the crime that affect cultural heritage. The Office will also appropriately underline such aspects in its sentencing and reparations submissions.

d) Crime of aggression: article 8 bis

89. The crime of aggression poses a unique threat to cultural heritage, not only owing to the harm caused by the prohibited act itself, but also because of the much broader potential harm which may be caused to cultural heritage by the armed conflict, which is then likely to ensue. As noted by the Nuremburg Tribunal, "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[135] In investigating and prosecuting the crime of aggression, the Office will underline the targeting and destruction of cultural property by the aggressor, *inter alia*, as potential acts of aggression, or as an aggravating circumstance in sentencing. It will also highlight such destruction in its reparation submissions.

90. Article 8 *bis*(1) explains that the "crime of aggression" is constituted by the participation[136] of a sufficiently high-level State official or similar person[137] in an "act of aggression", which is of sufficient gravity.[138] Attacks against or affecting cultural heritage are potentially relevant both to the conduct, which may constitute an "act of aggression", and to the assessment of the gravity threshold.

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[135] 22 *Trial of the Major War Criminals Before the International Military Tribunal* (1948), p. 427.
[136] Specifically, by "planning, preparation, initiation or execution": Statute, art. 8 *bis*(1).
[137] Specifically, "a person in a position effectively to exercise control over or to direct the political or military action of a State": Statute, art. 8 *bis*(1).
[138] Specifically, which "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations": Statute, art. 8 *bis*(1).

91. Conduct which might satisfy the requirement for an "act of aggression" is listed in article 8 *bis*(2). Many, if not all, of these prohibited forms of conduct might be directed against, or may affect, cultural heritage. For example, the invasion, attack, occupation or annexation;[139] the bombardment, or the use of any weapons against, the territory of another State;[140] the use of armed forces of a State or any extension of their presence within the territory or another State in contravention or beyond the termination of their agreement;[141] the action of a State in allowing its territory and placing it at the disposal of another State to be used for perpetrating an act of aggression against a third State;[142] and the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry on an act of aggression against another State,[143] might in particular be directed against, or affect, cultural heritage.

92. In assessing whether an "act of aggression" constitutes "a manifest violation of the Charter of the United Nations",[144] the Office will take into account, among other considerations, the adverse effect on cultural heritage, and in this context, the potential multiplicity of victims and irreversible nature of the damage which might have been done. In particular, the Office considers that intentionally destroying or damaging cultural property or cultural heritage may be a particularly grave form of the use of force, and that such objects should not be instrumentalised in the conduct of international relations.

III. Preliminary examinations

93. The Office is responsible for determining whether a situation meets the legal criteria established by the Statute to proceed with an investigation.[145] For this purpose, the Office conducts a preliminary examination of all communications and situations that come to its attention based on the statutory criteria and the information available, in accordance with its Policy Paper on Preliminary Examinations.[146]

94. During the preliminary examination of a situation, the Office analyses information on alleged crimes potentially falling within the Court's jurisdiction, including, where present, conduct that may amount to crimes against or affecting cultural heritage. In doing so, the Office will pay particular attention to allegations of attacks on cultural heritage and the general context within which

[139] Statute, art. 8 *bis*(2)(a).
[140] Statute, art. 8 *bis*(2)(b).
[141] Statute, art. 8 *bis*(2)(e).
[142] Statute, art. 8 *bis*(2)(f).
[143] Statute, art. 8 *bis*(2)(g).
[144] *See also* Kress, 'State Conduct Element', in Kress and Barriga (eds.), *Commentary on the Crime of Aggression* (CUP), pp. 513 ff., 520.
[145] Statute, art. 53(1).
[146] *See* Policy Paper on Preliminary Examinations.

the alleged crimes may have occurred. To facilitate this understanding, the Office will also seek to identify local institutions and expertise, international organisations, non-governmental organisations and other relevant entities which may have relevant information. In accordance with internal protocols, and where considered appropriate, the Office will seek to preserve such information so that it may be used in the context of future investigations.

95. When assessing the gravity of alleged crimes against or affecting cultural heritage, the Office will take into account the broad and severe impact that these crimes may have on individuals, affected communities, and potentially humanity as a whole.[147] Considering the unique character and significance of cultural heritage,[148] the Office will consider, as necessary, relevant information from the range of sources it has identified to best capture the multilayered harm resulting from these crimes. This may include the suffering of the victims and their increased vulnerability incurred as a result of the loss of, and other impact on, affected cultural heritage, the terror subsequently instilled, and the social, economic and environmental damage inflicted on the affected communities.[149] In this regard, the Office will carefully assess the qualitative aspects of these crimes in addition to other quantitative considerations of relevance to its gravity assessment.

96. Taking into account all the circumstances (including the gravity of the crime and the interests of victims), the Office must also consider, on a case-by-case basis, whether there are substantial reasons to believe that an investigation would not serve the interests of justice.[150] To inform this assessment, and given the presumption in favour of investigation or prosecution where the statutory criteria have been met,[151] the Office will interact with relevant stakeholders, including victims' legal representatives, affected communities and civil society organisations, in order to gather the views of victims and others who may be affected by crimes against or affecting cultural heritage.

97. In accordance with its internal guidelines and statutory criteria, the Office will react promptly to allegations of crimes against or affecting cultural heritage. Where relevant, the Office will engage with States and international and non-governmental organisations at an early stage in order to verify the information available to prevent the recurrence of crimes. Based on the information available,

[147] *See* *Al Mahdi* Reparations Order, paras. 74-76, 89-90.
[148] *See* *Al Mahdi* Reparations Order, para. 17.
[149] *See* Policy Paper on Preliminary Examinations, para. 65.
[150] Statute, art. 53(1)(c). If the Prosecutor determines that there is no reasonable basis to proceed with an investigation solely on these grounds, she will inform the Pre-Trial Chamber.
[151] See Policy Paper on Preliminary Examinations, para. 71.

the Office will consider the issuance of a preventive statement in accordance with internal guidelines.

IV. Investigations

98. The Office is committed to paying particular attention to crimes against or affecting cultural heritage from the earliest stages of an investigation, taking into consideration possible links between such attacks and other conduct being investigated, irrespective of whether they took place during an armed conflict or in peace time.

99. The Office will ensure that any collection of evidence is done with appropriate respect for local customs, culture and religion, including by seeking the views of, and consulting with, the affected communities, including women, minorities, and cultural rights defenders, where possible. In some sites, contacts with local custodians might have to be made ahead of accessing the sites in order to ensure not only that customs are respected, but also that security issues are addressed in a timely manner.

100. In addition to general challenges experienced by the Office in the collection of evidence, such as the prevalence of violence, insecurity, remoteness, and institutional failure in the affected countries, the investigation of crimes against or affecting cultural heritage may present specific challenges.

101. Often, investigations into crimes against or affecting cultural heritage are complicated by a lack of documentation of the state of (tangible) cultural heritage prior to, during, and after the attack. This makes it more difficult to establish that damage or destruction has occurred and to distinguish between human-caused damage or destruction and natural degradation or change over time. Therefore, the Office stresses the importance of accuracy in the identification of destroyed cultural heritage, and the availability of detailed documentation, and stresses, in this context, the crucial role that UNESCO and related organisations can play.[152] The Office may seek to obtain sources documenting the state of the attacked heritage as close in time as possible to before and after the damage happened (and, where possible, contemporaneous documentation of the damage as it occurs). Wherever possible, the Office may liaise with local, regional and international partners working on the preservation and documentation of cultural heritage. To combat the difficulties encountered in assessing the precise condition of the affected cultural heritage, the Office may look to diverse

[152] *See, e.g.*, 1999 Second Protocol, art. 27(3) (explicitly mentioning Blue Shield as an advisory body to the Committee for the Protection of Cultural Property in the event of an Armed Conflict).

evidentiary sources,[153] including, where available, imagery displaying cultural heritage before, during and after the attacks.

102. Circumstances often surrounding crimes against or affecting cultural heritage lead to an increased risk of loss of evidence. This can happen through illicit means, such as illicit trade in cultural property, pillaging, looting, unlawful excavations, or the wholesale destruction of cultural property. The transnational nature of these phenomena, often coupled with a lack of access to relevant sites and the passage of time since the attacks were committed, add to the difficulties investigations face.[154] To combat these difficulties, it is important to conduct the investigations in a timely and expedient manner. The Office may consider the use of the measures provided for under article 56 of the Statute in relation to unique investigative opportunities, where the conditions are met. If evidence is at risk of being lost owing to potential crimes under the Statute – such as pillaging or looting – the Office may investigate those crimes and ensure that potential synergy effects between investigations are fully utilised. In the case of illicit trade, which may not amount to an article 5 crime under the Statute, the Office may liaise with local and international partners,[155] and use the powers at its disposal to prevent loss of evidence.

103. While many communities and States have the important and legitimate desire quickly to reconstruct or rehabilitate cultural heritage, important evidence can be lost in that process. The Office may liaise with the competent authorities and local, regional and international partners to reconcile the need for a thorough collection and preservation of evidence with the desire for quick reconstruction or rehabilitation of cultural heritage.

104. Another challenge pertains to the collection, storage and preservation of evidence. It may not always be possible for the Office to physically collect, properly package, store and preserve identified evidence with regard to crimes against or affecting cultural property, although this forensic process 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 remain with that community. Consequently, in addition to the general methods of storing evidence available at the seat of the Court, the Office may use innovative

[153] With specific regard to the methods and tools employed in the assessment of damage caused to immovable tangible cultural heritage, the Office may employ technology, including satellite imagery, 360° imagery, data obtained from aerial drones, geolocalisation of visual evidence, and documentary and video evidence.

[154] *See* INTERPOL, "Enhancing the fight against the illicit traffic of cultural property", Lyon, 19 July 2018, available at https://www.interpol.int/es/Noticias-y-acontecimientos/Noticias/2018/Enhancing-the-fight-against-the-illicit-traffic-of-cultural-property.

[155] These can include, among others and if appropriate, INTERPOL, and Eurojust.

technology and preservation methods. It may work with local, regional and international partners as necessary to reconcile the need for the collection, storage and preservation of evidence with the views, customs, culture and religion of the affected communities.

105. To overcome these challenges, the Office has developed in-house forensic capacities for the recording of the identified evidence on site, such as 3-D mapping, 3-D laser scanning, 3-D modelling and drone imagery, as well as capacities in geographic information systems. The Office may also establish and boost its networks of contacts in the field of documentation, preservation and protection of cultural heritage to assist in effective investigations, based, among other things, upon contacts obtained during the preliminary examination stage. The Office may further identify local, regional and international expertise in various relevant fields, including satellite data, imagery, forensic, geolocation, architecture, history, theology, anthropology, and others, as appropriate. The Office may obtain such expertise in a timely manner. Obtaining information from diverse sources remains a primary consideration, as does the emphasis on corroboration of any evidence gathered.

106. As with the investigation of any crime before the Court, sufficient resources are needed for the analysis of the data collected, in particular as regards evidence related to attacks on immovable cultural heritage. As such, evidence will often comprise satellite imagery, geolocation data, and audio-visual material. Where the Office does not possess sufficient in-house expertise for the analysis of such evidence, external expertise will be sought.

V. Prosecutions

107. The Office will seek to investigate and prosecute those most responsible for crimes that fall under the Court's jurisdiction,[156] including lower-level perpetrators where their conduct was particularly grave and has acquired extensive notoriety.[157]

a) Selection of Charges

108. The Statute confers upon the Court jurisdiction over crimes directed at cultural heritage,[158] as well as offences in which crimes against or affecting cultural heritage can otherwise fulfil a necessary element or play a role. The Office is committed to strengthening accountability for these crimes, thus contributing to their prevention, and also to the development of international jurisprudence.

[156] *See* Policy Paper on Preliminary Examinations, para. 103.
[157] *See*, *e.g.*, OTP Strategic Plan 2016-2018, paras. 35-36; OTP Strategic Plan 2012-2015, para. 22.
[158] *See*, *e.g.*, Statute, arts. 8(2)(b)(ix), 8(2)(e)(iv).

109. Wherever evidence permits, the Office may bring charges for crimes against or affecting cultural heritage. In relation to other crimes, it may also highlight the role of conduct against or affecting cultural heritage, as laid out in the regulatory framework. In this respect, and consistent with the applicable law, the Office will consider bringing cumulative charges in order to reflect the gravity, multifaceted nature and far-reaching impact of crimes against or affecting cultural heritage.

b) Presentation of evidence

110. In line with its strategy to support expeditious court proceedings,[159] the Office will seek to strengthen its presentation of evidence related to crimes against or affecting cultural heritage. To that end, it may, for example, seek to adduce documentary evidence, including videos and photographs, and explore the use of available technology, such as satellite imagery, 360°-presentation software, 3-D imagery, and geolocalisation of visual evidence.[160]

111. The Office recognises the benefits of strengthening networks with partners using the latest imaging and remote-sensing technologies to document, preserve, and promote cultural heritage, and to bring elements of the past to life in ways that transcend time and distance.

112. Where necessary, the Office may consult with experts, and present the testimony of expert witnesses or victims, to provide evidence related to crimes against or affecting cultural heritage. Such testimony may cover, for example, the religious or historical nature or other relevant characteristics of the affected cultural heritage; and the physical, psychological and socio-economic impact of such crimes on individual victims and the local, national and international community.

c) Sentencing

113. In the determination of an appropriate sentence, the Court is required to take into account, among other factors, the gravity of the crime, the extent of the damage caused — in particular the harm caused to victims and their families — and the nature of the unlawful behaviour.[161]

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[159] OTP Strategic Plan 2019-2021, para. 25.

[160] For example, in *Al Mahdi*, the Office combined satellite imagery with the use of 360°-presentation software to create a platform of the destroyed and damaged mausoleums in Timbuktu.

[161] *See* Statute, art. 78(1) ("In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."). According to rule 145(1)(c) of the ICC's RPE, in its determination of the sentence, the Court shall, "In addition to the factors mentioned in art. 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of

114. The Office will advocate for sentences reflecting the particular gravity of, and the severe and widespread harm caused by, crimes against or affecting cultural heritage. Where appropriate, the Office will adduce evidence reflecting the impact of crimes against or affecting cultural heritage on the victims, their families, the community, and humanity as a whole, by way of victim or expert testimony and written statements. To that end, the Office may explore potential partnerships with organisations and other experts able to testify on cultural heritage issues. The Office will highlight if crimes against or affecting cultural heritage are indicative of a discriminatory motive, constituting an aggravating factor for sentencing.[162]

115. The Office will take into consideration the particular gravity of crimes against or affecting cultural heritage in its decisions regarding appeal proceedings.

VI. Co-operation and external relations

116. Together with complementarity, cooperation is a fundamental component of the Rome Statute system. Effective cooperation is crucial to the Office's ability to conduct effective investigations and prosecutions, including in relation to crimes against or affecting cultural heritage. Accordingly, the Office actively engages with States and other relevant stakeholders in order to ensure the requisite level of assistance to its operations, to enhance diplomatic and political support for its work, and to improve the general understanding of its mandate.

117. The Office recognises that no actor is able effectively to fight impunity alone. Often, prior to the Court's engagement in a situation, early responders such as UN bodies, peacekeeping and humanitarian personnel, non-governmental organisations and the media, deploy into areas where international crimes, including those against or affecting cultural heritage, have been committed. The Office may seek to cooperate and collaborate with early responders and other relevant stakeholders.

118. In the specific context of this policy, the Office recognises the efforts of many national and international bodies and institutions responsible for the prevention and fight against the destruction of, and illicit trafficking in, cultural heritage. The Office will endeavour to expand its network of partners, and seek to reinforce cooperation with such organisations, which may include relevant

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manner, time and location; and the age, education, social and economic condition of the convicted person." *See also* reference in relation to the gravity of the crimes in the special and enhanced protection systems of cultural property established respectively by Article 8 of the 1954 Hague Convention and Article 10 of the 1999 Second Protocol; Paragraphs 106-110 of the Military Manual on the Protection of Cultural Property also provides clarification on the immunity of cultural property under enhanced protection which is also referred to in paragraph 14 in the judgement of the case *Prosecutor v. Ahmad Al Faqi Al Mahdi*.

[162] *See* ICC RPE, rule 145(2)(a)(v).

academic institutions, non-governmental organisations, UN agencies, and private actors with the mandate, programmes or knowledge pertinent to cultural heritage. Focus will be on, *inter alia,* operational assistance, preservation of evidence, raising awareness, and strengthening capacities at national levels in situation countries, within the means and purpose of the Office's mandate.

119. In this endeavour, the Office will enhance institutional and operational collaborative mechanisms with both international enforcement organisations such as INTERPOL, Europol and Eurojust, and national police-force units and departments specialised in preventing and investigating cultural-heritage-related crimes, as well as relevant co-ordinating networks such as the EU CULTNET.[163]

120. While respecting one another's respective independent mandates, and recognising the sensitivities that might be linked to the work and mandate of the Court and different actors, the Prosecutor has highlighted that "an effective strategy to address the destruction of cultural heritage requires a multifaceted and collaborative approach". To that end, in November 2017, the Office signed a Letter of Intent with UNESCO, memorialising the organisations' intent to enhance contacts with each other, to collaborate on the development of this Policy, to engage in public information and raising awareness, and to explore synergies and other areas of co-operation.[164]

121. Noting the extent to which relationships with external partners have already greatly empowered and enriched the Office's work, the Office may continue to consult with external partners on how best to facilitate and optimise co-operation with partners.[165] In doing so, the Office also stands to strengthen its co-operation with, and continue to benefit from the unique expertise of, UNESCO and other specialised bodies.

122. In this regard, and recognising the UN Security Council Resolution 2347 of 24 March 2017,[166] which condemned the destruction of cultural heritage and

[163] The Office benefits from co-operation with a vast number of partners. Without being exhaustive, the Office recognises the contributions from, and will consider developing or strengthening partnerships, as appropriate, with, international and regional bodies such as UNESCO, INTERPOL, Eurojust, Europol, the World Customs Organization (WCO) and the United Nations Office on Drugs and Crime (UNODC); the United Nations Special Rapporteur in the field of cultural rights, and others; specialised units of national police forces with expertise in relation to cultural heritage; and international non-governmental institutions such as the International Council on Monuments and Sites (ICOMOS), the International Council on Archives (ICA), the International Centre for Museums (ICOM), Blue Shield International, etc., in addition to academic institutions and private actors, as appropriate.
[164] 'The ICC Office of the Prosecutor and UNESCO sign Letter of Intent to strengthen Cooperation on the Protection of Cultural Heritage', 6 November 2017.
[165] The Office will do this in accordance with its strategic goal 6: OTP Strategic Plan 2019-2021.
[166] United Nations Security Council Resolution 2347, 24 March 2017.

recognised the important roles of both UNESCO and the ICC in addressing that phenomenon, the Court and UNESCO are in the process of concluding a Court-wide co-operation agreement which will, among other objectives, aim at:

- drawing upon UNESCO's mandate for the protection, conservation, and promotion of cultural heritage affected by conflicts and intentional destruction and the Court's mandate under the Rome Statute, to co-operate to work towards ending impunity for the commission of crimes against cultural property, including any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property, and thus contributing to their prevention, within their respective mandates; and

- establishing close relations between the ICC and UNESCO in order to enhance co-operation and encourage the exchange of knowledge, experience and expertise;

- With a view to facilitating the effective discharge of their respective mandates, they agree to co-operate closely and consult each other on matters of mutual interest, pursuant to the provisions of the Agreement to be concluded, and in conformity with their respective applicable legal frameworks.

123. While complementing national efforts, the work of the Office may serve as a reference for national jurisdictions and other actors addressing crimes against or affecting cultural heritage committed in all contexts, in particular during an armed conflict. Accordingly, consistent with its positive approach to complementarity, the Office will seek to strengthen its ability and that of partners to close the impunity gap. The Office will enhance its efforts to identify, support, and engage with initiatives undertaken to respond to situations where crimes against or affecting cultural heritage may occur, including by responding, where possible, to requests for assistance from States to access information pursuant to article 93(10) of the Statute, or to share its lessons learnt and best practices; by participating, where appropriate, in co-ordinated efforts; as well as, generally, by contributing to the further development of a global network among investigative and prosecutorial bodies for sharing information and experience.

124. Beyond its operations, and in conjunction with other stakeholders, the Office seeks to contribute to, and highlight the need for, accountability for all crimes under the Court's jurisdiction, including those against or affecting cultural heritage through missions, public statements, and participation in conferences and training. It will actively engage with States, international and local organisations, as well as other stakeholders, in order to continue to improve the

effectiveness of actions taken as regards crimes against or affecting cultural heritage. The Office will continue to make a concerted effort to ensure meaningful co-operation with these actors in order to ensure support for the Office's work as regards cultural heritage, particularly in countries in which the Office carries out its activities.

125. In this regard, and in line with its positive complementarity approach, the Office will expand its partnership with all the stakeholders in this area — including non-governmental and academic institutions — so as to build networks for training and expertise-sharing with relevant national jurisdictions.

126. The Office encourages various initiatives and actions — most notably those by States Parties — to address crimes against or affecting cultural heritage. These include efforts towards universal ratification and domestic implementation of the Statute, and co-operation with the Court; the adoption of domestic legislation which incorporates the conduct proscribed under the Statute, and procedures which would protect the interests of victims and facilitate the effective investigation and prosecution of such cases; support for domestic investigations and prosecutions for these crimes; the enhancement of co-operation for the execution of ICC arrest warrants; and strengthening political support to end impunity and to prevent the recurrence of such crimes. These contributions are important to establish and reinforce the normative framework of the Statute for the accountability of all crimes within the Court's jurisdiction.

127. In order to integrate and create awareness of crimes against or affecting cultural heritage, the Office's public information activities may include seizing opportunities to highlight the impact of these crimes, and increase awareness and contribute to the prevention of future crimes. The Office will continue to develop its ability effectively to communicate with its stakeholders, with the victims and affected communities, and the general public.[167] It will utilise various platforms such as the Court's website, public events, media and social media campaigns, media programmes on high-level missions, or documentary projects, to communicate in a clear and timely manner so as to maximise transparency and ensure that its stakeholders have an accurate and up-to-date picture of the Office's actions and decisions.

128. Outreach initiatives are also very important in achieving these objectives. The Registry is responsible for, and leads in, the planning and implementation of outreach-related activities, in co-ordination with other Organs of the Court. The

[167] This will be done in accordance with the OTP Strategic Plan 2019-2021.

Office will support the Registry and participate in outreach activities, as appropriate.

VII. Institutional development

129. The Office will continue to enhance its institutional capacity to investigate and prosecute crimes within its jurisdiction, including crimes against or affecting cultural heritage. In this regard, the Office will seek to work with specialised partners in the field such as UNESCO, which may, within the limits of their mandates, be able to offer assistance in sharing their expertise on different aspects of the protection of cultural heritage related to the work of the Office.

130. The Office recognises the need for in-house expertise on crimes against or affecting cultural heritage, regardless of whether the crimes were committed in situations of armed conflict or not. It will continue to recruit persons with the required expertise and experience in this field, as appropriate, while benefiting from external expertise, where required.

131. Staff training on an ongoing basis constitutes an essential component of the Office's realisation of goals, including the effective investigation and prosecution of crimes against or affecting cultural heritage.

132. The Office will endeavour to ensure that it has the necessary competencies and support to perform its functions effectively in relation to crimes against or affecting cultural heritage. In addition, the Office will seek to build capacity related to the collection and analysis of evidence of crimes against or affecting cultural heritage, the relevant legal framework, cultural issues, and practices related to the situation and specific communities where the investigation is being conducted.

133. In as far as is possible, the demonstration of awareness, knowledge, and best practice regarding the cultural context of the investigations will be fostered through team leadership.

134. The Office will monitor its practices with regard to the investigation and prosecution of crimes against or affecting cultural heritage. The Office will utilise its standardised and institutionalised lessons-learnt process to identify, document, and implement best practices with regard to crimes against or affecting cultural heritage. This will promote learning and the preservation of institutional knowledge gained from experience.

135. This Policy paper, together with the Operations Manual and other relevant internal rules and procedures, will be regularly reviewed in order to incorporate best practices and other relevant developments, including jurisprudence.[168]

136. The Office will monitor the implementation of this Policy. | OTP

[168] This is in accordance with the third strategic goal of the Office, which emphasises a need for regular review of Office standards and practices: OTP Strategic Plan 2019-2021, para. 17.