

## ARTIJ Symposium: 'Art and International Courts'



Collection of publications on the results of a two-day workshop  
dedicated to the theme of 'Art and International Courts'.

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## Table of Contents:

<b>INTRODUCTION: ART AND INTERNATIONAL COURTS .....</b>	<b>3</b>
<i>By Marina Aksenova and Maja Spanu, posted on 25.06.2019</i>	
<b>SCATTERED THOUGHTS ON ART AS CONTRARIAN: JUSTICE PAL'S MEMORIAL IN TOKYO .....</b>	<b>6</b>
<i>By Mark A. Drumbl, posted on 26.06.2019</i>	
<b>ICONOGRAPHY AT THE INTERNATIONAL CRIMINAL COURT AND THE IDEA(L) OF INTERNATIONAL JUSTICE: SYMBOLIC OR SUBSTANTIVE? .....</b>	<b>13</b>
<i>By Jayati Srivastava, posted on 27.06.2019</i>	
<b>"A HAPPY BUILDING": ARCHITECTURE AND UNIVERSAL JUSTICE AT THE INTERNATIONAL CRIMINAL COURT .....</b>	<b>19</b>
<i>By Miriam Bak McKenna, posted on 28.06.2019</i>	
<b>ART, JUSTICE AND RECONCILIATION.....</b>	<b>25</b>
<i>By Rachel Kerr, posted on 30.06.2019</i>	
<b>THE USE OF ARTISTIC PRODUCTIONS AS A TRANSITIONAL JUSTICE MECHANISM IN THE CONTEXT OF INTERNATIONAL CRIMINAL JUSTICE AND THE MISUSE OF INTERNATIONAL TRIBUNALS' MANDATES .....</b>	<b>31</b>
<i>By Fiana Gantheret, posted on 1.07.2019</i>	
<b>INTERNATIONAL JUSTICE THROUGH THE KALEIDOSCOPE OF PHOTOGRAPHY – THOUGHTS ON THE EXHIBITION 'TRAUMA, HEALING AND HOPE' AT THE INTERNATIONAL CRIMINAL COURT .....</b>	<b>37</b>
<i>By Raphael Oidtmann, posted on 2.07.2019</i>	
<b>THE PROTECTION OF CULTURAL HERITAGE BY INTERNATIONAL CRIMINAL COURTS: THE EMERGENCE OF A LACUNA .....</b>	<b>42</b>
<i>By Giulia Bernabei, posted on 3.07.2019</i>	
<b>EXPLORING CULTURE IN INTERNATIONAL CRIMINAL LAW THROUGH THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI .....</b>	<b>46</b>
<i>By Shea Esterling, posted on 4.07.2019</i>	



# INTRODUCTION: Art and International Courts

By Marina Aksenova and Maja Spanu \*  
posted on 25.06.2019

International law can be thought of in a number of ways. Most evidently, international law is a wide set of norms, rules, and standards that define and regulate relations among states and at times within them. The domains covered by international law are multiple: from diplomacy to economics, from warfare to human rights. But international law is not just concepts and norms. To exist, international law is practiced, performed, conceptualized but also contested by agents across the globe in multiple ways. The actors involved with international law include policy makers, parties to a conflict, members of the civil society, intellectuals as well as the wider public. International law can therefore also be seen as a constantly changing social phenomenon that not only accommodates opposing views and narratives, but which actively encourages conflict (see [Hakimi](#)). It is through these social interactions that international law is shaped. Over the years, numerous authors have therefore focused on law as a social practice creating and created by individuals and groups, whether in the field of international law or in other disciplines such as International Relations, sociology, psychoanalysis, ethics and communication. Looking at international law as sets of practices rather than just normative outcomes has therefore opened up a multitude of approaches and understandings to international law.

Our first ARTIJ workshop on ‘Art and International Courts’ co-organized with iCourts at the University of Copenhagen on 25-26 April 2019 aimed to open up a discussion on what we deem is an overlooked aspect of the practice of international law, namely the relationship between art and international courts, as the *loci* where and through which international law is most obviously performed. What is the role that art plays in the discourse and practice of international law? How do aesthetics – whether understood as the study of visual, sensorial or rhetorical expressions - shape perceptions of law and courts? To what extent do they matter, across time and space, in the law’s actualization? How have different forms of art been used by courts, and for what purpose? How do international law and international courts deal with cultural heritage and protection of art? Bringing together a number of scholars working across law, International Relations, sociology, history and philosophy as well as artists this two-day workshop thus aimed to initiate a new and interdisciplinary conversation directly tackling these questions.

At ARTIJ, we engage with different forms of ‘art’, including visual art, fine art, performative art, moving art and applied art. In the context of this workshop we thus wanted to operate with a similar understanding of the concept to allow for the widest possible conversation. The challenge of defining art for the purposes of an academic discussion (no matter how transdisciplinary this conversation may be) is that in its widest possible sense, art lies beyond concept and therefore beyond description and categorization. Yet, we do believe that it is possible to distill and discuss art in a number of ways: art as experience, art as emotion, art as a form of representation of reality, art as a set of practices, as well as art’s functions across time and space. Moreover, a focus on art allows connecting all the actors involved in the processes of conceiving, making and receiving the artwork. The objects of art - whether explicitly called as such, as in the context of an exhibition, or in the form of a decorative item placed in a building hosting a legal institution- are the carriers of meaning both intended by the creator and attributed to them by the person experiencing the object in question.

We suggest that three core reasons define the need for exploring the role of art in the practice of international courts, directly connecting with the various contributions to our workshop and ensuing symposium.



Firstly, art is an inalienable feature of any social practice, international law included. Some art theory is helpful in explaining this point. John Dewey in particular eloquently argued that in the course of history art became artificially separated from the conditions of its creation. Dewey points out that art traditionally was a manifestation of the processes and tasks of everyday life, such as worship, war or hunting – “all the rhythmic crises that punctuate the stream of living”. Later on, and especially in Europe, art became increasingly confined to closed spaces only accessible to some such as museums, opera houses and so on. Yet, it is undeniable that there is an obvious continuity between artworks and everyday events and practices. For instance, the Greek Parthenon in Athens’ acropolis is regarded today as an art masterpiece. However, it was originally designed and built as a temple dedicated to civic commemoration. In a way not dissimilar to the past, the Peace Palace in the Hague was built at the beginning of the 20<sup>th</sup> century with the intention of transforming it into the ‘temple of peace and justice’. The building though also presents an incredibly rich décor, including manifold artworks, making of it not just the temple but also the museum of peace and justice, at a given point in time.

International law is a social practice concerned with issues of interest to the multitude of states and actors operating within them. If one accepts Dewey’s position that art is inherent in social life, then it is easy to see how artistic practices accompany the administration of international law. Art is inherently part of the process of international justice through architecture of the courthouses, through judicial rhetoric, through iconography and other forms of expression. A number of contributions at the workshop thus sought to shed light onto this ‘hidden’, or unspoken, aspect of international justice and examine what questions and contradictions it may hold. Mark Drumbl’s contribution speaks directly to this latter point. The author investigates the rituals of commemoration, remembrance and tribute stemming from the activity of international courts. In particular, Drumbl draws attention to the celebration in Japan of Judge Pal, an enthusiastic dissenter at the post-World War II Tokyo War Crimes Tribunal organized by the Allies, winners of the war. In his contribution, Drumbl argues that visibility brings with it unintended consequences, it opens up the space for a multitude of interpretations.

Jayati Srivastava’s contribution explores, in turn, international justice’s iconography. She points out that its emblems and symbols serve representational purposes whilst carrying specific meanings. This, the author claims, is visible for instance in the simple architecture and in the logo of the International Criminal Court (ICC), both seeking to convey notions of trust and transparency. Yet, Srivastava tells us, these aspirational messages are in clear opposition to current international criminal justice, which in practice is both hierarchical and imbalanced. The tension between ethics and aesthetics that the author uncovers stresses the discord between symbolic and substantive justice. Miriam Bak McKenna further explores the dichotomy between the aspirations and the actual reality of international justice reflected through aesthetics. More specifically, McKenna investigates the architectural design of international courthouses, drawing particular attention to the ICC structure: while the ICC was created with the ideas of internationalism in mind, the architectural aesthetic of the building is reminiscent of the sleek, glass structures common in Northern Europe.

In his piece on international justice and photography, Raphael Oidtmann ponders about the role of photography in eliciting truth. He argues that photography opens a unique window to reality. In the context of international criminal justice, photography therefore constitutes evidence that certain actors or even the wider public may doubt or refuse to believe. In the form of public exhibitions, photography can also participate to reconciliation processes, including all the actors involved in a given conflict as well as external observers, in a unique conversation. Finally, Oidtmann invites us to stop and think about the ethical implication of using photography for the purposes of international criminal justice.



Secondly, a number of contributions to the workshop and symposium stress how art can be thought of as experience. This approach is fundamental to seeing international justice as a process and not only as an outcome-driven activity. Art may offer a different lens through which to see the activities of international courts. This alternative lens can yield positive results when it comes to attaining broader social legitimacy of international law. [Simon O'Sullivan](#) argues that art has two functions: to represent reality and to create an affective state in the person or parties experiencing art. This latter function is an instrument of transformation. The experience of art creates an opening where the person is taken outside the familiar frame of referencing, or as Sullivan calls it, outside of the habitual time and space register. The function of art lies therefore in creating a possibility for making visible the invisible, placing attention to where it has not been placed before. The experiential function of art and its ability to focus on the process rather than the outcome is particularly useful in understanding broader outreach efforts of international courts and their attempts to foster a dialogue with various communities.

More specifically, art may be helpful in talking about the goal of reconciliation of international (criminal) justice. Although not expressly mentioned in the statutes of international tribunals, reconciliation became one of the objectives sought by international justice. Can international justice contribute to healing of the communities affected by violence? Can the deployment of outreach instruments with artistic value lead to a meaningful transformation? Contributions by Rachel Kerr and Fiana Gantheret explore these questions in depth. Rachel Kerr claims that artistic interventions may create space for a dialogue in which people can engage emotionally physically, and intellectually. Yet, she goes on, one should resist the temptation to fully instrumentalize art as a 'tool' of transitional justice. For it is a more complex practice that creates room for opposing views whilst allowing their co-existence. In turn, in her contribution, Fiana Gantheret maps out reconciliation efforts by the International Criminal Tribunal for the Former Yugoslavia and by the ICC. She argues that because reconciliation as a goal lies outside of the mandate of international courts and tribunals, express legal work towards its attainment, especially when embracing an artistic component, should be modest.

Thirdly, art can be seen as a protected value in its own right. It is clear that international justice is moving in the direction of increased recognition of culture, including but not limited to artworks, as internationally protected objects. The constitutive role of arts and culture in building and keeping the communities together is finding increasing support both in the academic literature and in the work of international courts and commissions of inquiry. For instance, the [recent report](#) of the Canadian National Inquiry into Missing and Murdered Indigenous Women and Girls found that Canadian policies of assimilation, which included the imposition of laws, institutions and cultures on indigenous peoples resulted in racial colonial attitudes and may well amount to genocide in both social and legal understandings of this term. This finding is a clear recognition of the central role of art and culture in forming and sustaining the existence of indigenous communities. The attack on language, rituals and cultural practices, amounted to an attack on the people(s) themselves.

In line with the logic of the report by the Canadian National Inquiry, Giulia Bernabei draws attention to the legal lacunae in the protection of cultural heritage when it comes to the specific field of international criminal justice. She insists that cultural heritage has value that goes beyond the physical objects that constitute it; it extends to their role in preserving life in a collective and communal sense. In her contribution, Shea Esterling explores the same topic in depth by focusing more specifically on the *Al Mahdi* case decided by the ICC. She argues for the importance of incorporating the narrative of cultural intra-nationalism in international criminal adjudication. This means that the court is to acknowledge the significance of cultural heritage to the local communities. Law is there to underscore arts' vital role for the survival of such constituencies. This view of culture as significant locally should complement the dominant view of cultural internationalism that treats the works of art as a legacy of humanity as a whole.



To conclude, we hope that the symposium provides insightful takes on the interaction between art and international justice on all the different levels mentioned in this short introduction. As co-founders of ARTIJ and editors of this symposium, we therefore hope that this is just the beginning of a new yet essential conversation.

*\*Marina Aksenova and Maja Spanu are the co-founders of ARTIJ.*

## **Scattered Thoughts on Art as Contrarian: Justice Pal's Memorial in Tokyo**

*By Mark A. Drumbl \**  
*posted on 26.06.2019*

Commemoration, remembrance, tribute: these rituals, which richly resonate within the world of art and architecture, are presumed to be positive ways to honor victims of atrocity. Visuality is assumptively taken as intrinsically benign, respectful, and in harmony with the arc of justice. Is this correlation axiomatic, however, or even usually the case? Art, after all, may be a vehicle for multiple normativities, contested truths, and variable veracities. Art may challenge. Art frustrates. It perturbs. It conspires as it inspires. Art, too, may soothe. It may calm and balm. Hence, in order to *really* speak about the relationships between the aesthetic and international criminal law, one must uncork the full range of initiatives – whether pop-up ventures, street art, or grassroots public histories – prompted by international criminal trials.

Very few international judges have ever been memorialized in brick, imagery, and mortar. One international judge, however, has seen two memorials arise in his honor. This judge is Radhabinod Pal of India. Justice Pal authored a vehement dissent at the International Military Tribunal for the Far East (IMTFE), established in 1946 to prosecute Japan's leadership. He would have acquitted all the defendants. Pal was the only judge to reach this particular result.

### **Justice Pal's Dissent**

While Pal determined that all sides had committed atrocities in the Pacific Rim, he would not have convicted because of retroactivity for some charges and lack of individuated evidence for other charges. It vexed Pal that international law suddenly could sanction the Japanese leadership for having mimicked the colonial imperialism of the West. The time was not right; things were not yet ripe; the rite of law was inopportune. According to Pal, international law could only legitimately punish if it organically emerged through and from a genuinely equal consensus of all states. For Pal: 'The colonized cannot be made to submit to external domination only in the name of peace.' It greatly disconcerted Pal that the deployment of atomic weaponry in Hiroshima and Nagasaki, along with the suffering(s) of Japanese civilians, never was adjudicated.

Pal's dissent has been controversial. It has been lauded and feted; it has also been witheringly critiqued and derisively shunned.

Although Pal's dissent certainly fractured the IMTFE, it may have bolstered that tribunal's overall credibility. More tangibly: had Pal not dissented he never would have been lionized as he was. No memorials would have been built or maintained, let alone cherished.

### **In Memoriam**



Two sites commemorate Pal. One is in Tokyo (completed in 2005), the other in Kyoto (completed in 1997).

The Tokyo site sits between the Yasukuni Shrine and Yushukan, a museum committed to the Japanese military. The Yasukuni Shrine is dedicated to war dead. Both the shrine and the museum have attracted fulmination for venerating the Japanese war effort, in a sense aligning this effort with the crushed romanticism of a 'lost cause'.

Here is the Pal memorial, towards the middle ground, in the morning sun:



*Author's photo, July 2, 2018*

This memorial reclines in a courtyard of statuary. On Pal's immediate left (shown above) is a statue commemorating a Japanese mother, widowed, who clutches three children ('Statue of War Widow with Children'), which was erected in 1975. To her (their) left is a glass-enclosed space containing tattered shoes, military garb, and two maps that I think show parts of Burma. On Pal's right is a monument commemorating a patrol boat and sailors; to the further right of that is an old bronze cannon. More or less across from Pal, though at a slight diagonal, from left to right when one turns one's back to Pal are three sequential statues that commemorate animals for their service in war: a dog, a horse, and a carrier pigeon. To the right of the carrier pigeon lies a smoking enclosure. There are lots of benches all around. It is a tranquil, pretty place. Vending machines sell cold coffee in cans, which refresh in the heat and humidity.

I have written [elsewhere](#) about what struck me, first and foremost, *when* I sat with Justice Pal in Tokyo. These are the vestiges, in words, of the slaver Jefferson Davis, the only President of the Confederate States of America, quoted in Pal's dissent and plaqued on the memorial.

Here, now, I would like to write [more than before](#) about what struck me *after* I had sat with Pal. These are the traces of Pal's footprints elsewhere in today's Tokyo. Had Pal not dissented, my sense is that sites of recollection in Tokyo would be of a different tenor, choreography, and composition. Pal's dissent pluralized *how* to remember the atrocities, pain, and hardship of the Pacific War. Pal thereby nudged, nurtured, and negated spaces and places for war memory.

### **Tokyo's War Museums**

Tokyo hosts six museums that involve World War II. Each differs in tone, cadence, and curatorial perspective. Pal's shadow lingers in different hues throughout each of them. In most of



these six, Pal's shadow is spectral – a whisper – since he is not referenced, but still I felt his presence and his touch. Some amid these museums feature a few glimmers and glimpses of post-conflict accountability, and one – the Yushukan – has a section that does overtly include Pal.

The [Memorial Museum for Soldiers and Detainees in Siberia and Postwar Repatriates](#) reclines on the 33<sup>rd</sup> floor of a generic office building amid the business and ramen of Shinjuku. This museum helps 'ensure that the memory of the suffering of Japan's World War II soldiers, detainees in Siberia, and postwar repatriates is passed down to future generations who have never experienced war'. It includes a 'diorama [that] reproduces life in a Russian concentration camp, where the inmates survived forced labor, terrible cold, and a near starvation diet'. It is here that the thread of the suffering of Japanese civilians, including those who had emigrated to Manchuria to occupy conquered lands, is narrated along with the fates of those combatants who fought there. This museum also evokes the last-minute – and convenient – declaration of war the USSR made against Japan, and the resultant territorial shifts in the region.

Manchuria is also the place where the first brothels, which later became cruelly institutionalized as comfort women stations, were established. Tokyo's [Women's Active Museum on War and Peace](#) focuses on comfort women while doubling as an archive for the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (2000). This museum sharply criticizes the Japanese government. It recounts the victimization, and survival, of many women of many nationalities. Justice Pal was even less charitable than the IMTFE majority when it came to the sexual torture and enforced prostitution of thousands of women. He was a skeptic, wincingly so; he was curtly dismissive. In his own words, pulled from his dissent: 'I might mention in this connection that even the published accounts of Nanking "rape" could not be accepted by the world without some suspicion of exaggeration.' Pal's sarcastic air-quotes around the word rape, intentionally introduced, speak volumes. Milinda Banerjee [puts it well](#): 'Pal did (in hindsight, irresponsibly, and perhaps unforgivably) express doubts about the extent of Japanese war crimes; thus he suggested that reports of the Rape of Nanking (Nanjing) might have been exaggerated.'



*Woman's Active Museum on War and Peace, portraits of comfort women, flowers in memoriam. Tokyo, July 4 2018 (author's photograph).*

A third museum is the [Center of the Tokyo Raids and War Damage](#). This museum documents the U.S.'s indiscriminate Great Tokyo Air Raid on the *Shitamachi* (downtown) district of Tokyo on March 10, 1945. This attack targeted civilians – the district was densely populated and inhabitants lived in wood frame houses nicknamed *yakeya* ('fire houses') because of their susceptibility to flames. The Great Tokyo Air Raid killed 100,000 persons, injured a far larger



number, and rendered 1 million others as internally displaced persons. American planners carefully selected the date of the raid because of the strong winds that day which accelerated the burning. This museum strives 'to teach the value of life and peace to the next generation' while also reflecting events in that '[a]fter the war, while Hiroshima and Nagasaki became symbols of Japan's suffering and the peace movement, the Great Tokyo Air Raid was virtually excluded from public discourse.' This museum questions the 'public amnesia' regarding the Tokyo air raids, similar to Pal's questioning of the IMTFE's amnesia regarding the use of atomic bombs. Paintings, themselves incendiary, illustrate the hellscape.



*The Umay Bridge on the Night of March 10* , Fukushima Yasusuke (age 6 at the time of the air raid)



*My Child* , Miyamoto Kenzo (aged 12 at the time of the air raid)

The [National Showa Memorial Museum](http://www.showa-kan.jp) (Showa-kan) unfurls the Japanese home front during the war and 'commemorates Japanese suffering during and after World War II'. This is not a museum of why (or why not) but simply of *how*, namely how it was and how it went during the war, narrated from the perspective of Tokyo's powerless. Showa-kan paradoxically opens up the agency of ordinary residents and unspools the limited ways in which they managed some of their little spaces. Visiting is a bittersweet experience: mention is not made of the glory of causes won or lost,



but rather the pain of war, occasional streaks of joy, and the struggle to rebuild. One theme in this museum is the indoctrination process of Japanese children – the ‘rising sun lunchbox’, featuring a plum in the middle of the rice, for the ‘little nationals’. Here, too, the date of the very first air raid – April 18, 1942 – tags as the beginning of a terrible time for Tokyo residents, leading to massive levels of internal migration from the cities to the countryside. In one exhibit, a child growing up during the war who visits with the spirit of his father (killed) at Yasukuni Shrine remembers it all as ‘nightmarish but heartwarming’.

*Kidding around  
Carried my mother  
Piggy-back  
I stopped dead, and cried.  
She's so light  
-- Ishikawa Takuboku (1908)*

Toshio Miyawaki, First Grade Class Five number 30, included this poem in an essay (“Together with mother”) that appears in exhibits on Japanese civilian life during World War II. Toshio recites the poem while reminiscing about his time with his mother in Tokyo during the War, including pedaling her about on his bicycle.



*Author's Photo, July 2, 2018, Showa-Kan Museum Tokyo: internal refugees in Japan, sloped and shouldered and staggering with belongings, hunched, their backs like Edvard Munch's 'The Scream'*

The [Edo Museum](#), somewhat like Showa-kan, has some rooms given over to civilian life in Tokyo during World War II. This is a museum of the full history of Tokyo (formerly known as Edo). This museum chides the Japanese war government for the inadequate policies it put in place



to protect the people against air raids. It points out that distribution of buckets, mops (*hitataki*), and sand bags only could go so far. The exhibits on the firebombing are powerful. In one, an American B29 pilot reports that ‘under the bright flames, he could read his watch from the height of 20,000 feet’. This museum (along with others) showcases the increasingly anemic nature of Japanese military capacities and defensive tactics as the war dragged on: *kamikaze*, bamboo spears, the *kaiten* (human torpedo), balloon bombs made by children to be buffeted by wind across the Pacific to reach the US.

And finally, [Yushukan](#), where a small section near the end of the museum’s tour path dedicates to Pal. This section riffs off the messaging of the Pal memorial, which sits perhaps 100 meters away from the museum’s entrance. The Yushukan Museum has been criticized for a revisionist portrayal of history, in particular, Japanese aggression in China (the ‘Manchurian Incident’). The museum is large, chronological, and detailed – it narrates a story of Japan dragged against its will into a war after having been ‘othered’ by the international community and strangled by trade embargoes. It presents international law and international treaties as cleansing and legalizing Japan’s unequal status – a point Pal advances in his dissent, referencing similar instruments. The museum directly connects Japan’s initial victories in the ‘Great East Asia War’, and the earlier conflict with Russia, with the emergence of third-world liberation movements including in Asia. The theme of Japan as an Asian liberator, of Japan having the spine to take on the West, lurks throughout. Pal incidentally also picks up this theme, albeit is rebutted by the two other Asian judges on the IMTFE who point out that Asian peoples were the overwhelming victims of this putative Asian liberation movement. On the day of my visit to Yushukan, a group of German high-schoolers drifted in. A monk who worked for the museum gave them an official tour. I confess I eavesdropped. The pedagogy of the tour matched the pedagogy of the placards. Some students listened intently and nodded, others chortled, several laughed, some stood bored, while a few asked many questions. The tour and I eventually parted ways. We split into separate rooms. I surmised that the tour had ended when I heard applause and thanks from afar. While pointing out Japan’s unfair position in the world, and how the war was forced upon Japan, Yushukan differs from other museums by emphasizing the martial pride, dedication, and victorious moments that Japan savored – fleetingly – in a cause, long lost, that was (and still is, there at least) depicted as necessary and just. That said, Yushukan never asks: what would have been had Japan won that war? Nor does it expose the pain, all the torment, inflicted on peoples on the lands Japan had occupied.

## **Conclusion**

In sum, then, Pal’s Tokyo memorial inspires as it rankles. It consoles, confronts, and confounds. Yet, it too is an example of how art, from below, responds to international criminal trials, from above. Pal’s memorial may render (certain) visitors squeamish, to be sure, but it generates room about how and what to remember. The dissent triggers the memorial and in turn quietly splices with and sluices into Tokyo’s museums. Along that path, to be sure, the visibility of Pal’s dissent also triggers what Shannon Fyfe [has adroitly described as ‘epistemic harm’](#). By this Fyfe means that those who suffer pain become doubly hurt when their narratives must hang together as equally valued with the falsity of denialist narratives. These victims – for example, the comfort women doubted by Justice Pal – suffer epistemic harm because they are no longer seen as ‘knowers’ or as credible sources of information. In addition, they have to endure other harms, such as gaslighting. This searing loneliness, too, lies among the remnants of Justice Pal’s legacies in Tokyo.

To end where I began: Courts may be able to stage their own outreach, to be sure, but they cannot micromanage the outreach of others. As for the outreach of others, well, these responsive efforts may take the form of art, commemoration, and tribute. These efforts, moreover, may veer off the ‘official script’ and deviate from ‘appropriate’ transnational views. They may be raw and unvarnished. They may unsettle while they upend. Such is the case with the memorials to Justice Pal.



*Bullet holes on a bridge under an ugly highway overpass. Yet another remnant of WWII in Tokyo. Author's photo, July 4, 2018*

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# Iconography at the International Criminal Court and the Idea(l) of International Justice: Symbolic or Substantive? <sup>[1]</sup>

By Jayati Srivastava \*  
posted on 27.06.2019

In a world dominated by iconography and circulating imageries, the proximity of the medium and its political ramifications cannot be overstated. Iconography related to international justice – whether an emblem, logo, painting or building - not only enacts an event but also encodes a message. Images are both the subject and object, simultaneously representing and creating realities about specific ideas and practices of international justice. Such iconography becomes a part of the representation and recollection of given ideas and informs the practice of justice. Hence, the deployment of an image is as significant as its encoded meaning.

The official and public iconography of justice at different international courts and tribunals uses multiple symbols to stamp the authority of law. These symbols - sometimes evolving, sometime ossifying, also indicate a gap between the symbolisms and substance of justice.

This post reads meaning into the idea of international justice through a translation of the official iconography of international justice encapsulated in logos, images, artwork and the architecture of the International Criminal Court (ICC), which constitutes one of the important registers of international justice. In doing so, it also addresses the gap between the ideal and practice of international justice.

## Iconography of ICC Building: Transparency & Trust

The iconography of the ICC symbolises the 21<sup>st</sup> century's vision and articulation of international justice, which arguably encapsulates an ambitious formulation of justice as it seeks to break with the long-established principle of non-interference in the domestic jurisdiction of member countries. It aims at eradicating impunity for the gravest of crimes: genocide, war crimes and crimes against humanity <sup>[2]</sup> referred to it either by a state party or by the UN Security Council, or, initiated by the Prosecutor acting in a *proprio motu* (on his own impulse), as per the Rome Statute. The ICC places justice at the heart of peace by stipulating that “justice is a key prerequisite for lasting peace. International justice can contribute to long-term peace, stability and equitable development in post-conflict societies. These elements are foundational for building a future free of violence.” <sup>[3]</sup>

Situated in the city of peace and justice <sup>[4]</sup> - the Hague, <sup>[5]</sup> the building was meant to reflect the transparency of the institution and its innovativeness. The design of the Danish firm, Schmidt Hammer Lassen, was selected “for its understanding of the concept of transparency...The design also shows how democratic values upon which the Danish tradition for architecture rests reflect in an international institution that is subject to some of the strictest security requirements in the world.” <sup>[6]</sup> The statement by Bjarne Hammer, Co-Founding Partner and Creative Director of Schmidt Hammer Lassen Architects, <sup>[7]</sup> captures the spirit of that vision:

To the victims, to their families and to the world, the ICC building must communicate respect, trust and hope. This building cannot be anonymous; it must have the courage to express the values and the credibility of the ICC.

He continues:



The building is designed as an abstract and informal sculpture in the landscape. This way, it becomes a backdrop for the ICC to communicate trust, hope, and most importantly, faith in justice and fairness. <sup>[8]</sup>

The court building is situated close to the North Sea. At the time of its conception, the design of the building was thought to both inscribe ICC's authority and showcase its intent of transparency, trust and respect - hence, the use of glass cladding system to create a chessboard effect that creates shifting patterns of light and shadow. <sup>[9]</sup>



*ICC Building*



*ICC Wall Panel*

The courtroom itself is devoid of any traditional iconography and is a modern and professional room, perhaps meant to convey a functional approach to international justice. Although ICC is bereft of any embellishment, it houses a few select motifs. For example, on the far side of the ICC compound there is a sculpture of Inukshuk which was used as an ancient stone landmark representing a human figure in Arctic regions of North America to denote food cache or a point of reference for travel routes amongst people in the region. Today, it has become a symbol of friendship and cooperation, especially after having been used as a symbol of the 2010 Vancouver Olympic games. Its location on the ICC compound denotes friendly overtures and spirit of human cooperation. The spirit of cooperation is further symbolised in parterre gardens, which houses flowers and plants from the member countries of the ICC. The water channel inside the building is meant to represent tranquillity, symbol of life and eternal quest for peace.

Inside the building is a multimedia exhibit - Justice Matters - documenting the personal testimonies of suffering and torture, which are a living monument to denial of justice and the continued struggle for justice through the agency of ICC.



*Water Channels inside ICC* <sup>[10]</sup>



*Inukshuk*  
(meaning to act in the capacity of a human)



*Court Room* <sup>[11]</sup>



*Detention Centre* <sup>[12]</sup>

The ICC detention centre is meant for custody of people detained by the ICC. It is only a temporary arrangement till the convicted person is sent to one of the state parties, which have entered into an agreement with the ICC for enforcement of such a sentence. <sup>[13]</sup>



*The ICC Logo*

The logo of the ICC that marks its visual identity is simple, free of any embellishments: a white graphic against the blue background with scales of justice encircled by olive branches, depicting peace. <sup>[14]</sup> The logo portrays the message of peace through justice.

### **The Contrast Between Symbolism and Substance**



The mandate of ICC constitutes an ambitious formulation on international justice by breaching the protective shell of sovereignty and tries people for genocide, war crimes and crimes against humanity. However, despite the ambitious aspirations of justice, the ICC falls short of a global reach. In all, 122 countries make up the ICC membership, which includes 33 from Africa, 18 from Asia-Pacific, 18 East Europeans, 28 Latin American and Caribbean, and 25 Western European and other States.<sup>[15]</sup> Many important countries are still not part of the ICC such as the US, India, China, Iraq, Libya, Saudi Arabia, Qatar, to name a few. Russia and Israel too have withdrawn their commitment to the Rome Statute.<sup>[16]</sup>

More substantially, the International Criminal Court produces an image of targeting smaller and weaker countries given its record of cases predominantly against the African leaders/countries. The presence of the two imperial languages —English and French—as working languages further stresses hierarchy of power.<sup>[17]</sup> Thus, even though the scale of justice in the logo carries the promise of being the leveller, the working of ICC has been mired in controversy and has largely been seen as biased.

In 2016, out of ten ongoing investigations at the ICC, nine involved African countries – leading to allegations of bias against African countries. Sudan, Kenya and Burundi (the first country to do so) have withdrawn from the ICC and so have the Philippines and South Africa, finding “its obligations with respect to the peaceful resolution of conflicts at times incompatible with the interpretation given by the International Criminal Court.”<sup>[18]</sup> Gambia’s Information Minister went on to underline the discriminatory treatment by the ICC to say that it had failed to indict Western war crimes, such as those by the former British Prime Minister, Tony Blair during Iraq war and by the US and allied forces in Afghanistan. This reasserted the notion that the ICC is “an International Caucasian Court for the persecution and humiliation of people of colour; especially Africans.”<sup>[19]</sup>

The institutional weaknesses of the ICC in the face of powerful countries’ recalcitrance became more pronounced after the U.S. Secretary of State, Mike Pompeo, in March 2019, threatened to withdraw and deny visas to ICC investigators involved in alleged war crimes investigations by the US and allied forces in Afghanistan.<sup>[20]</sup> After a formal revocation of visa for Fatou Bensouda, the ICC Pre-Trial Chamber in April of the same year, decided not to proceed with investigations into this situation, citing practical considerations; thereby inviting condemnations by the human rights groups for its weak resolve.

Speaking of the iconography of the court building meant to personify transparency; it has evolved its own security procedure, partly because of the cases it deals with. Visitors need to go through a security check after showing proof of identity and can also attend open sessions of the court under strict rules of decorum. Court chambers appear to silence people into submission to the power of law and as mute spectators, especially when the proceedings are seen via video streaming. The very glass panes, which were meant to exemplify transparency, create an aura of intimidation as the light reflects back through the glass panes, creating an impression of opacity.

Clearly, important trust gaps exist between the symbols and the substantive practice of justice, which point to both the limitations of the ICC and its modest record of delivering justice.

## **Conclusion**



The official iconography of justice uses multiple symbols to represent and operationalize justice and endorse the rule of law. These symbols serve important functions but are also a reminder of the gap between the promises encoded in the symbols and substantive outcomes.

The iconography at the ICC is geared towards displaying a modern and transparent approach to justice, devoid of any embellishment and yet it is adopting unique symbolism, as it pushes the wheels of international justice. At the ICC, there appears to be a fracture between the symbolisms and substance of justice. Justice as a virtue as codified in official iconography and justice as practice are two different things and point to the gap in the form of unfulfilled promises of justice. It is in this very gap that one sees the possibilities of imagining a comprehensive and meaningful idea(l) of international justice.

<sup>[1]</sup> The study is a part of a large research project titled 'Insignia and Images of Justice: Politics, Law and Visual Culture in the Age of Globalisation', in collaboration with Dr. Pratiksh Baxi (who is focussing on the courts in India), under the grant extended by the University Grants Commission, India to the Jawaharlal Nehru University, New Delhi, India under its University with Potential for Excellence (UPOE) scheme. A longer version of findings were presented at the *Workshop on Art and International Courts*, organised by iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts, University of Copenhagen, 25-26 April 2019. Comments received at the workshop, especially from Prof. Marina Aksenova and Dr. Maja Spanu are gratefully acknowledged. All photographs, unless otherwise stated, are taken by the author. The author would also like to acknowledge the staff at the ICC who facilitated access to the building. Photography is not permitted inside ICC but a visit to the building gave some ideas about the mechanics and symbolisms of international justice marshalled at the ICC.

<sup>[2]</sup> Amendments made in 2010 – the crime of aggression (for these amendments to enter into force, they must be ratified by at least 30 States and then voted upon by States Parties in 2017.

<sup>[3]</sup> ICC, 'About ICC',

<sup>[4]</sup> The city is branded as the city of peace and justice in promotional literature as it also houses International Court of Justice (ICJ), International Criminal Tribunal for the former Yugoslavia and the Appeals Chamber of the International Criminal Tribunal for Rwanda, amongst others.

<sup>[5]</sup> With Field offices in Kinshasa and Bunia (Democratic Republic of the Congo); Kampala (Uganda); Bangui (Central African Republic); Nairobi (Kenya), Abidjan (Côte d'Ivoire).

<sup>[6]</sup> Alyn Griffiths, Schmidt Hammer 'Lassen Completes Headquarters for the International Criminal Court', *dezeen*, 16 November 2015,

<sup>[7]</sup> The project was executed by Courtys, which was the consortium of the VolkerWessels subsidiaries Visser & Smit Bouw and Boele & van Eesteren.

<sup>[8]</sup> 'A New Home for the International Criminal Court', in *Detail*, 1 May 2010,

<sup>[9]</sup> Alyn Griffiths, 'Schmidt Hammer Lassen Completes Headquarters for the International Criminal Court', *dezeen*, 16 November 2015,

<sup>[10]</sup> Tjitske Lingsma and Janet H. Anderson, 'The International Criminal Court: A New Building, but is it Better' *International Justice Tribune*, 15 December 2015,

<sup>[11]</sup> ICC, 'How the Court Works'

<sup>[12]</sup> ICC, 'How the Court Works'

<sup>[13]</sup> ICC, 'How the Court Works'

<sup>[14]</sup> Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, Yale: Yale University Press, 2011, p 287.

<sup>[15]</sup> ICC, *State Parties to the Rome Statute*,

<sup>[16]</sup> The US signed the Rome statute under the Clinton administration but it was not ratified by the Congress and later withdrew under George W Bush. In 2016 Russia decided to withdraw its process of joining the ICC after its ruling that Russia's action in Crimea amounted to an "ongoing occupation."



<sup>[17]</sup> Other official languages in addition to English and French (which are also the working language) include Arabic, Chinese, Russian and Spanish.

<sup>[18]</sup> Statement by the South Africa's Minister of International Relations and Cooperation, Mr. Maite Nkoana-Mashabane quoted in 'South Africa to Quit International Criminal Court' The Guardian, 21 October 2016,

<sup>[19]</sup> Statement by the Information Minister of Gambia, Mr. Sheriff Bojang on Gambia's withdrawal from the ICC quoted in 'Gambia Withdraws From ICC, Accuses World Body of Bias Against Africans', The Wire, 26 October 2016,

<sup>[20]</sup> The ICC began reviewing material related to the case initiated by prosecutor, Fatou Bensouda, in November 2017 against alleged war crimes and crimes against humanity committed by the security forces in Afghanistan since May 2003.

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## “A Happy Building”: Architecture and Universal Justice at the International Criminal Court

By *Miriam Bak McKenna* \*  
posted on 28.06.2019

Six white cubes stand in a row along the coastal landscape of the Hague. Their opaque trapezoid windows with their angled panes, interspersed with glass-free panels, give the appearance of a checkerboard. High fences are absent, rather it is a large concrete mote and the surrounding sand dunes that protect the structure. Apart from the conspicuous video cameras, and guard patrols directly outside the entrance, approaching the structure, there is little to set the building apart from any other corporate headquarters or multi-national institution. Despite its somewhat discreet appearance, the building houses the International Criminal Court (ICC), arguably one of the most significant international design projects since the construction of the United Nations Headquarters in 1951. Built nearly 100 years after the first purpose-built structure for an international organization – the Peace Palace, also located in the Hague, built in 1907 to house the International Court of Justice (ICJ) – the visual language of the two buildings could not be more different.



*The ICC Building, the Hague*

In this post I reflect upon the aesthetic and material dimensions of the ICC premises, particularly as it seeks to represent the project of international criminal law in supposedly universal terms. It forms part of a wider project I have been developing which explores international law's relationship to architecture. <sup>[i]</sup> It is my claim that the sites and spaces of international law (courts, organization buildings, offices etc.) create law's physical presence, generating the material space in which international law is practiced, and in which ideas about international law and order can be expressed and, more importantly, experienced. <sup>[ii]</sup> This is true, I argue, not only of their functional aspects (the spatial elements that support the operation of international law) but also their aesthetic qualities which project certain institutional ideals and imageries to the outside. <sup>[iii]</sup> In this short piece,



I draw particular attention to the tensions inherent in efforts to develop an architectural expression of international justice, translated beyond the specifics of culture and history.

### **Expressing International Justice beyond the Nation**

While the design of domestic courthouses and spaces of justice have long played a highly symbolic role in manifestations of national legal and political authority (for example through the tropes and figures of courtroom design— the “scales of Justice” or the personification of the Virtue Justice, coats of arms, flags, state emblems),<sup>[iv]</sup> the contingent nature of these localized forms of expression have posed a challenge when seeking to embody the role and function of international courts (as well as international organizations more generally). With the move towards the institutionalization and bureaucratization of international law in the late 19<sup>th</sup> century,<sup>[v]</sup> architectural expression was to assume a central role in lending a newly imagined presence to the international legal community through the design of its organisational and administrative spaces. Yet, as soon became apparent the question of how to symbolize internationalism and ideas of a global community beyond the nation-state and its cultural values proved problematic.



*Peace Palace, the Hague*

We can see the tension between nationalism and internationalism in the design of the first permanent international legal structure - the Peace Palace. Inspired by the *Nieuw-Vlaamse* movement, the elaborate building with its picturesque towers and dormered roofs, drew extensively from the local Dutch architecture and its inherited renaissance tradition.<sup>[vi]</sup> Evoking the aesthetic of the Amsterdam Town Hall of 1652, the jury praised Louis Cordonnier’s design for its ‘following the local traditions of XCI Century architecture’ in the Hague, while architect Arthur Eyffinger described the structure as loyal to ‘the pillars of the Dutch Golden Age: Christian faith, the wealth of the merchant class and classical learning’.<sup>[vii]</sup> Internationalism here was anchored in the national aesthetic, in a visibly grand and historicist style, reflecting the design preferences of a selective elite composed of mainly Western diplomats and academics (much like the supposedly universal ideals the Palace was said to embody).<sup>[viii]</sup> This can also be seen in the visualizations of the story of universal justice in the Palace’s decorations and gifts, which were ‘littered with symbols of Christian and humanist virtue’ as well as the standard of civilization which underpinned the rights of membership to the community of nations.<sup>[ix]</sup> Critics disparaged its ‘lack of world harmony’, calling the design ‘wholly imitative of the architecture of another era, without the slightest effort at large symbolism of modern life’.<sup>[x]</sup> By contrast the Headquarters of the Pan American Union, built the following year in Washington DC, was praised for its harmonious combination of various national design elements representing both North and South American states, such as the terracotta roof,



ornamental bronze work, Aztec and Mayan artwork and tiled central courtyard that featured flora from across the Americas, along with a more contemporary Beaux-Arts aesthetic.

### **Universal Justice at the International Criminal Court**

Ideas of internationalism have since undergone a radical transformation, which is also reflected in the architectural expression of international law's newest flagship structure: the ICC. When the worldwide competition to design the space was launched in 2008, the brief called for a building that not only satisfied the ICC's functional requirements, including striking a balance between security and accessibility, but that also provided a *'well-balanced representation of the entire international community'*. From the outset there was a tremendous emphasis on architectural representation, and the expectation that the building physically embody the values of the ICC. Out of 171 submissions, German firm Ingenhoven Architects was declared the winner for a design evoking the circular design of the ECJ, which the jury oddly praised as a *'happy building'*. In the accompanying brief, the architects explained that they had sought to create a building that was 'light, careful, elegant' and 'detached from any specific cultural context'.

In 2010, the ICC decided to grant the commission to the second-prize winning design by [Schmidt Hammer Lassen](#). Completed in 2016, the solitary structure stands amongst the coastal dunes, its six towers are connected at podium level, yet appear from a distance to be separated from one another. The central tower, which houses the courtrooms, was designed to be clad in black timber, but ultimately changed due to its aesthetic similarity to the Kaaba at Mecca. <sup>[xi]</sup> The rest of the building, which houses offices, is constructed using neutral colours – beige, grey and white, and a mix of metal, glass and concrete. There is a distinctly ostere, authoritarian expression inherent in the design, and despite the extensive use of windows, one cannot look inside. The ICC President at that time, Judge Silvia Fernández, noted that the building *'helps us safeguard the independence of the Court, its credibility, and, ultimately, its legitimacy'*.



*The ICC Building, the Hague*

Commenting on the aesthetic choices behind the design Bjarne Hammer noted, that the firm had decided early on *'not to be specific regarding all these nationalities, cultures, and religions, as it's just not feasible for all of them to be reflected in a coherent architectural design'*, instead international unity was to be expressed through the surrounding gardens, which includes plants, flowers and substrates from all State Parties. Hammer noted that *'[n]o matter where they are, each culture always has a garden. It is the very smallest fundamental thing that we share'*. <sup>[xii]</sup>

Despite professing the aesthetic neutrality of the buildings, however, in another interview Denis Olette, director of Schmidt Hammer Lassen also spoke of the parallels between Nordic architecture and the professed values of the ICC:



*'We were happy to hear that our design perfectly reflected the ICC's criteria of transparency, fairness, trust, respect, and democracy. It was a match made in heaven, as these same values are anchored in Danish architectural design as well as in our firm's philosophy. We recognized ourselves in the ICC's briefing, and vice versa.'* <sup>[xiii]</sup>

And indeed, the ICC's overall aesthetic is reminiscent of the sleek, glass structures that have become the dominant form of expression of commercial and political power and prestige in Northern Europe. It is, for example, extremely close in design to both the Europol building and the Dutch Supreme Court, located in close proximity within The Hague's 'International Zone', and in stark contrast to say the design of the African Court of Human and Peoples Rights, the ECOWAS court building, or the Inter-American Court of Human Rights building.



*The Inter-American Court of Human Rights, San Jose and The African Court of Human and Peoples' Rights, Arusha*

Concerns have already been raised upon the message the building sends to non-European actors and visitors to the court, particularly given the prevalent discourse of political bias against African states that already clouds the ICC's work. One of the court's first detainees, Germain Katanga, described it as 'a place of business, like a bank', according to his lawyer David Hooper, whose own description of the building was that it might as well be 'Google's headquarters in the Netherlands'. <sup>[xiv]</sup> A similar criticism comes from the disparity between the white, open waiting rooms where the witnesses and victims wait before they take their place in court, in contrast to the dark grey holding cells, where the accused spend time in between courtroom sessions. As Christine Murray notes, contrary to the notion of presumed innocence, 'the architecture has already chosen sides'. <sup>[xv]</sup> One can't really imagine a Western leader being held here, Murray notes.

...



What this brief sketch seeks to underline, is that the aesthetic and functional frames for international justice communicated by the new ICC building are - consciously or not - far from neutral, and should prompt us to consider how it and other structures affect our understanding about international law and the identity of the international community. The Peace Palace still retains an iconic status for international justice, despite its visibly nationalist and colonial origins and aesthetics. What does this say about the way we continue to view international law? Similarly, despite its contemporary aesthetic, the ICC's new home, located firmly in the Global North, with its modern Nordic expression, tells a very clear and powerful story about the contemporary project of international justice. One that may not, in fact, be so far removed from the legacy of the Peace Palace.

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<sup>[i]</sup> See M Bak McKenna, 'Designing for International Law: The Architecture of International Organisations 1922-1952', *London Review of International Law* (forthcoming)

<sup>[ii]</sup> See S Stolk and R Vos 'International Legal Sightseeing' *Journal of the Oxford Centre for Socio-Legal Studies*, issue 2 (2018); ); Hyo Yoon Kang, 'Law's Materiality: Between Concrete Matters and Abstract Forms, or How Matter Becomes Material', *Routledge Handbook of Law and Theory* (Routledge, 2018), 453-474.

<sup>[iii]</sup> On the significance of visual narratives and image-making to international law, see also D Joyce, 'Photography and the image-making of international justice', *Law and Humanities* 4.2 (2010): 229-249.

<sup>[iv]</sup> J Resnik and Dennis E. Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, (Yale UP, 2011)

<sup>[v]</sup> See A Peters, 'International Organizations and International Law' in J Cogan, I Hurd and I Johnstone (eds) *Oxford Handbook of International Organisations* (OUP, 2016)

<sup>[vi]</sup> J Bank, W Frijhoff, M Spies (eds) *Dutch Culture in a European Perspective: 1900, the age of bourgeois culture*, (Van Buuren, 2005) 75.

<sup>[vii]</sup> ACGM Eyffinger, *The Peace Palace: Residence for Justice, Domicile of Learning* (Carnegie Foundations, 1988)

<sup>[viii]</sup> See M Duranti, *The Conservative Human Rights Revolution. European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford 2017) 31.

<sup>[ix]</sup> Duranti 2017, 39; see also D Litwin, 'Stained Glass Windows, the Great Hall of Justice of the Peace Palace', in *International Law's Objects* Hohmann and Joyce (eds) (OUP, 2019) 463-477.

<sup>[x]</sup> Resnik, 2011, 251.

<sup>[xi]</sup> Christine Murray, 'Transparency, democracy, high-security: Schmidt Hammer Lassen's International Criminal Court', *The Architectural Review*, 5 February 2016, online at <https://www.architectural-review.com/buildings/transparency-democracy-high-security-schmidt-hammer-lassens-international-criminal-court/10001999.article>

<sup>[xii]</sup> Murray, 2016.

<sup>[xiii]</sup> Mosa, 'A Design That Has It All' <https://www.mosa.com/en-us/inspiration/case-studies/a-design-that-has-it-all>

<sup>[xiv]</sup> Stéphanie Maupas, 'The International Criminal Court get a new home', *Justice Info*, 15 December 2015, online at <https://www.justiceinfo.net/en/justice-reconciliation/25221-international-criminal-court-gets-a-new-home.html>

<sup>[xv]</sup> Murray, 2016. See also Mulcahy, Linda. "Architects of justice: The politics of courtroom design." *Social & Legal Studies* 16.3 (2007): 383-403. See also Maass, Anne, et al. "Intimidating



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## Art, Justice and Reconciliation

By Rachel Kerr \*  
posted on 30.06.2019

There is new and exciting body of work emerging that interrogates different aspects of the arts and creative approaches in transitional justice and peacebuilding, including some exciting work that has begun to interrogate the aesthetics of international justice concepts and practices discussed here on the Art and International Justice blog. These new approaches apply innovative methodologies, drawing on a wide range of disciplines, to bring new insights into the theory and practice of transitional justice, from the aesthetics of the institutions and buildings, the courtroom drama, and the projection of the work of international courts to its main constituencies through artistic and creative approaches to outreach activities. Particularly interesting is the question of the extent to which the arts might be leveraged to serve two of the ostensibly most important goals of international justice – peace and reconciliation – by helping not only to communicate the work of international courts through outreach, but also more significantly by engaging people in dialogue about the issues and contexts with which it is concerned.

What can art do?

This short piece offers some thoughts on the key question of ‘What Can Art Do?’ in relation to international justice, especially in furthering goals of peace and reconciliation associated with it. It discusses the role of visual images within and outside the courtroom and the relationship between art, justice and reconciliation. It draws on research undertaken as part of two AHRC-funded projects, both conducted in collaboration with my colleagues at King’s College London, Professor James Gow and artist-in-residence, Dr Milena Michalski.

### **Spectacles of Justice: Visual Images and the Courtroom**

‘[Pictures of Peace and Justice](#)’ explored the role of visual images in providing impetus for the creation of international justice institutions, how they were deployed in the courtroom and how they were used to communicate the court’s work, in outreach activities. We sought to investigate how visual methodologies might provide new and different insights into the practice and politics of international justice. In August 1992, images of the notorious Omarska concentration camp in northern Bosnia taken by ITN had enormous impact, increasing the pressure to ‘do something’, which resulted in the establishment of the first international tribunal since Nuremberg, the International Criminal Tribunal for the Former Yugoslavia (ICTY), in May 1993. What is striking about those images is the extent to which, especially when rendered in black and white, they resonate with images from the Nazi Concentration Camps film. This film, shown on Day 6 of the Nuremberg Trial to liven things up, shifted the perception of the legacy of Nuremberg from being primarily about crimes against the peace and war crimes to be most commonly identified now with crimes against humanity (Douglas, 2001)

Later on, in 2005, footage was shown in the courtroom and later broadcast on news media in Serbia of a Serbian paramilitary unit, The Scorpions, carrying out executions of unarmed Bosnian Muslim men and boys in Srebrenica in 1995 at the trial of Slobodan Milošević. Given that this footage was not in the end admitted as evidence, one could argue that it had much more impact outside the courtroom than within it, piercing the veil of denial in Serbia, at least briefly (Zverhanovski, 2007). Meanwhile, local communities in Bosnia and Herzegovina responded to visual imagery in ways that were unexpected and probably unintended. One of the most striking findings was that images of the courtroom transmitted to these communities via Court TV actually



made it feel more remote and alien – the rituals and aesthetics of the ICTY were deemed alien and somehow otherworldly. One respondent called it ‘space-capsule justice’ (Gow *et al*, 2013).

### **Visuality outside the courtroom – art and reconciliation**

The potentially powerful role of visual images in international justice led us to question what the potential role might be of visual, artistic and creative approaches in fostering one of the key purported goals of international justice – reconciliation. Although reconciliation is not formally in the mandate of the ICTY, it does appear as one of the key stated goals of its sister tribunal, the International Criminal Tribunal for Rwanda (ICTR), and is often articulated as one of its missions by advocates of international justice.

We set out to investigate the potential role of the arts in reconciliation in another AHRC-funded project, ‘[Art and Reconciliation: Conflict, Culture and Community](#)’, together with colleagues at the London School of Economics and Political Science, Dr Denisa Kostocovica and Dr Ivor Sokolic, and University of the Arts London, Dr Paul Lowe and Dr Tiffany Fairy. Acknowledging the essentially contested nature of the term itself, both generally and specifically in the context in which we worked – the Western Balkans – where even the term reconciliation is hotly resisted, we did not seek to measure a pre-defined conceptualisation of reconciliation, but rather set out to tackle the question of what reconciliation was understood to mean in different contexts, and by different groups of people, and especially what alternative approaches in the arts might offer. We sought to do this in a few different ways – through history, discourse, and practice.

With regard to practice, we mapped reconciliation activity and honed in on the arts and creative practices as alternative approaches that had the potential to offer alternatives. What was notable was that despite resistance to the term, local actors were very much engaged with societal transformation activities that the project team identified as ‘everyday reconciliation’. In particular, such interventions seemed to provide a space in which dialogue might occur about the future as well as the past, and a space in which people might be engaged emotionally and physically as well as intellectually – which we have come to understand as being at the core of what reconciliation might be in practice. These interventions also allowed artists to play with time and space, and with order and disorder, thus reflecting some of the complexity and nuance of the construction of memory and narratives. Creative practices seemed therefore to have what we see as dialogic potential to engage people in discussions around, and reorientate reconciliation. As noted elsewhere by people like John Paul Lederach and Cynthia Cohen, the emergent, unstable and open-ended character of art has the potential to produce new and creative means of intervention that might enable the ‘moral imagination’ and open up discursive space in which paradoxes of peace and justice, truth and mercy, necessary for peacebuilding and, possibly also, for reconciliation.

Our research involved a number of different sorts of practices and actors, but was mainly focused on visual arts. In total, eleven artistic interventions were produced. Two of these were participatory – a drawing workshop and a youth media project, [Balkan Diskurs Youth](#) conducted in collaboration with the Post-Conflict Research Center in Sarajevo.



*Caption: Balkan Diskurs youth correspondents photography workshop. © PCRC*



*Caption: Drawing workshop in Sarajevo led by Professor Paul Coldwell, University of the Arts London.*

The other nine projects involved artists creating new work, either directly commissioned or in response to open calls issued in partnership with [the History Museum of Bosnia and Herzegovina](#) and the Institute of Contemporary Arts in Prishtina. These works were exhibited Sarajevo in June-August 2018 and in London in November-December ('Reconciliations'). Our aim was emphatically not to provide a 'toolkit' for artistic intervention, but we did think carefully about implications for evaluation and sought to do this without pre-judging outcomes. Nor was it to pin down an overarching definition of reconciliation, but rather to open up the concept and understand how each of these interventions engaged with a version of it.



*Caption: Exhibition poster, 'Reconciliations', History Museum of Bosnia and Herzegovina, June-August 2018.*



*'Memoria Bosniaca' by Vladimir Miladinovic. Photo by Isabella Pierce.*



*Caption: Artist Adela Jušić and an audience member experiencing [Bedtime Stories](#) by Jušić and Lana Čmajčanin, now part of the permanent exhibition at the History Museum of BiH.*



*Caption: MRWL 100mm by Mladen Miljanovic on the roof of the History Museum of BiH, Sarajevo. Photo by Isabella Pearve.*

### **Implications – the dialogic potential of art as reconciliation**

What we found was that whilst art and creative approaches had the potential to be leveraged for peacebuilding and reconciliation in different ways, optimism about their use should be tempered with caution. There are ways in which art might contribute to healing and allow time and space for self-reflection, as a means both of representing and processing lived experience. Art is also a useful means of exploring complexity, ambiguity and contradiction and as such has dialogic potential – it is precisely the idea that the engagement is open-ended, and not pre-determined, that means that it can accommodate difference, not seek a single didactic ‘truth’. Art can also be emotive/connective or ‘affective’ (Rush and Simic, 2014). The visual can connect in a way words cannot and make meaningful the suffering of others, and in some instances can bridge divides and create empathy based on shared humanity. It can also draw attention and so combat denial. Finally, there is an important role for the artist not only in dealing with the past but in reimagining the future. The dialogic potential of art is to open up a space for what John Paul Lederach calls the ‘moral imagination’ in peacebuilding, transitional justice and reconciliation (Lederach, 2005). This suggests a



recasting of how we might conceptualise reconciliation as space in which paradox and contestation can be accommodated, rather than seeking agreement on a shared narrative.

But we should also understand that open-ended connection can also be difficult and counter-productive. And that just as art might push for positive change, it can also serve to reinforce the status quo and consolidate divisive narratives. Moreover, we should avoid instrumentalising art as a 'tool' of transitional justice or peacebuilding. Catherine Cole points out that transitional justice and arts practitioners may be fundamentally at odds, with artists valuing opacity, ambiguity, irony and instability and transitional justice seeking normatively driven outcomes (Cole, 2014). We must also be careful not to fetishise or lionise 'art', but rather apply critical evaluation as we would to any other form of activity. This can be problematic where art is employed as a research method, rather than as research data, and involves navigating relationships between artists and researchers based on mutual respect and robust critical engagement.

Nevertheless, we should acknowledge and explore the power of art to resist overarching reconciliation discourse and narratives and to provide alternative sites and spaces in which reconciliation might occur. Rather than see it as a goal to be evaluated, we might then reconceptualise reconciliation as a space in which dialogue occurs and see how it both creates space for engagement with and complements or contradicts international justice narratives.

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# The Use of Artistic Productions as a Transitional Justice Mechanism in the Context of International Criminal Justice and the Misuse of International Tribunals' Mandates

By Fiana Ganttheret \*  
posted on 1.07.2019

What is the power of images? What do stories tell?  
Who produces them? And for whom?

In this short contribution, I would like to underscore the use – or rather the misuse – of a reconciliatory mandate of international courts and tribunals in international criminal justice.

According to the [International Criminal Court's \(ICC\) Outreach webpage](#), the mandate of the Outreach program of the ICC is to interact with affected communities. The page adds: “people most affected by the crimes have the right to understand, to participate in, and to have a sense of ownership of the justice process”.

There are two rationales behind this mandate: a pragmatic one, which entails finding witnesses and ensuring cooperation in the absence of armed forces to implement arrest warrants and investigation;<sup>[1]</sup> and a transitional justice one, namely the need to inform people to fulfill the reconciliatory mandate of the ICC. This latter mandate is not explicitly included in the Rome Statute of the ICC. Yet, the Statute's preamble emphasizes the suffering of victims of “unimaginable atrocities” in the paragraph preceding the one recognizing that crimes under its jurisdiction threaten international peace and security. This essay suggests that such strategic placement reveals the importance of transitional justice rationales at the ICC.

The [sixth annual report of the International Criminal Tribunal for the former Yugoslavia \(ICTY\), sent to the General Assembly and the UN Security Council on 25 August 1999](#), mentions in the section dedicated to the Tribunal's Outreach program that the criminal mandate of the ICTY is “to establish the legal accountability of those who committed crimes during the conflict in the former Yugoslavia” (para. 146). The report, however, goes on to underline the contribution that the Tribunal brings, “in so doing” to the restoration of international peace and security:

“In the region, therefore, the Tribunal is a means to assist in reconciliation and to prevent a recurrence of conflict. The achievement of these objectives is dependent on the victims being aware of and understanding the war and its causes. It is therefore critical to the success of the Tribunal that the populations of the region are informed about the work of the Tribunal and understand its significance ”.

This intermingling of international peace with local and lasting peace as the result of successful national reconciliation is rather daring. It must also be recalled that even though the 1999 report mentions national reconciliation, transitional justice was not an objective or a mandate that was included in UN Resolution 827, founding the ICTY. In contrast, a year and a half later Resolution 955 creating the International Criminal Tribunal for Rwanda (ICTR) affirmed that “the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace”.



The prism of transitional justice and national reconciliation is also present in the founding texts of the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).



*ICC lobby, headquarters premises.*

Thus, the communities of conflict-affected victims are the primary targets of Outreach strategies of various international courts and tribunals. These strategies and programs target groups that are not party to the proceedings – the broader audience in general, and the victims, in particular.

Such [programs](#) were first put in place at the ICTY in 1997 by then President Gabrielle Kirk McDonald, who noticed that decisions issued by the Tribunal were not understood, even sometimes rejected, by local populations. Yet, the local communities are the ultimate recipients of these activities. Such a targeted practice undertaken by the international criminal institutions raises the question of - to put it in Frédéric Mégret's words - the identity of the constituency of international criminal justice. <sup>[iv]</sup> Who is international justice rendered for?

Beyond a purely judicial and repressive mandate to try and punish, it seems that international criminal institutions have taken on an extra-judicial function that places the trial in a process of reconciliation and restoration of a lasting peace in the countries where violations of international humanitarian law occurred. A paradigm of transitional justice is therefore applied to internationalized justice. The Outreach programs of international tribunals underscore this shift in the way international justice contemplates its mandate(s), whilst raising the question of their effectiveness.

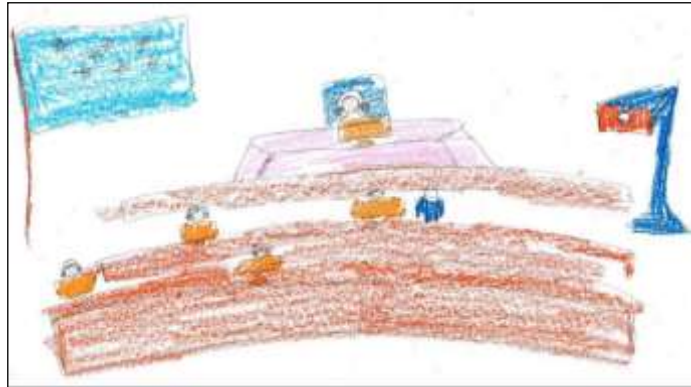
### **Artistic activities in the outreach programs and why art is being used by international tribunals**

At the ICTY (see the [outreach page of the tribunal](#)), the staff of the Tribunal prepared a long series of documentaries on specific subjects. <sup>[v]</sup> Moreover, the Youth Outreach section refers to two projects with a clear artistic focus. The first one is entitled 'ICTY through children's eyes' and is a project established in 2014. Below is how the project is presented on the [dedicated page](#) on the ICTY's website:

*"Every year, during specifically organized workshops such as the annual 'Sarajevo Kids festival', hundreds of children from Bosnia and Herzegovina aged 7 to 14 interact with Outreach representatives. Children are invited to reflect on the following questions: 'How do you imagine justice? What kind of work does the Tribunal do? Will war crime trials contribute to reconciliation in Bosnia and*



Herzegovina?” They are also shown age-appropriate photographs of wartime events and of ICTY proceedings, which serve as a catalyst for a discussion about the war and its consequences.”



*ICTY Through Children's Eyes – Sarajevo Kids Festival 2013. Adnan, Sarajevo*

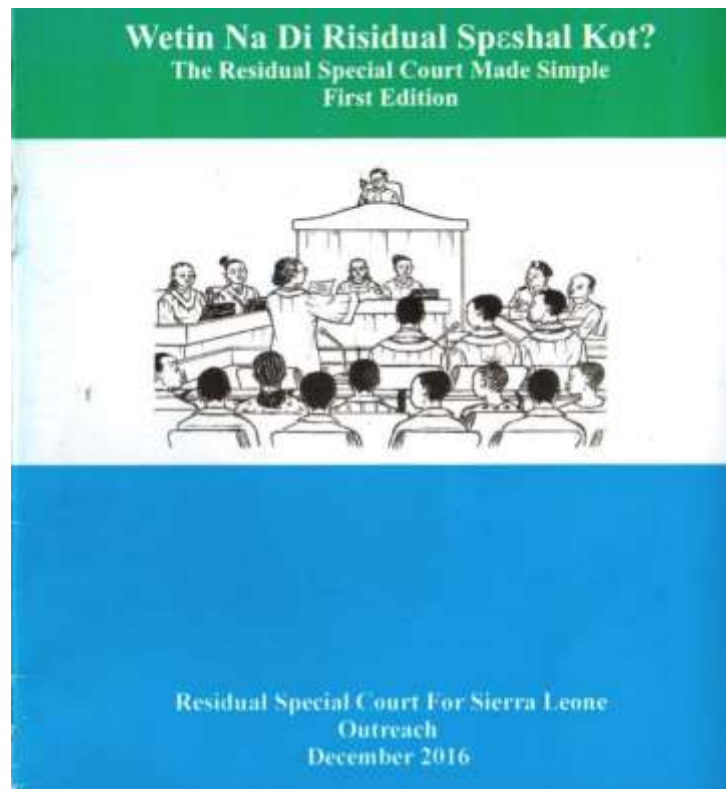
The second project is an essay-writing competition for school children. Below is an abstract from Maja Graca, first prize winner of the 2013 essay-writing competition, from the Meša Selimović Gymnasium in Tuzla (Bosnia):

“Other people’s past is our present, and to have a normal future, we must go through a complete social catharsis. The past of war is like a weight tied to our legs, slowing us down in our development and on our path to a normal life.”

Not unlike the ICTY, the ECCC also implemented outreach activities - one of these being the Tuol Sleng Museum of Genocide, located in the former prison grounds, Pol Pot’s secret prison, codenamed S-21. 114 photographs are currently displayed on its website. <sup>[iv]</sup>



The Outreach program of the SCSL is one of the most commented and praised, specifically because it was established before the start of the judicial activities of the Court, a lesson learned from the mistakes of the ICTY. The court was created locally, which has made it easier to engage with local communities. A [booklet](#) was made for the purposes of outreach: “The Residual Special Court for Sierra Leone made simple”.



As for the ICC, the celebrations of the 20 years of the Rome Statute in 2018 offered a good momentum for the outreach section to develop their projects, including artistic ones. One art project, created in partnership with the National Geographic photographer [Marcus Bleasdale](#) and in consultation with the ICC trauma expert is an exhibition entitled “Healing, Trauma and Hope” and deserves particular attention. It tackles the following issues: trauma, healing and hope, the aftermath of crimes, loss, insecurity and injustice. Details of the project are available [online](#). The project features pictures that were physically exhibited within the ICC premises, as well as at the Atrium in The Hague, and at the UN Headquarters in New York. On 11 September 2018, it was also launched as a digital exhibition.



*Screenshot of one of the pictures part of the exhibition Trauma, Healing and Hope.*

One of the *raison d'être* of using art approaches to outreach issues is, as indicated by Outreach officers of the ICC, that it is easier to address certain subjects through art. Matters such as justice and peace that could not always be discussed frontally emerge from scenes, pictures, or paintings. Artistic representations make concepts and functioning of courts easier to understand to the broader



public as well as to communities of victims. Arts and artistic representations also allow the courts to better access the target groups of the outreach: the general public is more easily targeted through photo exhibition for example. Finally, extensive literature in the fields of sociology, psychology and transitional justice, explored the fact that these initiatives may help victims in their healing processes as survivors of atrocities.

As put forward on outreach webpages of international courts and tribunals, the designed programs are meant to help in attaining a reconciliatory goal at the national level. However, do outreach sections proceed to evaluate the *impact* of their tools, in this instance artistic, with regard to the international tribunal's goal to contribute to national reconciliation? Is it at all possible to proceed to such an evaluation?

### **Evaluation of the effectiveness of ICTs as transitional justice mechanisms, through their outreach programs**

The reports of the ICC prefer a statistical approach to evaluate the impact of the various activities, workshops and exhibitions organized. Data is gathered on the number of attendees and the groups they belong to (women, NGOs, journalists...), as well as on the documents produced. However, this numerical approach does not take into account the qualitative reception of the work of the courts. That is why, according to staff members of the Outreach section of the ICC, surveys are also conducted, for example through satisfaction forms, by independent actors such as universities (Berkeley or Harvard are cases in point). These qualitative assessments have been conducted in Uganda and Central African Republic to monitor factors such as trust, understanding, and involvement. However, they are not employed in relation to artistic and creative approaches used by courts. Moreover, recent outreach reports are not available, so the public will need to wait for the results of these studies.

At the moment, there is therefore no evaluation of the artistic and creative outreach processes, and when available it is in a very limited form.

I would thus now like to raise the question of actors' role here: who should conduct outreach activities in the context of international criminal justice? Should these programs be undertaken by the very institutions in charge of performing the judicial tasks? Due to the context in which these tribunals operate – the need for cooperation with countries for arrest and surrender, as well as investigations – how can these programs be seen as anything else than marketing strategies? <sup>[v]</sup>

It is important to note that leaving the task of branding or marketing their work to the very institutions in charge of the judicial activities produces two negative effects. First, the message communicated by the court, which tries to convey the fairness of the procedure and the independence of the judiciary, is marked for the audience as an endeavour to conceal what some victims still perceive as a "victors' justice". The risk is therefore that these initiatives do not build the confidence as expected but encourage mistrust of the institution. The very opposite of what was intended. This situation also engages the question of judicial truth versus historical truth. Secondly: there is a conflict of interest. A judicial institution – even more so a penal one – is expected to respect fair trial processes. This can be challenging if there is pressure to reach national reconciliation by ending impunity and bringing justice to victims, namely, implicitly, by condemning.

This short essay underlined the challenges stemming from a shift in the paradigm applied to international justice, which has incorporated a transitional justice rational to its mandate. Outreach programs of international tribunals, in particular through artistic approaches targeting primarily communities of victims, make this shift visible, but cannot provide for solutions yet to the challenges that it creates.



<sup>[i]</sup> Patrick VINCK and Phuong N. PHAM, Outreach Evaluation: The International Criminal Court in the Central African Republic, in *The International Journal of Transitional Justice*, Vol. 4, 2010, at 422.

<sup>[ii]</sup> Frédéric MÉGRET, « In Whose Name? The ICC and the Search for Constituency » in C. De VOS, S. KENDALL and C. STAHN (dir.), *Contested Justice, The Politics and Practice of International Criminal Court Interventions*, Cambridge, Cambridge University Press, 2015

<sup>[iii]</sup> See also Kirsten AINLEY, Stephen HUMPHREYS, and Immi TALLGREN, *"International criminal justice in/on film" in the London Review of International Law*, 2018.

<sup>[iv]</sup> See also Maria Elander, *Figuring Victims in International Criminal justice – The Case of the Khmer Rouge Tribunal*, Routledge, 2018.

<sup>[v]</sup> Fiana GANTHERET, Le grand public comme acteur de la justice pénale internationale: les enjeux de la sensibilisation à la justice pénale internationale, *Revue électronique du CRDH*, Université Paris II Panthéon-Assas [accessible here: [https://droits-fondamentaux.u-paris2.fr/sites/default/files/droits\\_fondamentaux/fichiers/le\\_grand\\_public\\_comme\\_acteur\\_de\\_la\\_justice\\_penale\\_internationale.\\_les\\_enjeux\\_de\\_la\\_sensibilisation\\_a\\_la\\_justice\\_penale\\_internationale.pdf](https://droits-fondamentaux.u-paris2.fr/sites/default/files/droits_fondamentaux/fichiers/le_grand_public_comme_acteur_de_la_justice_penale_internationale._les_enjeux_de_la_sensibilisation_a_la_justice_penale_internationale.pdf)]; Christine SCHWOBEL-PATEL, "The Market and Marketing Culture of International Criminal Law" in *Critical Approaches to International Criminal Law*, Christine SCHWOBEL (ed.), Routledge, 2014.

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# International Justice Through the Kaleidoscope of Photography – Thoughts on the Exhibition ‘Trauma, Healing and Hope’ at the International Criminal Court

By Raphael Oidtmann \*  
posted on 2.07.2019



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‘Photography is truth’. This is how French-Swiss film director Jean-Luc Godard once responded to the question of photography’s essential role and function. As eye-minded individuals, we tend to instantly agree with Godard: our intuition suggests that what we can see through our own eyes must be something tangible, something present, something real. And still, true as Godard’s dictum may be, it seems as if photography is more than just a random technique to (objectively?) record incidents occurring around us. Indeed: photography is a way of documenting truth.

Photography allows us to retain and preserve glimpses of reality: it provides a unique access towards the world by opening a momentous window through which we can take a look outside and capture what we see on a film reel (or, more likely these days, a SD card). But beyond that, photographs are the documentation of time, witnesses of bygone moments and enduring proof of what has revealed itself as visible to the human eye. Thus, in a certain way, photographs are also a visualization of the manifestation of human activities in all their different forms. Therefore, taking it back to Jean-Luc Godard: photography is truth, since it enables us to capture everyday occurrences, to conserve countless impressions and, thereby, to make myriads of small and isolated cuttings of reality tangible and comprehensible for only for ourselves, but for others.

It is therefore in this context that photography fulfils another important function, one that is of particular relevance for the purposes of international (criminal) law or, even more precise, for international (criminal) lawyers and legal practitioners: considered in a legal context, photography is able to provide evidence for things we might doubt, for things we refuse to believe, but which become more probable or can even be proven by and through the efficacy of an image. As Susan Sontag masterly noted in one of her seminal essays collected in the volume *On Photography*,



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‘Photographs furnish evidence. Something we hear about, but doubt seems proven when we are shown a photograph of it. In one version of its utility, the camera record incriminates [...]. In another version of its utility, the camera record justifies. A photograph passes for incontrovertible proof that a given thing happened. The picture may distort: there is always a presumption that something exists, or did exist, which is like what’s in the picture.’

(Susan Sontag (1977), *On Photography*, Penguin Books: London, 5).

The potential to either incriminate or exonerate thus hints at the fundamental clout of photography. And indeed, there should be no doubt that photography is a mighty sword in the armoury of international (criminal) law and at the disposal of institutions and individuals operating within its realms: most importantly, photographs are therefore used as pieces of evidence before international criminal courts and tribunals, but beyond that they might also be utilized as visual proof that atrocities have been committed somewhere abroad in the daily eight o’clock news or on the cover of a news magazine. On a more abstract level, photographs thus have a function as ‘normative imprints’, reminding us of international criminal justice’s overall imperatives: to end impunity for the most serious international crimes. To hold alleged perpetrators individually responsible. To prevent future abomination from taking place. In all these manifestations, photography hence fulfils a crucial function towards society as it helps us to speak truth to reality by documenting what has been.

The more specific function of photography as factual evidence in court, however, warrants a closer analysis: as already mentioned above, human beings tend to be more susceptible to images as compared to other forms of communication. As Gilles Peress – a renowned photographer and member of *Magnum Photos*, but also a professor of human rights and (!) photography – has aptly put it: ‘I don’t trust words. I trust pictures.’ Thus, if we are to accept this dictum, various questions remain, which – in the context of these brief considerations – can only be superficially grazed: for example, we might need to inquire what the key implications of being more receptive to images effectively are, particularly in the context of photographs as evidence in proceedings before an international criminal court or tribunal. In other words: we may need to contemplate what role we effectively attribute to photographs when these are introduced as evidence, how these visual documents of reality are actually utilized and which audience(s) we thereby aim to address in the context of international (criminal) justice.

These are only some of the considerations that judicial institutions such as the International Criminal Court (ICC) have increasingly been confronted with in recent years. Thus, while the overall importance of photographic evidence in proceedings before its numerous chambers appears to be widely accepted, photography has also been used in other contexts by the Court: in this respect, the



ICC's manifold outreach activities – aiming at informing the broader public about the institution's mission and mandate – are particularly noteworthy. Through its employment in a number of projects, the role of photography at the International Criminal Court has been substantially expanded and thus complements the use of photographic evidence in ongoing proceedings. Amongst the more visible outreach activities inaugurated by the Court – or, more precisely, the Registry – have been photographic exhibitions, such as the [Justice Matters](#) multimedia exhibit that opened in November 2012, commemorating the International Criminal Court's 10<sup>th</sup> anniversary. Not the least since then, public exhibitions have been a recurrent form for the Court to facilitate information about its activities towards a broader audience.

It is in the context of the Court's '[Integrated Strategy for External Relations, Public Information and Outreach](#)' combined with its enhanced focus on victims and their inclusion in fostering reconciliation that the most recent public exhibit '[Trauma, Healing and Hope – Towards a More Just World](#)' should be located. On 11 September 2018, as part of the celebrations marking the 20<sup>th</sup> anniversary of the Rome Statute – the International Criminal Court's foundational legal document – the exhibit was inaugurated, both in a digital and in physical version: while the former was (and at the time of the present writing still is) available on the Court's website as an interactive presentation, the latter was previously opened both at the United Nations Headquarters in New York City as well as the seat of the Court in The Hague.



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Featuring an impressive series of monochrome pictures, 'Trauma, Healing and Hope' captures various scenes and impressions from countries currently investigated by the International Criminal Court – either as preliminary examinations (as in the case of Georgia) or active situations (as, for example, the Democratic Republic of Congo or the Central African Republic). Featuring the works of award-winning photojournalist [Marcus Bleasdale](#), the exhibit provides a comprehensive overview of the Court's activities in different parts of the globe.

Moving from one picture to another, what instantly strikes the observer's eye is Bleasdale's deep understanding of the underlying conflicts and their respective ramifications: after spending more than twenty years covering conflict and human rights violations particularly in sub-Saharan Africa and closely collaborating with organisations such as *Human Rights Watch* or *The Enough Project*, Bleasdale has an unerring eye for providing a balanced and yet authentic account of each situation. His photographs are a disturbing account of atrocities beyond imagination, impressive in their narrative depths, sometime outright cruel and disturbing, but always portraying victims in a dignified manner and sometimes even instilling a vanishing glimpse of optimism and hope.



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For instance, we learn about Valentine, a young girl from the Central African Republic, who was abducted at the age of thirteen, forced to become the ‘wife’ of a militia member and raped presumably countless times. We meet Masua, a fisherman from the Democratic Republic of Congo, kidnapped from his village at young age and forced to work as a porter for a local rebel group. Or we become familiar with the story of Khadidja, a 30-year-old women, who witnessed her husband and three children being killed right in front of her eyes before she was shot in the neck. She survived.



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These are only three of the stories featured in the exhibit: supplemented by explanatory remarks and background information, the observer is thus taken by the hand and guided through all three dimensions of conflict entailed in the exhibit’s eponymous title. Thereby, we become witnesses to how victims have been traumatized, but also obtain at least a little impression of how much strength must be required not only to effectively survive, but to slowly face the process of healing. But even beyond that, we are allowed to take part in what makes the exhibit so impressive: to see the victims of most heinous international crimes still holding on to a shred of hope. The exhibit forcefully challenges the far too often employed narrative of further ‘victimizing victims’ by portraying these remarkable individuals as, indeed, marked by their sufferings, but not as hopeless. In a subtle way, the photographs are documents of a limited, yet persevering optimism: there still is a life to live after the conflict has ended.



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‘For reconciliation to take place and wholeness and harmony to be approached, then some degree of truth, mercy, or forgiveness, justice, and peace must be woven into the process’. This quote, which is also taken from the exhibit, aptly mirrors the versatile challenges that are inherent to the reconciliation process. Amongst those challenges, however, one aspect of paramount importance is to make sure that victims of international crimes are being heard, that their stories are being told, that they are given a voice. To host high-profile exhibits at public fora such as the International Criminal Court hence support the notion that ‘victims’ narratives’ now feature more prominently in this endeavour. It is in this context that photography can play a crucial role as not only does it lend victims a face, a ‘visual identity’, but it also provides us as bystanders with tangible evidence when we are in doubt, when we do not want to believe that atrocious crimes have indeed been committed. Bringing these brief considerations full circle, photography therefore is a manifestation of truth and as such is an inevitable component in the process of facilitating reconciliation after conflict has come to a halt.

*\* Raphael is a lecturer in international law at the University of Mannheim and an associated fellow at the Peace Research Institute Frankfurt (PRIF). He currently works on a project investigating the role of photography in international justice. These preliminary remarks are intended to moot some early thoughts, feedback and further comments are therefore highly appreciated and may be directed to [oidtmann@uni-mannheim.de](mailto:oidtmann@uni-mannheim.de).*

*The author would also like to cordially thank Marcus Bleasdale for the permission to use the above-shown photographic materials.*



# The Protection of Cultural Heritage by International Criminal Courts: the Emergence of a Lacuna

By Giulia Bernabei \*  
posted on 3.07.2019

This post discusses the function of two international criminal courts within the pursuit of the protection of cultural property and identifies the emergence of a lacuna. I consider the material element of war crimes against cultural heritage, as required by the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Court (ICC). At present, a gap between the approaches of such courts undermines the degree of protection these judicial bodies accord to cultural goods.

As this post will further explain, cultural heritage does not only need to be safeguarded for the intrinsic value of the physical items which constitute it, but also because – in a more extensive acceptance – it preserves life in a collective and communal sense.

## **Introduction: Back to the Latin roots**

Before addressing the emergence of a lacuna, it is helpful to consider the origins of the phrases ‘cultural property’ and ‘cultural heritage’.

The notion of ‘heritage’ as we commonly conceive it today is linked, by etymology, to the idea of ‘inheritance’, of ‘handing down a multitude of objects, buildings and traditions from one generation to another’. International treaties also provide definitions of ‘cultural heritage’, ‘intangible cultural heritage’, and ‘cultural property’: e.g. the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (art. 1), the Convention for the Protection of the World Cultural and Natural Heritage of 1972 (art. 1) and the Convention for the Safeguarding of the Intangible Cultural Heritage of 2003 (art. 2 (1) and (2)). To date, however, there is not a universally agreed understanding of those terms, since the definitions in treaties are limited ‘for the purposes’ of those conventions and the debate on their precise meaning is still ongoing.

In this post, I use the expressions ‘cultural property’ and ‘cultural heritage’ as interchangeable phrases, given that I will tackle the topic of attacks against cultural goods from the perspective of international criminal law.

While cultural *property* hints at an element of ownership (its Latin root, *proprietas*, implies this idea of physical possession over something), the distinguishing feature of cultural *heritage* (from the Latin *hereditas*) is its quality of being passed down from one individual to another, which, in principle, might also extend beyond concrete goods and include abstract elements like knowledge and beliefs. These concepts have been combined with another macrocosm of its own, that of *culture*. The common employment of this term is actually a figurative use of it, since its original meaning points at the sphere of land cultivation and agriculture (the Latin noun *cultura* is a derivative of the verb *colĕre*, to cultivate). It then expanded to include the worship of Gods and Goddesses and, from there, to embrace a vast set of values, cognitions, knowledge and social behaviours at the heart of an individual’s, a people’s or a certain age’s development. Thus, the term *culture* carries an inherent nuance related to the action of tilling the soil, of tending and guarding it with constant care, zealous attention and lengthy dedication. Out of metaphor, this subtends a whole idea of *culture* as the fruit of a well-nurtured field, as a source of identity.

## **International criminal courts’ stance towards crimes against cultural heritage**



As it has been underpinned by the Chief Prosecutor of the UN International Residual Mechanism for Criminal Tribunals (IRMCT), Serge Brammertz, at the ‘[International Conference on the 20th anniversary of the 1999 Second Protocol to the 1954 Hague Convention](#)’ held in April 2019, the ICTY has been the first international judicial body which qualified attacks against cultural property as international crimes. The general pattern has then been to condemn those acts primarily as war crimes, as also confirmed by the judgment of the ICC in the *Al-Mahdi* case of 2016.

In order to protect cultural heritage to the fullest extent, international criminal courts have to strike a balance between many conflicting poles.

The first type of friction is one between the interests of a group and those of humankind as a whole: is cultural property defined with regard to the values of a local community or is it rather understood as being relevant for humanity in general? And, moving a step further, which acts substantiate an attack against cultural heritage? Are such acts supposed to impact the entire universal society or does it suffice that they affect a smaller unit of human beings? In this respect, the threshold does not seem to be particularly high, as the provisions of the Statutes of the ICTY and the ICC (respectively: art. 3 (d) and arts. 8 (2) (b) (ix) and 8 (2) (e) (4)) generally mention buildings dedicated, for instance, to the arts, sciences, religion and education. There are not additional criteria to be met, like, for example, that such constructions are ‘of great importance to the cultural heritage of every people’ (required by art. 1 (a) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954) or that they are ‘of outstanding universal value’ from the historical, artistic, scientific, aesthetic, ethnological or anthropological point of view (mentioned by art. 1 of the Convention for the Protection of the World Cultural and Natural Heritage of 1972).

But there is also a second type of resistance those courts have to tear down. It originates from one of the pillars of international humanitarian law: the goal to limit the effects of the hostilities which, by virtue of the principle of distinction, affords a certain degree of protection to civilians, as opposed to combatants. This principle is also applied to goods, so that only those of military nature can be the legitimate objects of attacks. Cultural objects generally fall under a specialized category of civilian objects, although they can also turn into military objectives by function (see: art. 6 (a) (i) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 1999). Pursuant to art. 4 (2) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and to art. 6 of its Second Protocol of 1999, only under exceptional circumstances, a waiver to respect cultural property could be invoked on the basis of imperative military necessity.

According to these premises, all cultural goods (not only those under special/enhanced protection) should be spared from being jeopardized by warfare. Due to an overarching, natural precedence of the right to life over any other type of right, however, there seems to be a tendency to prioritize the prosecution of crimes against human beings over those targeting inanimate things. I would like to be clear on this point. Life is absolutely sacred in every single form it takes. It has to be shielded from any type of violence and its offenders must be prosecuted by justice in all instances. No human being can be deprived of or impaired in the enjoyment of their right to life under any circumstance. Nonetheless, to defend cultural heritage before international courts does not downgrade the right to life as such. In fact, the preservation of the right to life and that of cultural heritage are not necessarily alternatives but can be achieved in parallel. Of course, when a choice must be made, the prioritization of the right to life shall trump the safeguarding of cultural property. What I try to uncover here is that this choice is not always needed, that both interests can be pursued at the same time. That cultural heritage has a dignity of its own, for which it deserves to be saved from peril in the first place and for which its aggressors must be subject to trial.

### **The material element of war crimes against cultural heritage**



The traditional approach of both courts has been to consider attacks against cultural heritage as war crimes. I will now focus on the material element required for the performance of war crimes as it emerges from the reading of the ICTY and ICC Statutes, leaving aside other important issues such as the appraisal of the mental element and the assessment of those acts as crimes against humanity.

The ICTY has now ceased to perform its functions and the IRMCT has a mandate to complete its remaining work and that of the International Criminal Tribunal for Rwanda. For this reason, I refer to the ICTY with a past tense.

Art. 3 (d) of the ICTY Statute spoke of 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'. The ICC Statute addresses similar acts under the prescriptions of arts. 8 (2) (b) (ix) and 8 (2) (e) (4), which condemn as a war crime the act of 'intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives', respectively, in international and non-international armed conflicts.

In brief, it looks like, by requiring the actual 'seizure, destruction or damage' of cultural property, the ICTY had a stricter attitude when it came to establishing the acts which imply the performance of those war crimes. On the other hand, the ICC has a more flexible posture as it is satisfied with the simple direction of attacks against those buildings.

### **Conclusions: a two-tiered approach**

Two conclusions can be drawn from the above discussion.

First, the Statutes of the ICTY and the ICC show some imbalances in those courts' response to the need of protecting cultural property at the judicial stage. Admittedly, this might be partly due to the peculiarities of the historical and factual contexts those courts have been confronted with. As a result, they have applied different standards for the assessment of war crimes against cultural property (at least with regard to the material element). They (correctly) relied on their own statutes but remained strictly within those boundaries, without searching for a comprehensive approach that could eventually reconcile incompatible trends. A lacuna emerged between the stance of the ICTY and that of the ICC.

Second, international criminal law is a field governed by many and diverse forces. Different types of permanent and special courts and tribunals exercise various types of jurisdiction. While it may be deceptive to look for an identical application of many principles and norms by such bodies, a certain level of uniformity can be reasonably hoped for. This would guarantee an even protection of the rights at stake but also a fair treatment of the accused. If, in line with the above, cultural property concerns all human lives, then we have to make sure that it is granted the same kind of protection by all judicial bodies.

I like to think about cultural heritage with the Latin undertone of inheritance. I like to think about it as some treasure we are asked to look after for all of those who are going to come next. As a form of legacy, which belongs to all human beings, it should not be subject to the varying shifts of courts and tribunals and should be entitled to a universal, consistent degree of protection.

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*and Law Journal, which develops the present issue in greater detail and advances a possible solution in order to fill the identified lacuna.*



# Exploring Culture in International Criminal Law through The Prosecutor v. Ahmad Al Faqi Al Mahdi

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The threats to cultural heritage are as many and varied as heritage itself. Amongst others they include economic development, natural disasters, degradation, tourism, illicit trade, iconoclasm and war. Like these threats, the responses are also many and varied. One response by international criminal law [ICL] is to proscribe behaviour that involves the destruction of cultural heritage. At Art. 8(2)(e)(iv), the [Rome Statute of the International Criminal Court](#) [ICC] makes criminal “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments ... provided they are not military objectives...” Yet, what is the ICC’s understanding of culture?

In 2016 the ICC considered the destruction of cultural heritage in [The Prosecutor v. Ahmad Al Faqi Al Mahdi](#). After making an admission of guilt, *Al Mahdi* was convicted of intentionally directing attacks against buildings of religious and historical character in [Timbuktu, Mali](#), between 30 June 2012 and 11 July 2012. As the Prosecutor did not subsume these acts within any charges for crimes against humanity, this was the first freestanding charge and conviction under Article 8(2)(e)(iv) of the Rome Statute. The exploration of the *Al Mahdi* narrative which unfolded within the ICC reveals a dual approach to culture. Specifically, it both recognizes the importance of cultural heritage to the broader international community while acknowledging the significance of cultural heritage to local community. In effect, the *Al Mahdi* narrative reflects dual views of culture embodied in the theories of cultural internationalism and cultural intra-nationalism which developed within cultural heritage studies.

## Cultural Internationalism and Cultural Intra-nationalism

Cultural internationalism understands that cultural objects demand protection as a result of their development of common human culture and so should not be subject to the arbitrary boundaries of the state in which the object was produced. It thus stands in contrast to cultural nationalism. At its core, cultural nationalism posits that cultural objects belong within the state of origin stressing the link between cultural objects and the cultural identity of a people. Consequently it repudiates ownership claims that would result in the (dis?)location of cultural objects outside of its state of origin. However, this focus on assigning clear cultural if not legal ownership of objects rooted in national identity can create some ‘sticky’ situations. Principally, it ignores one of the central tenants of multiculturalism; that culture does not stem from a territory but rather from peoples. Enter cultural intra-nationalism or cultural indigenism. This view retains focus on the importance of heritage to identity. However, cultural intra-nationalists inject a third possible group of people seeking control of their heritage: sub-state entities such as, amongst others, Indigenous Peoples.

## The *Al Mahdi* Narrative

Exploring the *Al Mahdi* narrative reveals that it embodies an understanding of culture rooted in both cultural internationalism and cultural intra-nationalism. For instance, in its [judgment](#) the Trial Chamber relies on an internationalist logic using the [UNESCO World Heritage status](#) of almost all of the sites that were destroyed [See para. 39] as evidence of their qualification as religious buildings and historical monuments under Article 8(2)(e)(iv) of the Rome Statute [See para. 46]. Yet in explicating the gravity of the crime, the Trial Chamber also places the most weight on intra-nationalist sentiments noting the importance of Timbuktu as “an emblematic city with a mythical



dimension” and “at the heart of Mali’s cultural heritage” [See para. 78]. It further explains that “destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu” [See para. 80].

### **Analysing the *Al Mahdi* Narrative: Preserving Cultural Heritage**

What does this conflicted narrative in *Al Mahdi* regarding culture tell us about the future of the protection and preservation of cultural heritage in ICL and the relationship of the latter with human rights law? First, it tells us that ICL endorses the protection and preservation of cultural heritage as understood by UNESCO and its bestowal of World Heritage status. The judgment in *Al Mahdi* explicitly relies on the logic of internationalism by using the UNESCO World Heritage status of almost all of the sites that were destroyed as evidence of their qualification as religious buildings and historical monuments under Article 8(2)(e)(iv) of the ICC Statute [See para. 39].

However, the *Al Mahdi* narrative also demonstrates that such an understanding of heritage goes beyond endorsement and that in this instance UNESCO World Heritage status serves as the measure for determinations of gravity for the purposes of admissibility before the ICC. The Rome Statute requires that for a case to be admissible, the [Office of the Prosecutor](#) must assess the gravity of the crime and in particular it stipulates at Article 17(1)(d) that it must be of “sufficient gravity to justify further action by the Court.” Factors to be considered here in relation to gravity are scale, nature, manner of commission of the crimes, and their impact. In making her [determination to bring charges](#) against Al Mahdi for the intentional destruction of cultural heritage, Prosecutor Fatou Bensouda relied on the UNESCO World Heritage status of the sites in Mali as the basis of her finding of the gravity of the charges in relation to the scale, nature and impact of Al Mahdi’s actions [ See paras. 154-57].

The Prosecution’s approach to the charges in *Al Mahdi* in relying on such internationalist logic makes clear for the future that ICL understands the destruction of heritage with UNESCO World Heritage status as meeting the requirements of gravity necessary for admissibility. In and of itself this is not problematic. However, issues arise as the *Al Mahdi* narrative leaves open the question of whether heritage that does not have this status would make the admissibility cut? If interpreted not simply as endorsement of UNESCO World Heritage status but as a threshold requirement for gravity regarding admissibility, the internationalist logic of the *Al Mahdi* narrative would have devastating consequences for the protection of heritage by ICL through limiting its scope and applicability.

Specifically, I argue that such an interpretation rooted in a rigid internationalist approach must not be taken; not only on the grounds of such disastrous consequences for cultural heritage but on the grounds that such an interpretation is out of step with developments in other threads of international law, namely human rights law.

### **Human Rights Law and Cultural Intra-Nationalism**

Human rights law increasingly embraces an approach to culture rooted in cultural intra-nationalism or cultural indigenism. Prominent among its advocates are [Elazar Barkan](#) , [Ana Filipa Vrdoljak](#) , [Catherine Bell](#) and [Robert K. Paterson](#) who both constitute and define this approach which has a better understanding of cultural diversity including indigenous and minority issues in relation to cultural heritage. As the [Universal Declaration on Cultural Diversity](#) notes, “[t]he defence [sic] of cultural diversity is an ethical imperative, inseparable from respect for *human dignity*. It implies a commitment to *human rights* and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.” It is evidenced in human rights law by the development of new instruments and the interpretation of existing instruments in a fashion that



increasingly privileges a concept of culture developed by social anthropologists who view culture not simply as a means of interpreting the world but as a tool for survival which aligns more closely with indigenous or other sub-state entities views.

This understanding of culture has hitherto been scarce in international law. Rather international law has offered understandings of culture that are indifferent if not contrary to this view. However, this more holistic understanding of culture is slowly being recognized under international law especially in human rights law through interpretation of existing instruments that recognize collective cultural rights for minorities and Indigenous Peoples. These include [Article 27 of the International Covenant on Civil and Political Rights](#) but also the development of new instruments in human rights law such as the [U.N. Declaration on the Rights of Indigenous Peoples](#) which provides a *sui generis* scheme for the protection of cultural heritage. Consequently, the *Al Mahdi* narrative must not be confined to its internationalist logic and so narrowly interpreted in relation to its protection of cultural heritage in ICL, as such an interpretation is out of step with developments in human rights law which are imbued increasingly with a cultural intra-nationalist ethic.

This is not to suggest that human rights law does not continue to take a fragmented approach to the protection and preservation of heritage. In fact, such fragmentation makes manifest a recalibration from an internationalist to an intra-nationalist understanding of heritage. However, the arc of human rights law bends towards an intra-nationalist approach and ICL must mirror this bend for the most complete and effective protection of cultural heritage and human rights. Indeed, like the fragmentation that human rights law is experiencing, the dual approach to culture in the *Al Mahdi* narrative is symptomatic of a recalibration; in this instance a recalibration of ICL to an intra-nationalist understanding of heritage.

## **Conclusions**

The understanding of culture as perpetuated by cultural intra-nationalists should be infused into ICL to bring it in line with recent developments in human rights law. Ultimately, this will ensure the coherent development of the law but also most importantly the effective protection of people and their cultural heritage by more fully addressing cultural and human rights.

I suggest that the *Al Mahdi* narrative with its dual view of culture demonstrates that ICL has the scope for the inclusion of an intra-nationalist approach. Indeed, the dual view of culture in the *Al Mahdi* narrative makes manifest how ICL is grappling with such a recalibration which is being replicated across a number of areas of international law including human rights law. Time will tell if such a recalibration across a number of areas of international law represents a synergy in the approach to culture which will positively impact on the protection and preservation of cultural heritage. I hope that it is.

Crimes against cultural heritage deserve our full attention; not just on their own merit but due to their relationship with promoting and protecting cultural diversity and the cultural identity of individuals and communities.

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