



Observations communicated to the Office of the Prosecutor of the International Criminal Court on its Draft Policy on Cultural Heritage

Introduction

1. Anne Herzberg¹ and Joshua Kern² submit these observations on the Office of the Prosecutor's (OTP) Draft Policy on Cultural Heritage (the "Draft Policy") further to the invitation which was extended on 23 March 2021. We welcome the spirit of transparency communicated by the OTP's invitation and stand ready to assist with the consultation going forward should we be requested to do so.
2. The Draft Policy is correct to observe that "cultural heritage is the embodiment of the continuity of the human story, a celebration of identity, our commonality and the richness of our diversity."³ It is right that willful attacks on cultural heritage for far too long have been an all-pervasive feature of armed conflict (para 2). It is also correct that the protection of cultural property has been an important feature of international humanitarian law (IHL), criminal law instruments, and is included in the Rome Statute.
3. The Draft Policy provides a strong articulation of how the OTP can enhance protection for cultural heritage and hold those who are responsible for criminal violations accountable. Legally, the OTP must achieve these goals through adherence to the requirements of the Rome Statute. We would observe, for the reasons provided below, that a policy on cultural heritage which is consistent in its application of both Rome Statute principles (whether procedural or substantive

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³ Office of the Prosecutor Press Release, "The Office of the Prosecutor publishes Draft Policy on Cultural Heritage for consultation," 23 March 2021, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1579>



definitions of the elements of crimes) and customary international law will provide the OTP with a firmer basis to proceed.

4. Taking these initial considerations into account, we observe two principal areas of concern with the Draft Policy, as it is currently written.

1. A pluralistic approach to assessment of “cultural heritage” and “cultural property” is desirable

5. In formulating a policy concerning the investigation and prosecution of crimes affecting cultural heritage, the OTP should adopt a pluralistic approach while remaining mindful of the Office’s systemic vulnerabilities to politicization and instrumentalization.
 - a. The OTP must remain mindful of its duties of impartiality and independence
6. The Draft Policy rightly recognizes that the Rome Statute’s Preamble reflects that the cultures of all peoples are “pieced together in a shared heritage and concern” (para 1). The Draft Policy also recognizes that cultural heritage is the “bedrock of cultural identity” and that “crimes against or affecting cultural heritage often touch upon the very notion of what it means to be human, sometimes eroding entire swaths of human history, ingenuity, and artistic creation” (para 17).
7. Interference with cultural heritage and damage to cultural property is an endemic by-product of armed conflict. The “increase in deliberate attacks on cultural heritage has been associated with a strategy of violent extremism using deliberate and systematic destruction of culture as a weapon of war in order to destabilize populations and hurt societies at their core.”⁴ In addition, identification of, protection of, and claims to cultural heritage and cultural property can also be a significant driver of conflict. Such issues are often highly contentious and revolve around competing, but equally legitimate, cultural and historical narratives. As emphasized in Security Council Resolution 2347, the attempt “to deny historical

⁴ Reinforcement of UNESCO’s Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict, Doc No. 38 C/49, 2 November 2015. *See also*, NATO Open Publications, “The Protection of Cultural Property in the Event of Armed Conflict: Unnecessary Distraction or Mission-Relevant Priority?,” July 2018, <https://www.act.nato.int/images/stories/media/doclibrary/open201804-cultural-property.pdf>



roots and cultural diversity ... can fuel and exacerbate conflict and hamper post-conflict national reconciliation.”⁵

8. In analyzing and interpreting issues relating to cultural heritage and cultural property, therefore, the OTP should adopt a prudential approach. The Office should always seek to establish a broad and contextual understanding of issues relating to cultural heritage in any situation or case before it. Such an approach is a prerequisite to understanding how victims, affected communities, affected States, civil society, and the international community as a whole relate to issues impacting upon cultural heritage in a given situation or case. The OTP, as an organ of an international Court prosecuting international crimes, should avoid adopting or cherry picking one party’s narrative when it relates to matters affecting cultural heritage.⁶ This is because such an approach to investigation and prosecution – by an international criminal court – foreseeably will result in an exercise of jurisdiction which may ultimately harm cultural heritage and cultural property itself, which risks furthering conflict, and which directly or indirectly contributes to shattering of the “delicate mosaic” referred to in the Preamble to the Rome Statute, as well as the fragmentation of international law (to the extent that they concern separate principles).
9. In its Draft Policy, the OTP claims that it applies a “holistic approach to the consideration of crimes against or affecting cultural heritage at all stages of its operation” (para 30). The OTP also addresses how its examination of cultural heritage issues will be conducted in a manner that is “culturally sensitive” (para 38(iv)), and in accordance with international law, notably international human rights law pursuant to Article 21(3) of the Rome Statute (para 7).
10. However, the Draft Policy does not seek to articulate a methodology as to how such a holistic and culturally sensitive approach will be carried out.⁷ Some more clarity regarding the OTP’s proposed methodology would be welcome. In some situations, the OTP has been perceived to take an insensitive, narrow, and even partial approach towards cultural heritage, which in turn has been justified based

⁵ UN Security Council Resolution 2347, 24 March 2017, UN Doc No. S/RES/2347, <https://undocs.org/S/RES/2347%282017%29>

⁶ See eg. paragraph 26.

⁷ On the contrary, the Draft Policy states that it “does not detail guidelines, procedures or standards for operations” (para 23)



on its own, independent, but subjective concept of the “concern of the international community.”⁸

11. Greater transparency regarding how the OTP will approach issues relating to cultural heritage in a given case or situation would be desirable. This will help facilitate the growth of mutual trust between the OTP and the Court’s stakeholders. To that end, it is not enough for the OTP simply to pronounce that it will approach its work holistically, with cultural sensitivity, and in accordance with international legal standards. Its policy needs to include clear, transparent guidelines and safeguards to ensure that, in its work, the OTP will not analyze cultural heritage selectively or in a manner that privileges the narrative of one party while discounting, or even erasing, the legitimate cultural heritage of other parties. Doing so would not only run afoul of the OTP’s intention to maintain “cultural sensitivity” but would also foreseeably conflict with its obligations to take into account international human rights law,⁹ including fundamental rights to self-determination and non-discrimination, and also those norms and protections of human rights which are related to cultural heritage specifically.

b. Identification of and reliance on experts

12. In the Draft Policy, the OTP stresses the importance of “collaboration with external partners and experts” (para 21), consultations and interactions with “relevant stakeholders” and “civil society organizations” (para 94), engagement with international and non-governmental organizations, and collaboration with “early responders” such as NGOs and the media (para 115).
13. In its consultations, engagement, and collaboration with stakeholders concerning issues relating to cultural heritage, the OTP should seek out a diverse and pluralistic mix of stakeholders, scholars, NGOs, and media, particularly in situations where there are contested interpretations concerning cultural heritage. For instance, some NGOs may be particularly vocal on issues concerning cultural

⁸ In the Prosecutor’s brief to the Pre-Trial Chamber seeking the confirmation to open an investigation in the Situation of Palestine, the Prosecutor heavily relied upon UN resolutions and reports of political UN committees to privilege Palestinian historical, cultural, and legal narratives, without acknowledging the political context within which these bodies operate and how they routinely erase Jewish and Israeli perspectives and heritage. See also Emmanuel Altit, Jennifer Naouri, and Dov Jacobs, “The ICC, settlements and the Orwellian denial of the Jewish presence in Israel,” *The Jerusalem Post*, <https://www.jpost.com/arab-israeli-conflict/the-icc-settlements-and-the-orwellian-denial-of-the-jewish-presence-in-israel-612225>.

⁹ As mentioned in paras 7, 19, 28, 36, 38 of the Draft Policy.



heritage yet represent victims or affected communities associated with a specific group.

14. This is not to say that bias is directly a problem from a methodological perspective, nor indeed does political bias have to invalidate findings made by an expert if she follows a clear methodology that will allow for her conclusions to be relevant. An expert can have a political agenda, but still, when conducting her work, prove herself to be methodologically sound. In such cases, allegations of bias alone cannot, as a matter of principle, lead to the rejection of her work.¹⁰
15. However, there is a risk that absent such a clear methodology, advocacy may involve the denigration or erasure of the cultural heritage of other parties. It would be desirable for these limitations to be addressed in the OTP's policy.
16. The OTP should therefore produce a set of transparent guidelines for the selection of individuals and organizations from whom it receives information relating to cultural heritage in affected situations and cases in order to ensure that cultural sensitivities are honored. The OTP should also publicly disclose the experts, consultants, stakeholders, and NGOs that it consults during the investigatory phase(s).

c. UNESCO

17. The Draft Policy refers on more than several occasions to the OTP's relationship and cooperation with UNESCO.¹¹ We recognize that UNESCO plays a crucial role in the protection of cultural heritage globally. However, UNESCO is not, nor does it set itself out to be, an organ of an independent, international criminal court exercising judicial functions. It is a political body and political dynamics influence many of its activities and decisions. As such, its processes are also vulnerable to discounting the views of minority cultures if (and when) they come into conflict with more powerful State actors.
18. For example, in recent years, there have been contentious debates surrounding the designation by UNESCO of cultural heritage sites in Tibet, sites in Turkey venerated by Kurds, sites in Turkish-occupied Northern Cyprus, and the holy

¹⁰ See, in the context of material produced by human rights organizations, D. Jacobs, Methodological challenges relating to the use of third-party Human Rights Fact-Finding in Preliminary Examinations, Article 15 Communication, 31 May 2019, para. 50.

¹¹ See, eg., paras 21, 99, 103, 109-110, 115, 118-20



places in Jerusalem and Hebron.¹² Reflecting these concerns, the United States has withdrawn from UNESCO and frozen funding to it on multiple occasions due to what it has seen as the on-going politicization of the agency.¹³

19. In light of the clear necessity for and legal basis for collaboration between the ICC and UN organs, as reflected by the November 2017 Memorandum of Understanding between the OTP and UNESCO,¹⁴ as well as the Relationship Agreement,¹⁵ it may also bear recalling the ICC's treaty-basis and independence from the United Nations, as well as the OTP's status as the prosecuting organ of an international criminal court which exercises judicial functions. The protection of cultural heritage and cultural property must be depoliticized as far as possible.¹⁶ It is imperative that at every stage, but particularly during investigatory phases, that the OTP adopt a pluralistic approach to its analysis of cultural heritage that takes into account all affected communities in a given case or situation; that it drafts guidelines for selecting and engaging with stakeholders to ensure cultural sensitivity; and that it take into the account the political context when assessing material or instruments issued by UNESCO, UN organs, UN bodies, or other specialized agencies.

2. Legal standards relating to cultural heritage and cultural property

¹²Grace Guo, "Should China Now Lead UNESCO?", *The Diplomat*, 22 September 2017, <https://thediplomat.com/2017/09/should-china-now-lead-unesco/>; Free Tibet, "UNESCO Turns Tibetan Land into World Heritage Site after Controversial Chinese Proposal," 10 July 2017, <https://freetibet.org/news-media/na/unesco-turns-tibetan-land-world-heritage-site-after-controversial-chinese-proposal>; Leela Jacinto, "Destruction of Kurdish sites continue as Turkey hosts UNESCO," *France24*, 14 July 2016, <https://www.france24.com/en/20160714-turkey-unesco-heritage-sites-damage-kurdish-diyarbakir-sur>; Law Library of Congress, "Cyprus: Destruction of Cultural Property in the Northern Part of Cyprus and Violations of International Law," April 2009, <https://www.loc.gov/law/help/cultural-property-destruction/cyprus-destruction-of-cultural-property.pdf>; *BBC News*, "UNESCO declares Hebron's Old City Palestinian World Heritage site," 7 July 2017, <https://www.bbc.com/news/world-middle-east-40530396>

¹³*PBS News Hour*, "U.S. and Israel officially withdraw from UNESCO," 1 January 2019, <https://www.pbs.org/newshour/politics/u-s-and-israel-officially-withdraw-from-unesco>; Brett Schaffer, "Not the Time for the United States To Rejoin UNESCO," *Heritage Foundation*, 17 January 2001,

<https://www.heritage.org/global-politics/report/not-the-time-the-united-states-rejoin-unesco>

¹⁴ OTP Press Release, "The ICC Office of the Prosecutor and UNESCO sign Letter of Intent to strengthen Cooperation on the Protection of Cultural Heritage, 6 November 2017, https://www.icc-cpi.int/pages/item.aspx?name=171106_otp_unesco

¹⁵ Negotiated Relationship Agreement between the International Criminal Court and the United Nations, approved 13 September 2004, entered into force 4 October 2004, https://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf

¹⁶ Joris D. Kila and Christopher V. Herndon, "Military Involvement in Cultural Property Protection An Overview," 3 *Joint Force Quarterly* 116, 123 (2014), https://www.blueshield.at/aktuelles/kila-jfq_74_116-123.pdf



20. In the Draft Policy's section on the Regulatory Framework, the OTP asserts propositions of law which seek to summarize applicable legal standards pertaining to cultural heritage and cultural property. Regrettably, several of the suggested standards either do not reflect ICC case law or assert propositions which are inconsistent with both the Court's jurisprudence and customary international law. This is especially so in Section III(a), discussing Article 8 (war crimes) in connection with cultural heritage and cultural property; however, the comments and examples provided below are simply intended to be illustrative.
21. The drafters of the Rome Statute believed it was essential that the ICC should not engage in "judicial creativity."¹⁷ The principle of legality is expressly incorporated into the Rome Statute, and Article 5 crimes are to be strictly construed and may not be extended by analogy.¹⁸
22. The Rome Statute does not contain the express terms "cultural heritage" or "cultural property," although the war crimes prescribed by Article 8 include Articles 8(2)(b)(ix) and Article 8(2)(e)(iv) which specifically criminalize intentional attacks on species of cultural property and are characterized by the OTP in the Draft Policy as *lex specialis*. Nevertheless, the Draft Policy articulates legal standards regarding attacks on "cultural property" that are more stringent than for other civilian objects, even though this is not expressly provided for by the language of the Rome Statute.
23. For instance, the OTP states in paragraph 43 that when seeking a prosecution under Articles 8(2)(b)(ix) and 8(2)(e)(iv) it will "seek to build upon the rich body of practice developed by the ICTY." It should be mentioned, however, that the serious violation of the laws and customs of war prescribed by Article 3(d) of the ICTY Statute employs different language to these provisions of the Rome Statute, and their definition cannot simply be extended by analogy.¹⁹

¹⁷ William Schabas, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit," 49 *Case Western Reserve Journal of International Law* 75, 77 (2017) (citing Art 22(2)) at 77

¹⁸ Article 22(2) of the Rome Statute.

¹⁹ Article 3(d) of the ICTY Statute prescribes, as a serious violation of the laws and customs of war, the "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." According to Brammertz, et al., ICTY practice in interpreting Article 3(d) relies on a "military purposes" standard which is stricter than the standard of "military objectives" used by the Rome Statute. See Serge Brammertz, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich, "Attacks against Cultural Heritage as a Weapon of War," 14 *Journal of International Criminal Justice* (2016), 1143, 1156 (hereinafter "Brammertz, et al.")



24. At paragraph 45, the OTP cites to the *Al Mahdi* case for the proposition that the term “attacks” under Articles 8(2)(b)(ix) and 8(2)(e)(iv) have a “special meaning” and should be “defined differently” to other ‘conduct of hostilities’ offenses. However, this interpretation is not in keeping with the Appeals Chamber’s Judgment in *Ntaganda* of 30 March 2021 (which post-dates publication of the Draft Policy, and its tender for consultation on 23 March 2021).
25. In the *Ntaganda* Appeals Judgment, the scope of the definition of ‘attacks’ on cultural property, as an element of the war crime of attacking protected objects in a non-international armed conflict (prescribed by Article 8(2)(e)(iv) of the Rome Statute), was considered.²⁰ Two judges (Judge Morrison and Judge Hofmański) held that an “attack” on cultural property for these purposes means “combat action”.²¹ Two Judges (Judge Eboe-Osuji and Judge Balungi Bossa) declined to enter convictions on the basis that the charges ought to have been “brought under any special provision that caters better to the conduct charged.” Given that the property of an adversary was “destroyed or seized in a manner that was not compelled by the necessities of the conflict,” in these Judges’ view, it would be “more appropriate to bring the charge under Article 8(2)(e)(xii) of the Rome Statute (which deals with “destroying or seizing”) rather than Article 8(2)(e)(iv) (which deals with “intentionally directing attacks against buildings”).²² Judge Ibáñez Carranza held that the term “attack” in this context includes the preparation, the carrying out of combat action and the immediate aftermath thereof.²³
26. In the *Al-Mahdi* case, by contrast, the accused had pleaded guilty to one count of attacking protected objects in Timbuktu when the territory was under the overall control of a non-State armed group in a situation of non-international armed conflict.²⁴ The Trial Chamber specifically noted that it had not been requested by the parties to characterise the conduct as prohibited destruction and proceeded to

²⁰ ICC-01/04-02/06, *Prosecutor v Bosco Ntaganda*, Prosecutor’s Appeal Brief, 7 October 2019 (hereinafter “Prosecutor’s Appeal Brief”), para. 6 (emphasis in original omitted).

²¹ *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 A A2, Judgment, Appeals Chamber, 30 March 2021, para. 1164. See also Separate opinion of Judge Howard Morrison and Judge Piotr Hofmański on the Prosecutor’s appeal.

²² *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 A A2, Judgment, Appeals Chamber, 30 March 2021, para. 1164. See also Separate opinion of Judge Solomy Balungi Bossa on the Prosecutor’s appeal; Partly concurring opinion of Judge Chile Eboe-Osuji, paras. 103-137.

²³ *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 A A2, Judgment, Appeals Chamber, 30 March 2021, para. 1164. See also paras. 1165-1168.

²⁴ ICC-01/12-01/15, *Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016 (hereinafter *Al Mahdi Judgment*).



enter a conviction for attacks on cultural property. The implications of the decision were immediately clear;²⁵ yet the ‘value’ of the *Al Mahdi* precedent is relied upon in the Draft Policy to support the OTP’s broader characterisation of conduct as “attacks” on cultural property.

27. For the sake of both the consistency of the ICC’s own internal legal order, as well as to safeguard against the fragmentation of international law, the Draft Policy should be amended to as to reflect (at a minimum) the opinions and *ratio* of the Appeals Chamber in *Ntaganda*, even if that conflicts with the position the OTP has adopted in earlier cases.
28. To avoid the risk of fragmentation, the OTP should reconsider its reliance on the value of the *Al Mahdi* precedent in support of a broader interpretation of ‘attacks’ on cultural property. Not only do the Appeals Chamber’s Judgment and the individual opinions expressed in *Ntaganda* show that the legal position is more complex, but the OTP’s reliance on the precedent established by a guilty plea also represents the potential adoption of circular reasoning. Simply because the (largely uncontested) *Al Mahdi* case may have established a precedent does not mean that it should be relied upon uncritically by the OTP going forward. The practice of establishing precedent through Judgments resulting from guilty pleas is, as a policy matter, questionable itself.
29. In paragraph 54 of the Draft Policy, the OTP correctly states that under Articles 8(2)(a)(iv), 8(2)(b)(xiii), and 8(2)(e)(xii), the Prosecutor must prove that “the destruction or appropriation [of property] was not justified by military necessity.” The Draft Policy further explains that “generally it requires an ‘overall assessment’ of the perpetrator’s behavior, entailing consideration of a variety of factors, to conclude that the perpetrator had ‘no other option’ in the circumstances than to destroy or appropriate the object.” In other words, the OTP interprets the standard of military necessity to be fulfilled only where an attacker had “no other option.” To support this claim, the Draft Policy cites to the *Ntaganda* Trial Judgment (para 1164), and the *Katanga* Trial Judgment (para 894).
30. However, review of these citations²⁶ does not fully support the Draft Policy’s contention. The standard of “no other option”, as it pertains to military necessity

²⁵ See W. Schabas, *Al Mahdi Has Been Convicted of a Crime He Did Not Commit*, Case Western Reserve Journal of International Law, Vol. 49(1) (2017).

²⁶ *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Judgment, Trial Chamber VI, 8 July 2019, para 1164. *Prosecutor v Germain Katanga*, ICC-01/04-01/07, Judgment, Trial Chamber II, 7 March 2014



was made in both the *Ntaganda* Trial Judgment and the *Katanga* Trial Judgment in reference to Article 8(2)(e)(xii) (and not to Article 8(2)(a)(iv)).²⁷ The fact that the “no other option” standard applies to Article 8(2)(e)(xii) (or, for that matter, Article 8(2)(b)(xiii)) would appear to make sense when one reviews the language of those provisions which require that the destruction or seizure of property must be “imperatively demanded by the necessities of the conflict.” Article 8(2)(b)(xiii) mirrors this language although it refers to the property of the “enemy” as opposed to the “adversary” (and it is applicable in situations of international armed conflict as opposed to non-international armed conflict). In contrast, the language of Article 8(2)(a)(iv), a grave breach, is categorically different from Article 8(2)(e)(xii) and requires different elements of proof: “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

31. In paragraph 56, the OTP supports its position in this context by referring to the dissenting opinion of Judge Pocar in the 2017 *Prlić* Appeals Judgment, before the ICTY. Yet, the majority of the Appeals Chamber in *Prlić* adopted a different interpretation of military necessity. In particular, the Appeals Chamber found that the Old Bridge of Mostar, despite its cultural importance, was critical to military supply lines and therefore a military target at the time of the attack.²⁸ Given that its destruction offered a definite military advantage, it could not be considered wanton destruction not justified by military necessity.²⁹ The Draft Policy should either be amended to adopt the definition of military necessity applied by the Majority of the ICTY Appeals Chamber in this context, or (at a minimum) should provide more detail when explaining why the policy prefers the view of the dissenting judge in this case, and expressly recognize that this is a contested area of law.
32. More generally, it is crucial that the Draft Policy’s analysis of all elements of crimes strictly construes the applicable law in a manner that is consistent with the principle of legality. Setting innovative legal standards when defining crimes targeting cultural property (whether in relation to the concepts of military objectives, military necessity, or proportionality) risks perverse consequences and running afoul of the very protections the OTP is intending to promote through its

²⁷ The *Katanga* Trial Judgment noted, however, “that there is nothing to suggest that the constituent elements of the crime defined under article 8(2)(e)(xii) differ from those of the crime of destruction of enemy property committed in an international armed conflict, under article 8(2)(b)(xiii)” (para 889).

²⁸ *Prosecutor v. Prlić et al.*, Appeal Judgment, Volume I, IT-04-74-A, 29 November 2017, para. 411.

²⁹ *Id.*



Draft Policy. For instance, such an approach risks incentivizing belligerents to embed in and to launch attacks from cultural property, or to engage in other forms of shielding in order to capitalize on (erroneously) imposed legal stringencies. As noted by Michael Schmitt, while shifting interpretations of the law towards greater humanitarian considerations may appear imperative, “it equally risks destabilizing the delicate balance that preserves the viability of IHL.”³⁰ Consequently, some of the standards advanced in the Draft Policy could create a risk of greater danger and destruction to both civilians and to cultural property, as well as lead to violations of international legal obligations which affirmatively protect cultural property.

33. To that end, we would urge the OTP to address the use of cultural property for military purposes or efforts, including shielding, in its policy where applicable, potentially (in an international armed conflict) in connection with the serious violation of the laws and customs of war which is reflected in Article 8(2)(b)(xxiii), forbidding “utilizing the presence of a civilian or other protected person to render certain points, areas, or military forces immune from military operations.”³¹

Conclusion

34. The OTP’s Draft Policy on Cultural Heritage is a positive step towards improving protections for cultural heritage and holding accountable those who commit international crimes in relation to it. In finalizing its policy, the OTP should include provisions ensuring that in its activities, the Office should always seek to establish a broad and contextual understanding of issues relating to cultural heritage and to operate with transparency. The applicable legal standards articulated by the OTP in the policy should be fully sourced and reflect existing ICC jurisprudence and customary international law in a manner consistent with the principle of legality, rather than assert novel propositions. It is hoped that these comments will aid the OTP in revising and finalizing the Policy.

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³⁰ Michael Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,” 50 *Virginia Journal of International Law* 796

³¹ International legal instruments relating to cultural property emphasize the affirmative obligation to protect it. For example, Article 15 of the Second Protocol of the 1954 Hague Convention criminalizes the use of cultural property under enhanced protection for military purposes. *See* Brammertz, et. al. at 1173-74.