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# The ICC's Role in Combatting the Destruction of Cultural Heritage

Mark S. Ellis

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# THE ICC'S ROLE IN COMBATTING THE DESTRUCTION OF CULTURAL HERITAGE

*Mark S. Ellis\**

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*Cultural destruction is a systematic assault on the spirit and soul of a people. The [International Criminal] Court must prosecute; there should be no impunity for these types of crimes.<sup>1</sup>*

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<sup>1</sup> Anna Dubuis, *Timbuktu destroyer committed a war crime*, LONDON TIMES (Mar. 26 2016) (quoting Mark S. Ellis), available at <http://www.thetimes.co.uk/tto/news/world/africa/article4721768.ece>[<https://perma.cc/3BDD-SZUG>].

## I. INTRODUCTION

The willful destruction of cultural property is in no sense a modern phenomenon. Increasingly, however, this centuries-old practice has become as much an instrument as a consequence of war, and is now classified an international crime.<sup>2</sup> While prosecutions are recent,<sup>3</sup> statutory and treaty law dating to the Geneva Convention and Nuremberg Trials provide important jurisprudence regarding crimes of cultural destruction,<sup>4</sup> and the International Criminal Tribunal for the former Yugoslavia (ICTY) has been particularly active in pursuing accountability.<sup>5</sup>

Ahmad Al Faqi Al Mahdi's indictment by the International Criminal Court (ICC), on September 18, 2015, on charges of destroying cultural heritage sites in Timbuktu,<sup>6</sup> underscored the legal connection between the destruction of property and the attempt to erase history and memory.

The case of *Prosecutor v. Ahmad Al Faqi Al Mahdi*<sup>7</sup> is noteworthy for several reasons. First, Al Mahdi is the first member of an Islamist armed group to appear before the ICC.<sup>8</sup> Second, it is the first ICC case

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2. See Marc Balcells, *Left Behind? Cultural Destruction, the Role of the International Criminal Tribunal for the Former Yugoslavia in Detering it and Cultural Heritage Prevention Policies in the Aftermath of the Balkan Wars*, 21 EUR. J. CRIM. POL'Y RES. 1, 1-2 (2015).
  3. See Rebecca Hersher, *Militant Who Destroyed Mali Cultural Sites Pleads Guilty to War Crimes*, NPR (Aug. 22, 2016), <http://www.npr.org/sections/thetwo-way/2016/08/22/490962861/militant-who-destroyed-mali-cultural-sites-pleads-guilty-to-war-crimes> [<https://perma.cc/AR78-U3N7>].
  4. Julia Brooks, *Attacks on Cultural Heritage in Armed Conflict*, HARVARD HUMANITARIAN INITIATIVE (Aug. 3, 2015), <http://atha.se/blog/ihl-briefing-2> [<https://perma.cc/P8VV-BPWD>].
  5. Press Release, International Criminal Tribunal for the former Yugoslavia, ICTY paved way for accountability for attacks on cultural heritage, ICTY Press Release (Jun. 10, 2016), available at <http://www.icty.org/en/press/icty-paved-way-for-accountability-for-attacks-on-cultural-heritage> [<https://perma.cc/BL4A-RHWU>].
  6. Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Case Information Sheet (Int'l Crim. Trib. For the Former Yugoslavia Oct. 7, 2016) [hereinafter Al Mahdi Information Sheet].
  7. Prosecutor v. Ahmad Al Fagi Al Mahdi, ICC-01/12-01/15, Pre Trial Chamber-1, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24 2016) [hereinafter Al Mahdi].
  8. Owen Bowcott, *ICC's first cultural destruction trial to open in The Hague*, GUARDIAN (Feb. 28 2016),

in which the defendant made an admission of guilt.<sup>9</sup> Third, it is the only instance to date in which the war crime of destroying cultural heritage has been the primary subject matter in a case before the ICC.<sup>10</sup>

The case has attracted criticism from those who believe that property crimes are secondary to crimes such as rape, torture and murder.<sup>11</sup> Indeed, even the ICTY, which has been assiduous in its rulings concerning cultural treasures,<sup>12</sup> has tended to prioritize other “more serious” crimes rather than focus on cultural property cases alone.<sup>13</sup>

However, the case’s firm grounding in international law, and the clear connection between a category of cultural-property crimes and attempts at cultural erasure, challenges the notion that these are second-rate crimes. The case reinforces the legal principle that attacks on culture, like attacks against people, constitute war crimes subject to international criminal prosecution. The *Al Mahdi* case will be significant in determining how the international community should best deal with such abhorrent attacks in the future.

On July 18, 2012, the Malian Government referred the case to the ICC.<sup>14</sup> In July 2012, the Office of the Prosecutor (OTP) started a

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<https://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague> [<https://perma.cc/H5YP-TCM3>].

9. Press Release, *Al Mahdi case: accused makes an admission of guilt at trial opening*, ICC Press Release ICC-CPI-20160822-PR1236 (Aug. 22, 2016), *available* <https://www.icccpi.int/legalAidConsultations?name=pr1236> [<https://perma.cc/Y987-AV39>].
10. Amy Strecker, *ICC confirms charges against al-Mahdi for destruction of monuments at Timbuktu: case to proceed*, CENTRE OF GLOBAL HERITAGE AND DEVELOPMENT (Jun. 2, 2016), <http://www.globalheritage.nl/news/icc-confirms-charges-against-al-mahdi-for-destruction-of-monuments-at-timbuktu-case-to-proceed> [<https://perma.cc/AX7U-QMQ7>].
11. Timur Tusray, *The International Criminal Court Takes on Attacks on Cultural Heritage, But is it Enough?*, CENTER FOR ART LAW (Oct. 13, 2015), <https://itsartlaw.com/2015/10/13/the-international-criminal-court-takes-on-attacks-on-cultural-heritage-but-is-it-enough/> [<https://perma.cc/4ZER-9XD8>].
12. *See* Hiran Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 30–31 (2001).
13. *See* Robert Bevan, *Attacks on culture can be crimes against humanity*, ART NEWSPAPER (Sept. 27, 2016), <http://theartnewspaper.com/comment/comment/attacks-on-culture-can-be-crimes-against-humanity/> [<https://perma.cc/7P52-6P3Z>].
14. Mali ratified the Rome Statute on August 16, 2000. As a party to the Rome Statute, Mali can refer the case to the ICC. Situation in Mali, ICC-Office of the Prosecutor, Article 53(1) Report, ¶ 2 (Jan. 16, 2013).

preliminary examination to decide whether it was reasonable to launch a formal investigation.<sup>15</sup>

On the basis of the preliminary investigation, the Prosecutor declared there was a reasonable basis to consider that international crimes were committed including: (1) murder (constituting a war crime under article 8(2)(c)(i)); (2) mutilation, cruel treatment and torture (article 8(2)(c)(i)); (3) intentionally directing attacks against protected objects (article 8(2)(e)(iv)); (4) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court (article 8(2)(c)(iv)); (5) pillaging (article

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15. The Report on the Preliminary Examination Activities found the following. (1) Killings: Up to 153 captured members of the Malian armed forces were allegedly summarily executed by armed groups following the attack on the military camp in Aguelhok. The attack appears to have been conducted by MNLA with the assistance of other armed groups. It is alleged that in the context of the attempt to impose Sharia law on the population in the North by armed groups controlling this territory since April 2012, civilians were stoned to death or executed. On September 9, 2012, sixteen unarmed Muslim preachers were allegedly shot dead by the Malian army at an army checkpoint while they were on their way to Bamako. (2) Torture and other forms of ill-treatment: Following the seizure of northern cities, the armed groups, including Ansar Dine, the Movement for Unity and Jihad in West Africa (MUJAO) and Al Qaeda in the Islamic Maghreb (AQIM) allegedly imposed on the local population their interpretation of Sharia law, including physical punishments such as amputation, flogging and beating. (3) Attacks against religious and historical monuments: In the period from May 4, 2012 through July 10, 2012, a series of attacks in the city of Timbuktu against at least nine mausoleums, two mosques and two historical monuments with designated World Cultural Heritage status were directed by members of Ansar Dine and possibly by members of AQIM and MUJAO. (4) Punishments imposed by armed groups in the North: Since April 2012, armed groups such as Ansar Dine, AQIM and MUJAO have conducted punishments such as executions, amputations, flogging and beatings without due process on civilians. (5) Pillaging: According to Malian sources and international NGOs, the takeover of the large cities in the north of Mali, including Gao and Timbuktu, by MNLA and Ansar Dine at the end of March and the beginning of April 2012 gave rise to the systematic looting and destruction of banks, shops, food reserves, public buildings, hospitals, schools and Christian places of worship, offices of international organizations, residences of high-level civil servants, and members of the Malian security services. (6) Rape: Between 50 and 100 incidents of rape were reported following the seizure of the northern cities by armed groups, especially in Gao and Timbuktu. *See id.* at ¶¶ 5–6; *see also* Report on Preliminary Examination Activities 2012, ICC Office of the Prosecutor (Nov. 2012), *available at* <http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf> [<https://perma.cc/CZ7X-9NW8>].

8(2)(e)(v)), and (6) rape (article 8(2)(e)(vi)).<sup>16</sup> The case was assigned to Pre-Trial Chamber I.<sup>17</sup>

On September 18, 2015, the Court issued an arrest warrant for Al Mahdi.<sup>18</sup> Eight days later (September 26, 2015), he was surrendered by Niger authorities and transferred to The Hague.<sup>19</sup> Al Mahdi appeared before the ICC, on September 30, 2015, charged with the war crime of destroying Mali's cultural heritage.<sup>20</sup> Al Mahdi is one of several people under investigation for war crimes committed during the civil war in Mali, but is the first to appear in The Hague.<sup>21</sup>

As indicated earlier, critics have questioned whether Al Mahdi is the type of perpetrator that the ICC should be interested in.<sup>22</sup> The prosecution has been criticised for launching a case narrowly focused "only on cultural crimes and psychological harm."<sup>23</sup> Bintou Founé Samaké, president of the Malian NGO Women in Law and Development (WILDAF) has highlighted that there are "a large number of victims in Timbuktu and the North of Mali, particularly children and young women who experienced forced marriage and other sexual crimes" and that those victims "feel abandoned since they don't have access to justice neither in Mali nor at the ICC."<sup>24</sup> The

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16. Press Release, ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate," ICC Press Release ICC-OTP-20130116-PR869 (Jan. 16, 2013), *available at* [http://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx](http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx) [<https://perma.cc/H3B4-TEHA>].
  17. Al Mahdi Information Sheet, *supra* note 6.
  18. Al Mahdi is also known as Abou Tourab. Al Mahdi, *supra* note 7, at 4.
  19. Press Release, Situation in Mali: Ahmad Al Faqi Al Mahdi surrendered to the ICC on charges of war crimes regarding the destruction of historical and religious monuments in Timbuktu, ICC Press Release ICC-CPI-20150926-PR1154 (Sept. 26, 2015), *available at* <https://www.icc-cpi.int/legalAidConsultations?name=pr1154> [<https://perma.cc/J4X3-KB58>].
  20. Al Mahdi Information Sheet, *supra* note 6.
  21. *Mali: Al Mahdi trial on destruction of cultural heritage opens at the ICC*, FIDH (Aug. 17, 2016), <https://www.fidh.org/en/region/Africa/mali/mali-al-mahdi-trial-on-destruction-of-cultural-heritage-opens-at-the> [<https://perma.cc/69QF-NRHF>].
  22. Mark Kersten, *Big Fish or Little Fish—Who Should the International Criminal Court Target?*, JUSTICE HUB (Aug. 31, 2016) <https://justicehub.org/article/big-fish-or-little-fish-who-should-international-criminal-court-target> [<https://perma.cc/52K3-9P8D>].
  23. Alhagie Jobe, *ICC considers war crimes charges for cultural destruction in Mali*, NEWS HUB (Mar. 1, 2016) <https://www.the-newshub.com/general/icc-considers-war-crimes-charges-for-cultural-destruction-in-mali> [<https://perma.cc/Z8VK-WRZK>].
  24. *Id.*

International Federation for Human Rights (FIDH) has urged prosecutors not to let cultural damage overshadow violence against individuals,<sup>25</sup> and an editorial in the *New York Times* argued that a case such as the one against Al Mahdi—a prosecution for cultural crimes—“must proceed in tandem with accountability for all war crimes and crimes against humanity.”<sup>26</sup>

This criticism is demonstrably wrong, both in terms of law and ethics. ICC Prosecutor Fatou Bensouda is absolutely right in seeking accountability for the violent attacks on Mali’s cultural heritage.

The attacks in Mali against cultural property caused damage to the targeted areas and significant distress to the local population.<sup>27</sup> Al Mahdi, a member of the Islamist militant group Ansar Dine, was accused of intentionally directing attacks, either individually or jointly, against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque.<sup>28</sup> The monuments, revered for their age, craftsmanship, and cultural significance, are viewed as “living human treasures.”<sup>29</sup> When Ansar Dine seized the ancient city of Timbuktu in 2012, they systematically razed Muslim holy sites;<sup>30</sup> all but one was inscribed on the World Heritage List.<sup>31</sup> Timbuktu, known as the “City of 333 Saints,” was an important crossroads in the development of Islam in Africa.<sup>32</sup> Now, centuries of culture lay crumbled in ruins, and ancient manuscripts have been irretrievably lost.<sup>33</sup> The ICC Prosecutor has eloquently described the impact of the loss:

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25. *Id.*; see also *Mali: Al Mahdi trial*, *supra* note 21.
  26. *Cultural Destruction as a War Crime*, N.Y. TIMES (Oct. 8, 2015), <http://www.nytimes.com/2015/10/09/opinion/cultural-destruction-as-a-war-crime.html> [<https://perma.cc/AHQ6-3KXN>].
  27. Al Mahdi Information Sheet, *supra* note 6.
  28. Al Mahdi Information Sheet, *supra* note 6 (“(i) the mausoleum Sidi Mahmoud Ben Omar Mohamed Aquit, (ii) the mausoleum Sheikh Mohamed Mahmoud Al Arawani, (iii) the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabar, (iv) the mausoleum Alpha Moya, (v) the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi, (vi) the mausoleum Sheikh Muhammad El Micky, (vii) the mausoleum Cheick Abdoul Kassim Attouaty, (viii) the mausoleum Ahamed Fulane, (ix) the mausoleum Bahaber Babadié, and (x) Sidi Yahia mosque.”).
  29. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Statement of the Prosecutor of the International Criminal Court, (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822> [<https://perma.cc/7MUL-G7NP>] [hereinafter Prosecutor’s Statement].
  30. *Id.*
  31. *Id.*
  32. *Id.*
  33. Hersher, *Militant Who Destroyed Mali Cultural Sites*, *supra* note 3.

To destroy Timbuktu's mausoleums is therefore to erase an element of collective identity built through the ages. It is to eradicate a civilisation's landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes, practices and structures. [An] inhabitant of Timbuktu summarized this notion as follows: "Timbuktu is on the verge of losing her soul; Timbuktu is threatened by outrageous acts of vandalism; Timbuktu is being held under a sharpened blade ready for use in a cold-blooded murder."<sup>34</sup>

Al Mahdi, as head of the *Hisbah*, or morality brigade, personally directed and oversaw the attack against the ten buildings in question.<sup>35</sup> His actions were extensive:

He selected the sites to be destroyed. He determined the sequence in which the acts of destruction would take place, moving from the north to the south of the city. He provided the material resources. He gave instructions . . . He ensured that he was present at every single site that was targeted and destroyed.<sup>36</sup>

In the end, the Prosecutor's position has been vindicated. Mr. Al Mahdi admitted to the war crimes charges.<sup>37</sup> At his trial, Al Mahdi sought forgiveness:

I would like to remember the words of those who said that we need to speak justice even against ourselves. We have to be true to ourselves even that truthfulness would burn our hands. Ladies and gentlemen, it is with deep regret and with great pain I had to enter a Guilty plea and all the charges brought against me are accurate and correct. I am really sorry. I am really remorseful and I regret all the damage that my actions have caused. I regret what I have caused to my family; my community in Timbuktu; what I have caused my home nation, Mali; and I am really remorseful for what I have caused the international community as a whole.

My regret is directed particularly to the generations, the ancestors of the holders of the mausoleums that I have destroyed. I would like to seek the pardon of the whole people of Timbuktu. I would like to make them a solemn promise that this was the first and the last wrongful act that I will ever commit. I seek their

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34. Prosecutor's Statement, *supra* note 29.

35. Prosecutor's Statement, *supra* note 29.

36. Prosecutor's Statement, *supra* note 29.

37. *Malian jihadi to plead guilty in ICC cultural destruction trial*, GUARDIAN (May 24, 2016), <https://www.theguardian.com/law/2016/may/24/malian-jihadi-to-plead-guilty-forgiveness-icc-cultural-destruction-trial> [<https://perma.cc/W3FX-NQYE>].

forgiveness and I would like them to look at me as a son that has lost his way and consider me part of the social fabric that is Timbuktu and must not forget what I have contributed in the past to Timbuktu.<sup>38</sup>

Prosecutor Bensouda called Al Mahdi's admission of guilt a "milestone" in the history of the Court.<sup>39</sup> She rightfully described the case as follows:

[I]t is all the more historic in view of the destructive rage that marks our times, in which humanity's common heritage is subject to repeated and planned ravages by individuals and groups whose goal is to eradicate any representation of a world that differs from theirs by eliminating the physical manifestations that are at the heart of communities. The differences and values of these communities are thus simply denied and annihilated."<sup>40</sup>

Because Al Mahdi admitted guilt, the trial lasted only a few days.<sup>41</sup> It opened on August 22, 2016, before Trial Chamber VIII.<sup>42</sup> Mr. Al Mahdi pled guilty to the war crime of destroying historical and religious monuments in Timbuktu (Mali) during the period of June 30, 2012, to July 11, 2012.<sup>43</sup>

The trial concluded on August 24, 2016.<sup>44</sup> On September 27, 2016, Al Mahdi was sentenced to nine years in jail.<sup>45</sup>

A full trial would have had the benefit of focusing attention on the destruction of cultural heritage as a prosecutable crime against humanity. Despite the fact that it was dispensed with so quickly, the case remains important to the goal of deterring such crimes in the future. This article considers the likelihood of that aspiration by looking

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38. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Trial Hearing (Aug. 22, 2016) (statement made by Mr. Al Mahdi), [https://www.icc-cpi.int/Transcripts/CR2016\\_05767.PDF](https://www.icc-cpi.int/Transcripts/CR2016_05767.PDF) [<https://perma.cc/ZRQ8-NNXW>].

39. Prosecutor's Statement, *supra* note 29.

40. Prosecutor's Statement, *supra* note 29.

41. Press Release, Al Mahdi Case: Trial to open on 22 August 2016, ICC Press Release ICC-CPI-20160601-PR1217 (Jun. 1, 2016), *available at* <https://www.icc-cpi.int/Pages/item.aspx?name=pr1217> [<https://perma.cc/9248-YFWR>].

42. *Id.* (stating that the Trial Chamber VIII is composed of Judge Raul C. Pangalangan, Presiding Judge, Judge Antoine Kesia-Mbe Mindua, and Judge Bertram Schmitt).

43. Press Release, Al Mahdi case, *supra* note 9.

44. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1217> [<https://perma.cc/9248-YFWR>].

45. *Id.*

at the charges brought against Al Mahdi. It also reviews the *Al Mahdi* case in the context of international law and past practices, with particular emphasis on current treaties and jurisprudence from the ICTY.

## II. LEGAL FRAMEWORK AND CASE SIGNIFICANCE

The protection of property and treasure during armed conflict has a long history in international law. Plunder, the wanton destruction of cities and towns, and attacks against heritage sites dedicated to religion, education, art and science, are all acts prohibited by multiple international treaties, declarations and customary practices.<sup>46</sup>

Some of the earliest legislation emerged in the fifteenth century, supported by Rome and the Catholic Church.<sup>47</sup> Sweden also implemented decrees protecting cultural heritage sites.<sup>48</sup> In more modern times, the international community has relied on the 1874 Brussels Declaration;<sup>49</sup> the 1899 and 1907 Hague Regulations;<sup>50</sup> the 1949 Geneva Conventions and its two Additional Protocols;<sup>51</sup> the 1950

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46. Rome Statute of the International Criminal Court art. 8, Jul. 17, 1998, ICC-ASP/2/Res3.
47. JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 2 (2015).
48. *Id.*
49. See Project of an International Declaration concerning the Laws and Customs of War, Brussels, Aug. 27, 1874, INT'L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/135> [<https://perma.cc/ER8Z-N2NQ>].
50. The language of the 1907 Hague Regulations includes a very general list of protected property which overlooks the universal importance of protecting cultural property. Convention (IV) respecting the Laws and Customs of War on Land and its annex; Regulations concerning the Laws and Customs of War on Land, Oct. 8, 1907, available at <https://ihl-databases.icrc.org/ihl/INTRO/195> [<https://perma.cc/S9EU-6F5E>] [hereinafter 1907 Hague Regulations].
51. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 UNTS 287, available at <http://www.refworld.org/docid/3ae6b36d2.html> [<https://perma.cc/L2CU-MJ5N>]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 UNTS 3, available at <http://www.refworld.org/docid/3ae6b36b4.html> [<https://perma.cc/57R6-567Q>]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 UNTS 609, available at <http://www.refworld.org/docid/3ae6b37f40.html> [<https://perma.cc/T5KK-A9AE>].

Nuremberg Principles;<sup>52</sup> and, perhaps most significantly, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Convention)<sup>53</sup> and the 1954 Convention's 1999 Protocol,<sup>54</sup> which raised the burden on contracting parties to prohibit and criminalize any form of intentional destruction of cultural property.<sup>55</sup> The 1954 Convention sets forth in its Preamble the cornerstone of the Convention:

Cultural property has suffered grave damage during recent conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction . . . damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of mankind since each people make its contribution to the culture of the world.<sup>56</sup>

The 1954 Convention is now regarded as customary international law, having been ratified by 127 states.<sup>57</sup> However, it's important to note that despite its customary law status, crimes falling under the 1954 Convention and its Additional Protocols have been largely ignored<sup>58</sup> and “[have not yet] served as a basis for prosecution in national or

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52. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, *available at* <https://ihl-databases.icrc.org/ihl/INTRO/390> [<https://perma.cc/8LXP-DVXXV>].
53. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *available at* <http://www.refworld.org/docid/40422c914.html> [<https://perma.cc/TS96-9WQP>] [hereinafter 1954 Convention].
54. Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172, *available at* <http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf> [<https://perma.cc/6GX3-JQWB>] [hereinafter Second Protocol].
55. *Id.*
56. Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, *available at* <http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf> [<https://perma.cc/GK5A-LFD2>].
57. *See Treatises, States Parties and Commentaries*, INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=400](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=400) [<https://perma.cc/T6KF-XK22>] (last visited Apr. 1, 2017) (listing the ratifying states).
58. Amy Albanese, *The ICC Accepts First Cultural Heritage Destruction Case*, 37 MICH. J. INT'L L. (2015), *available at* <http://www.mjilonline.org/the-icc-accepts-first-cultural-heritage-destruction-case/> [<https://perma.cc/H2HR-WHP7>].

international proceedings.”<sup>59</sup> This is primarily due to a “lack of effective and consistent enforcement.”<sup>60</sup>

The establishment of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1945<sup>61</sup> and the 1948 Universal Declaration on Human Rights (UDHR)<sup>62</sup> also marked important developments in the protection of cultural heritage.<sup>63</sup> Further support for protecting cultural property came with the 1996 International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>64</sup> In addition, several other conventions that seek to protect specific aspects of cultural heritage and cultural property have been ratified.<sup>65</sup>

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59. Roger O’Keefe, *Protection of Cultural Property under International Criminal Law*, 11 MELB. J. INT’L L. 339, 358 (2010).
  60. Sam Sasan Shoamanesh & Giles Dutertre, *The ICC and Cultural Property: Reinforced Legal Enforcement of the Protection of Cultural Property in Armed Conflict*, INT’L CRIM. JUST. TODAY (Jun. 22, 2016), <https://www.international-criminal-justice-today.org/arguendo/the-icc-and-cultural-property/> [<https://perma.cc/DC6D-WHES>].
  61. *UNESCO past and present*, UNESCO MULTIMEDIA ARCHIVES, [http://www.unesco.org/archives/new2010/en/history\\_of\\_unesco.html](http://www.unesco.org/archives/new2010/en/history_of_unesco.html) [<https://perma.cc/4Q8F-MH6P>] (last visited Oct. 30, 2016).
  62. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 27 (Dec. 10, 1948) (“(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”).
  63. *Id.*
  64. G.A. 2200A, International Covenant on Economic, Social, and Cultural Rights art. 15 (Dec 16, 1966) (“1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.”).
  65. *See* Recommendation on International Principles Applicable to Archaeological Excavations, Dec. 5, 1956, UNESCO, *available at* [http://portal.unesco.org/en/ev.php-URL\\_ID=13062&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html) [<https://perma.cc/T5V9-PPW6>]; *see* Recommendation on Safeguarding the Beauty of Landscapes, UNESCO, Dec. 11, 1962, *available at* [http://portal.unesco.org/en/ev.php-URL\\_ID=13067&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13067&URL_DO=DO_TOPIC&URL_SECTION=201.html)

Currently, Mali is bound by some of these instruments, namely the 1954 Convention,<sup>66</sup> the World Heritage Convention of 1972;<sup>67</sup> and Protocol II,<sup>68</sup> an addition to the 1949 Geneva Convention (IV) relating to the protection of victims (art. 16).<sup>69</sup> Mali is also a State Party to the Rome Statute of the ICC,<sup>70</sup> and therefore was bound by its provisions relevant to this case (art. 8)(2)(e)(iv),<sup>71</sup> which refer to non-international armed conflicts (NIAC).<sup>72</sup> In addition, Mali is a State Party to the ICESCR,<sup>73</sup> and has accepted, but not yet ratified, the World Heritage

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[<https://perma.cc/9DVB-FQEL>]; see Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html)

[<https://perma.cc/QJH8-DJCA>]; see Convention on the World Cultural and Natural Heritage, Nov. 23, 1972, 1037 U.N.T.S. 151, 27 U.S.T. 37, 11 I.L.M. 1358, available at <http://whc.unesco.org/en/conventiontext/>

[<https://perma.cc/YFM3-ZW2W>]; see Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, available at <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/> [<https://perma.cc/CE7L-9GJH>]; see

Convention for the Safeguarding of Intangible Cultural Heritage, Nov. 17, 2003, 2368 U.N.T.S. 3, available at <http://www.unesco.org/culture/ich/en/convention>

[<https://perma.cc/N6EB-W969>]; see Convention for the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO, Oct. 20, 2005, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html)

[<https://perma.cc/9S5X-4LMR>]; see G.A. Res. 2994 (XXVII), Declaration of the U.N. Conference on the Human Environment, Dec. 15, 1972, available at <http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503> [<https://perma.cc/SJS6-VH3T>].

66. *Ratified Conventions: Mali*, UNESCO, [http://www.unesco.org/eri/la/conventions\\_by\\_country.asp?contr=ML&language=E&typeconv=1](http://www.unesco.org/eri/la/conventions_by_country.asp?contr=ML&language=E&typeconv=1) [<https://perma.cc/UQA4-9UGZ>] (last visited Nov. 7, 2016).

67. *Id.*

68. *Id.*

69. *Treaties, States Parties and Commentaries: Mali*, INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=ML](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=ML) [<https://perma.cc/38CH-XVPN>] (last visited Nov. 7, 2016).

70. Rome Statute, *supra* note 46.

71. Rome Statute, *supra* note 46, at 8(2)(e)(iv).

72. Rome Statute, *supra* note 46, at 8(2)(e).

73. *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION (Jul. 11, 2016),

Convention. The customary nature of the UNDHR would also apply to Mali.<sup>74</sup>

Interestingly, Mali had not yet ratified the 1999 Second Protocol at the time the crimes in the Al Mahdi case were committed;<sup>75</sup> Mali ratified the Protocol in November 2012.<sup>76</sup> Although all of the above-mentioned treaties seek to preclude the destruction of cultural property (so long as it is not being used for military purposes),<sup>77</sup> there are notable differences in their respective provisions.<sup>78</sup>

#### A. *The Reason for the 1954 Convention*

Why was a specific convention on cultural property necessary? The 1954 Convention grew out of World War II and the desire to prevent future attempts at mass cultural destruction such as had occurred during the Holocaust.<sup>79</sup> Cultural heritage links the past to the future and was seen as intrinsic to the life and identity of a community.<sup>80</sup>

In the case of *Attorney General of the Government of Israel v. Eichmann*, the Court noted that as soon as Hitler came to power, “the persecution of the Jews became manifest in the systematic destruction of the synagogues.”<sup>81</sup> The importance of a synagogue to the life and identity of the Jewish community is in this respect comparable to the reverence shown to the mausoleums and mosques of Timbuktu by its citizens. By purposefully destroying these symbols, the perpetrators are carrying out “a profound attack on the identity, the memory and, therefore, the future of entire populations.”<sup>82</sup>

Still, cultural destruction continued to be viewed as “collateral damage” rather than a pre-meditated act intended to eliminate a

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[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en) [<https://perma.cc/7SKG-TW22>].

74. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

75. Second Protocol, *supra* note 55.

76. *Id.*

77. Marina Lostal, *The First of Its Kind: The ICC Opens a Case Against Ahmad Faqi Al Mahdi for the Destruction of Cultural Heritage in Mali*, GLOBAL POL’Y FORUM (Oct. 2, 2015), <https://www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html> [<https://perma.cc/Z6DM-NYDL>].

78. *Id.*

79. 1954 Convention, *supra* note 53.

80. *Id.*

81. *Attorney-General of the Government of Israel v. Eichmann*, 36 I.L.R. 5 [1962] (Isr.); *The Prosecutor v. Tihomir Blaki*, Case No. IT-95-14-T, Judgment, ¶ 230 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

82. Prosecutor’s Statement, *supra* note 29.

people's identity.<sup>83</sup> Culturally significant properties were not always *primary* targets. Nonetheless, the destruction of cultural property was emerging as a distinct crime.<sup>84</sup> This was reflected in war crimes trials conducted immediately after the war.<sup>85</sup>

For instance, in *The United States of America v. Wilhelm von Leeb*<sup>86</sup> ("The High Command Trial"), former high-ranking officers in Germany were charged *inter alia* with war crimes and crimes against humanity for offenses including plunder of public and private property.<sup>87</sup> In another World War II case, *The United States of America v. Ernst von Weizaecker*<sup>88</sup> ("The Ministries Trial"), the defendant was found guilty of the seizure and destruction of cultural property,<sup>89</sup> in reference to Article 56 of the 1907 Hague Regulations.<sup>90</sup> In 1947, France's Permanent Military Tribunal heard a case against German national Karl Lingfelder,<sup>91</sup> who was charged with the destruction of public monuments.<sup>92</sup> The Tribunal noted that such crimes could amount to clear violations of the laws and customs of war and,

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83. Nicholas Stanley-Price, *The Thread of Continuity: Cultural Heritage in Post-War Recovery*, in CULTURAL HERITAGE IN POSTWAR RECOVERY: PAPERS FROM THE ICCROM FORUM HELD ON OCTOBER 4-6, 2005 5 (Nicholas Stanley-Price ed., 2007), [http://www.icrom.org/ifrcdn/pdf/ICCROM\\_IC506\\_CulturalHeritagePostwar\\_en.pdf](http://www.icrom.org/ifrcdn/pdf/ICCROM_IC506_CulturalHeritagePostwar_en.pdf) [<https://perma.cc/F5CD-BRCX>].
84. Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, 23 PENN ST. INT'L L. REV. 857, 860 (2005).
85. *Id.*
86. Trial of Wilhelm von Leeb and Thirteen Others, Dec. 30, 1947–Oct. 28, 1948 (Ger. High Command Trial) (United States Military Trib., Nuremberg), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-12.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf) [<https://perma.cc/5QKG-RPHY>].
87. Int'l Comm. of the Red Cross, *Customary International Humanitarian Law*, Rule 40 (Dec. 31, 2002).
88. United States v. Ernst von Weizsäcker, Judgment of Apr. 11, 1949 (The Ministries Trial) (United States Military Trib., Nuremberg), <http://werle.rewi.hu-berlin.de/ministries.pdf> [<https://perma.cc/32C6-82HG>].
89. *Id.*, at 406–07.
90. 1907 Hague Regulations, *supra* note 50, at art. 56 ("The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.")
91. Trial of Karl Lingfelder, Case No. 51, Judgment (Perm. Military Trib. at Metz Mar. 11, 1947).
92. UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS VOL. IX 67 (London, 1949).

therefore, could be punishable as war crimes.<sup>93</sup> It's important to note that the crime in question, "seizure of, destruction or wilful damage done to . . . historic monuments,"<sup>94</sup> not only violated laws and customs of war, but was also the 1907 Hague Regulations.<sup>95</sup>

In the trial of Arthur Greiser, before the Supreme National Tribunal of Poland, Mr. Greiser was charged, along with other war crimes and crimes against humanity, with the following:

Systematic destruction of Polish culture, robbery of Polish cultural treasures and germanization of the Polish country and population, and illegal seizure of public property.<sup>96</sup>

Greiser oversaw the closing of 1,200 to 1,300 churches in the Wartheland.<sup>97</sup> The churches closed were completely despoiled, including the removal of all bells, church books, documents and libraries as well as chalices, monstrances and candles.<sup>98</sup>

Furthermore, the 1919 Commission on Responsibilities<sup>99</sup> included the offense of "wanton destruction of religious, charitable, educational and historic buildings and monuments" as a war crime.<sup>100</sup>

#### 1. Relevant Provisions of the 1954 Convention

The 1954 Convention was the first international treaty "of world-vocation" that dealt exclusively with the protection of cultural property in the event of armed conflict.<sup>101</sup> The Convention applies to "immovable property of great importance to the cultural heritage of every people."<sup>102</sup> As part of its protection mandate, the Convention encouraged countries to mark significant cultural property, in time of war, with a blue-and-

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93. *Id.*

94. Hague IV, *supra* note 90.

95. Hague IV, *supra* note 90.

96. Trial of Gauleiter Arthur Greiser, Jun. 21–Jul. 7, 1946 (Sup. Nat'l Trib. of Poland), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Law-Reports\\_Vol-13.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-13.pdf) [<https://perma.cc/9WBY-8T6E>].

97. *Id.*

98. *Id.*

99. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT. L. 95 (1920).

100. *Id.* at 115.

101. 1954 Convention, *supra* note 53.

102. 1954 Convention, *supra* note 53, at art. 1(a).

white shield; lawful attacks on property were to be limited to cases of “imperative[] . . . military necessity.”<sup>103</sup>

The 1954 Convention is applicable both to non-international armed conflicts and international armed conflicts.<sup>104</sup> The relevant provision regarding cultural property destruction is Article 19:

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.<sup>105</sup>

It should be noted that the terminology of Article 56 in the 1907 Hague Regulations was later adopted as a subcategory for the “violations of the laws and customs of war” under the ICTY Statute.<sup>106</sup>

## 2. Second Protocol to the 1954 Convention (1999)

The 1999 Second Protocol was specifically adopted to impose a higher threshold of protection for cultural property.<sup>107</sup> While Article 4 of the 1954 Convention states that parties must refrain from “any act of hostility” that may damage or destroy property,<sup>108</sup> it also states that this obligation may be waived “where military necessity imperatively requires.”<sup>109</sup> The inclusion of “military necessity” has been described as a “serious weakness with respect to the basic principle of protection,” since it is not sufficiently clear when exactly the exception could be triggered.<sup>110</sup>

The Second Protocol attempted to ameliorate the problem by setting out provisions in keeping with the 1907 Hague Regulations,<sup>111</sup> and by emphasising that all steps must be taken to protect cultural

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103. Int'l Comm. of the Red Cross, *Customary International Humanitarian Law*, *supra* note 87, at Rule 38.

104. 1954 Convention, *supra* note 53, at art. 18–19.

105. 1954 Convention, *supra* note 53, at art. 19.

106. S.C. Res. 827, art. 3 Statute of the Int'l Crim. Trib. for the Former Yugoslavia (May 25, 1993) [hereinafter ICTY Statute].

107. Second Protocol, *supra* note 55.

108. 1954 Convention, *supra* note 53, at art. 4.

109. 1954 Convention, *supra* note 53, at art. 4(2).

110. Jean-Marie Henckaerts, *New rules for the protection of cultural property in armed conflict*, INT'L COMM. OF THE RED CROSS (Mar. 9, 1999), <https://www.icrc.org/eng/resources/documents/article/other/57jq37.htm> [<https://perma.cc/84ZL-MK9L>].

111. Second Protocol, *supra* note 55; 1907 Hague Regulations, *supra* note 50.

property unless such property is being used for “military purposes.”<sup>112</sup> The terminology broadens the stringent “military necessity” criteria and offers enhanced protection of cultural property if the following criteria are met:

- i) it is cultural heritage of the greatest importance for humanity;
- ii) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
- iii) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.<sup>113</sup>

### *B. The Rome Statute of the ICC*

The ICC is unequivocal in declaring its intention to prosecute cultural property crimes.<sup>114</sup> The very first paragraph of the ICC Statute states: “All peoples are united by common bonds, their cultures pieced together in a shared heritage.”<sup>115</sup> Whether crimes are committed in the context of international or internal armed conflicts, the destruction of cultural heritage falls within the ICC’s jurisdictional remit.<sup>116</sup>

As a signatory, Mali benefits from the provisions of the ICC’s Rome Statute.<sup>117</sup> Deliberate or willful attacks against buildings dedicated to “religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are

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112. Second Protocol, *supra* note 55, at art. 10.

113. Second Protocol, *supra* note 55, at art. 10.

114. See U.N. Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights*, ¶ 60, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016) (“In the UNESCO Declaration concerning the International Destruction of Cultural Heritage adopted in 2003, the international community reaffirms its commitment to fight against the intentional destruction of cultural heritage in any form...States are unequivocally instructed to prevent, avoid, stop and suppress international destruction, whatever such heritage is located.”).

115. Rome Statute, *supra* note 46, at Preamble.

116. See Rome Statute, *supra* note 46 at art. 5, art. 8(2)(b)(xi) (explaining that the ICC has jurisdiction over “War Crimes” and defining war crimes as “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments.”).

117. See Rome Statute, *supra* note 46, at art. 4 (“The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”).

collected” are serious violations, “provided they [are] not military objectives.”<sup>118</sup>

These provisions are generally considered to be derived from Articles 27 and 56 of the 1907 Hague Regulations.<sup>119</sup> As some experts observe, the ICC Statute favors different penalties for war crimes committed in international versus non-international armed conflicts.<sup>120</sup> However, certain elements within the ICC Statute, i.e., Article 8(2)(b)(ix) and Article 8(2)(e)(iv), are identical for both international and non-international armed conflicts.<sup>121</sup> They follow the 1954 Hague Convention and its Second Protocol.<sup>122</sup>

It should be noted that the ICC Statute has limitations regarding the protection of cultural property. The Statute does not clearly define what destroying moveable cultural property means,<sup>123</sup> and it does not elaborate an exception for military necessity.<sup>124</sup> It’s interesting that the drafters of the Rome Statute used the term “military objectives” rather than “military necessity” or “military purposes.”<sup>125</sup> The former was seen

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118. See Rome Statute, *supra* note 46 at art. 8(2)(e)(iv), (ix) (stating that violations against cultural property of a non-international character and of an international character fall into the ambit of the ICC’s jurisdiction).

119. Compare Rome Statute, *supra* note 46, with Second Protocol, *supra* note 55. (Art. 8 of the Rome Statute directly adopts the language of the 1907 Hague Convention, specifically prohibiting destruction of “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.”).

120. See, e.g. Micaela Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L L., 203, 210 (2011) (stating “[a]s is well known, the ICC Statute adopts a two-fold approach to war crimes, and it penalizes separately offences committed in international and non-international armed conflicts. This dual system implies an imperfect correspondence between the two spheres.”); see also Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT’L L. 144, 150 (1999) (“Insofar as Article 8 separates the law applicable to international armed conflict from that applicable to internal armed conflict, it is somewhat retrograde, as the current trend has been to abolish this distinction and to have simply one corpus of law applicable to all conflicts. It can be confusing—and unjust—to have one law for international armed conflict and another for internal armed conflict.”).

121. Frulli, *supra* note 120, at 210.

122. Frulli, *supra* note 120, at 210.

123. Frulli, *supra* note 120, at 212–13 (discussing the difficulty of protecting moveable cultural property when it is not referenced in the Geneva Conventions or its protocols).

124. Frulli, *supra* note 120, at 213–14.

125. Frulli, *supra* note 120, at 215.

as more clearly defined and could be “interpreted more restrictively.”<sup>126</sup> However, absent an actual case before the ICC, it is difficult to properly assess how this subcategory might be interpreted.

### III. THE ROLE OF THE ICTY

When looking beyond treaty law for a legal basis to bring to justice those involved with the destruction of cultural treasures in times of war, the *ad hoc* and international war-crimes courts have played the most important role. The statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the Cambodia War Crimes Court (ECCC), all have jurisdiction over the destruction of cultural property.<sup>127</sup> For example, Article 7 of the ECCC specifically sets jurisdiction over breaches of the 1954 Convention.<sup>128</sup> Moreover, the ECCC Statute applies the same rules for the destruction of cultural property that pertain to both the ICTY and ICTR.<sup>129</sup>

The ICTY has been particularly assertive on the issue of cultural heritage, charging individuals who destroyed cultural property in eleven important cases.<sup>130</sup> It was during the Yugoslav wars of 1992–95 that the

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126. Frulli, *supra* note 120, at 215.

127. The STL provides no explicit regulation of the protection of cultural property. The SCSL has the power to prosecute persons who committed or ordered the commission of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Reference to cultural heritage is made in Article 5 (Crimes under Sierra Leonean Law). The ECCC has the power to bring to trial all suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in Event of Armed Conflict, and which were committed during the period from April, 17 1975, to January 6, 1979. There is no reference to the destruction of cultural property, but the ICTR has the power to prosecute persons committing or ordering to be committed serious violations of Article 3 Common to the GCs and of AP II.

128. Law on the Establishment of Extraordinary Chamber in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, art. 7, 27 Oct. 2004, NS/RKM/1004/006.

129. *See* Frulli, *supra* note 120, at 206 (comparing the ECCC's, ICTY's, and ICTR's rules for the destruction of cultural property in Footnote 10).

130. Prosecutor v. Plasvic, Case No. IT-00-39&40 (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-T (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Miodrag Jokic, Case No. IT-01/42/1-S (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Krajisnik Case No. IT-00-39-T (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Pavle Strugar, Case No. IT-01-41-A (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Jadranko Prlic et al, Case No. IT-04-74-T (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Mićo Stanišić & Stojan Župljanin, Case No. IT-08-91-T (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Radovan Karadžić & Ratko Mladić, Case No. IT-95-5-I (Int'l Crim. Trib. for the Former Yugoslavia); Prosecutor

term “ethnic cleansing” gained currency in common parlance as well as the lexicon of international law.<sup>131</sup> In that conflict, over a hundred thousand people died, and millions became refugees.<sup>132</sup> When I travelled to Sarajevo in the final months of the war, the sense of death was palpable. The city, including homes, mosques, public buildings and the iconic National Library, was a ghostly wasteland.

Ethnic cleansing aims at erasure, not only of a people, but also of their mark on the world. It is a systematic assault on the soul. Legally, the term “ethnic cleansing” describes a deliberate policy to displace an ethnic or religious group through forced deportation, persecution, arbitrary detention and any extra-judicial means necessary to remove or segregate them.<sup>133</sup> The component acts of such policies invariably exist along a spectrum, and killing is just one part. Whether driven by xenophobic nationalism or religious fanaticism, ethnic cleansing simultaneously targets lives and culture, attempting to obliterate the cultural heritage of ethnic and religious groups. Churches, mosques, monasteries, temples, convents, architectural treasures, shrines, archives, books, sacred literature, pictures, and schools are eradicated as a way of eliminating all discernible traces of a people’s identity. Attacks on cultural treasures are an attack on collective memory, as if what came before never existed.

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v. Dario Kordić & Mario Čerkez, Case No. IT-95-14/2-T (Int’l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-T (Int’l Crim. Trib. for the Former Yugoslavia); Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T (Int’l Crim. Trib. for the Former Yugoslavia).

131. See *Ethnic Cleansing*, ENCYCLOPEDIA BRITANNICA (2016), <https://www.britannica.com/topic/ethnic-cleansing> [<https://perma.cc/9M34-KRV8>] (last visited Apr. 1, 2016) (“The term ethnic cleansing, a literal translation of the Serbo-Croatian phrase *etničko ciscenje*, was widely employed in the 1990s . . . to describe the brutal treatment of various civilian groups in the conflicts that erupted upon the disintegration of the Federal Republic of Yugoslavia”).
132. See *Bosnian Conflict*, ENCYCLOPEDIA BRITANNICA (2016), <https://www.britannica.com/event/Bosnian-conflict> [<https://perma.cc/7Z5M-7QKG>] (last visited Apr. 1, 2016) (stating that the death toll was about 100,000 people); see also Claire Gordon, *Coming to America: the top 5 biggest refugee groups in the last 20 years*, AL JAZEERA (Oct. 14, 2013), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/10/13/the-5-biggest-refugeegroupsofthelast20years.html> [<https://perma.cc/DG7Q-458N>] (stating that the former Yugoslavia resulted in over 1.7 million refugees).
133. *Ethnic Cleansing*, *supra* note 131.

Demolition of “enemy” communities<sup>134</sup> was a defining characteristic of the Yugoslav wars. Attacks on the Old Town of Dubrovnik, the National Library in Sarajevo, and the Mostar Bridge, resulted in incomparable historic and cultural loss.<sup>135</sup> The “cultural catastrophe”<sup>136</sup> that ensued was certainly a compelling factor when the drafters of the ICTY Statute included a provision regarding the destruction of cultural heritage as a subcategory of war crimes (Article 3(d)).<sup>137</sup> An earlier investigation by the Commission of Experts for the Former Yugoslavia supported this position.<sup>138</sup> This was a remarkable step, since it was the first time an international criminal court had jurisdiction over this distinct crime,<sup>139</sup> paving the way for accountability.<sup>140</sup> It is important to

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134. See O’Keefe, *Protection of Cultural Property*, *supra* note 59, at 344 (using the term “destruction of enemy communities” to describe the attacks on cultural buildings during the Bosnian conflict).
135. See Annex XI Destruction of cultural property report, U.N. doc. S/1994/674/Add.2 (Vol. V), Dec. 28, 1994 (“In determining the extent of the destruction of cultural property in the former Yugoslavia, the Commission proceeded under its overall plan of work and made use more particularly of its database and on-the-spot inquiries or reports by international organizations, including UNESCO and the Parliamentary Assembly of the Council of Europe”).
136. See Committee on Culture and Education, *The destruction by war of the cultural heritage in Croatia and Bosnia-Herzegovina*, Doc. 6756, ¶1 (Feb. 2, 1993), <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6787&lang=en> [<https://perma.cc/PHR3-SD4X>] (calling the war between Croatia and Bosnia-Herzegovina a “cultural catastrophe”).
137. See Helen Walasek, *The ICTY and the prosecution of crimes against cultural and religious property*, SENSE AGENCY, <http://heritage.sense-agency.com> [<https://perma.cc/PAC2-3L63>] (last visited Dec. 21, 2016) (“The inclusion of crimes relating to cultural and religious property in the ICTY’s Statute was an important addition to international legal instruments. However, the ICTY’s most distinctive contribution to the prosecution of crimes against cultural heritage has come through its landmark indictments and judgments which...have established that the destruction of structures that symbolized a group’s identity during campaigns of ethnic cleansing were a manifestation of persecution and crimes against humanity.”).
138. See Final Rep. of Comm’n of Experts for the Former Yugoslavia, ¶ 285 et seq. (‘Destruction of cultural property’), ¶ 293, U.N. Doc. S/1994/674 (1994) (“Thus, in respect of the statute of the International Tribunal, the offences in Dubrovnik can be said to concern extensive destruction and appropriation of property not justified by military necessity and seizure or destruction and damage to religious institutions dedicated to charity, education, the arts and sciences as well as historic monuments and artistic and scientific works.”).
139. JADRANKA PETROVIC, *THE OLD BRIDGE OF MOSTAR AND INCREASING RESPECT FOR CULTURAL PROPERTY IN ARMED CONFLICT* 211, (2013).
140. Press Release, International Criminal Tribunal for the former Yugoslavia, *supra* note 5.

note that this cultural provision in the Statute was tied to “grave alarm” in the U.N. Security Council and elsewhere about what was clear evidence of “ethnic cleansing” in Bosnia.<sup>141</sup>

Regrettably, the provisions of the ICTY Statute did not make explicit reference to “cultural property,” but rather listed the types of institutions upon which an attack would be punishable: “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”<sup>142</sup> However, in accordance with the Appeals Chamber in *Prosecutor v. Duško Tadić*,<sup>143</sup> the ICTY’s first case, the Article 3 reference to “violations of the laws and customs of war” is “merely illustrative, not exhaustive.”<sup>144</sup> The seizure, destruction or wilful damage to any of the above listed institutions would constitute a violation of the laws and customs of war and be subject to the jurisdiction of the Court.<sup>145</sup> Relevant cases falling under the Court’s remit are considered below.

#### A. ICTY Jurisprudence

In *Prosecutor v. Slobodan Milošević*,<sup>146</sup> Milošević was charged *inter alia* with three counts of destruction or wilful damage to historic monuments and institutions dedicated to education or religion, punishable under Article 3(d), and Articles 7(1) and 7(3) of the ICTY Statute.<sup>147</sup> In *Prosecutor v. Radovan Karadžić & Ratko Mladić*,<sup>148</sup> both Karadžić and Mladić were charged under those same articles for the “widespread and systematic damage to and destruction of Muslim and Roman Catholic sacred sites.”<sup>149</sup> Committed on a vast scale, the attacks “dehumanised” and “traumatised” the local Bosnian Muslim and

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141. See ICTY Statute, *supra* note 106, at ¶ 2 (acting under Chapter VII of the Charter of the United Nations, the Security Council established an international tribunal “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia. . .”).

142. ICTY Statute, *supra* note 106.

143. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

144. *Id.* at ¶ 87.

145. *Id.*

146. *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Second Amended Indictment ¶¶ 72, 83 (Int’l Crim. Trib. for the Former Yugoslavia 2004).

147. *Id.* at ¶¶ 72, 83.

148. *Prosecutor v. Radovan Karadžić & Ratko Mladić*, Case No. IT-95-5-I, Indictment, (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

149. *Id.* at ¶ 30.

Bosnian Croat populations.<sup>150</sup> Additionally, in *Prosecutor v. Mićo Stanišić & Stojan Župljanin*,<sup>151</sup> the accused were charged with the intentional destruction of mosques and other Muslim religious and cultural buildings.<sup>152</sup> The Trial Chamber noted that the attacks, which were selective and systematic, were carried out deliberately to discriminate against Muslims and Croats on the basis of their ethnicity.<sup>153</sup>

#### 1. Gravity of the Crime(s)

In *Prosecutor v. Miodrag Jokić*,<sup>154</sup> the ICTY stressed that attacks against cultural property affect “not only the history and heritage of the region, but . . . the cultural heritage of humankind.”<sup>155</sup> The *Jokić* case underscored the inherent value and irreplaceable nature of cultural treasures, raising the cost for any loss of “original, historically authentic material.”<sup>156</sup> The targeting of property on the World Heritage List only heightened the gravity of the offense, which was deemed “especially wrongful conduct.”<sup>157</sup>

An assessment of the severity of cultural property crimes was similarly made in *Prosecutor v. Biljana Plavšić*.<sup>158</sup> The Court noted that “the scope of the wanton destruction of property and religious buildings” contributed to the offense being “a crime of utmost gravity, involving . . . a campaign of ethnic separation.”<sup>159</sup> Referring to one particular attack on the historic Aladža Mosque, constructed in Foča in 1550,<sup>160</sup> *Plavšić* highlighted the parallel between a people and their history as represented by cultural monuments, noting that

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150. *Id.* at ¶ 31.

151. *Prosecutor v. Mićo Stanišić & Stojan Župljanin*, Case No. IT-08-91-T, Judgment Summary (Int’l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013).

152. *Id.* (finding that the Serb forces “imposed restrictions on the movement of the Muslim population, looted their property, and razed their houses and mosque,” and therefore charging the defendants with “wanton destruction of town and villages, including destruction or willful damage done to institutions dedicated to religion and other cultural buildings.”).

153. *Id.*

154. *Prosecutor v. Miodrag Jokic*, Case No. IT-01/42/1-S, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

155. *Id.*, at ¶ 51.

156. *Id.*, at ¶ 52.

157. *Id.*, at ¶ 53.

158. *Prosecutor v. Biljana Plavšić Sentencing Judgment*, Case No. IT-00-39&40/1-S (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

159. *Id.*, at ¶ 52.

160. *Id.*, at ¶ 44.

“[e]verything that in any way was reminiscent of the past . . . was destroyed.”<sup>161</sup>

In *Prosecutor v. Pavle Strugar*,<sup>162</sup> the Court determined that the consequences of attacks on cultural property (Old Town) could be “grave.”<sup>163</sup> Noting that “such property is, by definition, of “great importance to the cultural heritage of [a] people,”<sup>164</sup> the emphasis shifted away from individual victims toward the region’s shared heritage.<sup>165</sup> Furthermore, in determining the seriousness of particular crimes, the Trial Chamber in *Prosecutor v. Momčilo Krajišnik*<sup>166</sup> had to assess the “consequences of destruction of the property of its members and their cultural and religious monuments.”<sup>167</sup>

What all these cases have in common with *Al Mahdi* is that the perpetrator attempted to eliminate centuries-old traditions, thereby causing irreparable damage to the victims’ sense of identity.<sup>168</sup> In assessing the gravity of a case, the Court must consider more than simply the crime itself, but the long-term impact on the region and international community as a whole.<sup>169</sup>

The jurisprudence of the ICTY relating to the gravity of the crime of cultural destruction will be relevant to the ICC. This is due to the fact that the power afforded to the ICC Prosecutor (under Article 15(2)) to conduct a preliminary investigation is subject to the parameters of Article 53(1) of the Statute,<sup>170</sup> which requires that the Prosecutor must be satisfied that: (1) there is a reasonable basis to believe that a crime exists and that the Court would have jurisdiction

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161. *Id.*, at ¶ 44.

162. *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

163. *Id.*, at ¶ 231.

164. *Id.* at ¶ 232 (quoting the 1954 Convention, *supra* note 53, at art. 1(a)).

165. O’Keefe, *Protection of Cultural Property*, *supra* note 59, at 389.

166. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Sep. 27, 2006).

167. *Id.* at ¶ 1148.

168. *See, e.g.,* Abtahi, *The Protection of Cultural Property*, *supra* note 12, at 2 (“By inflicting cultural damage on present generations, the enemy seeks to orphan future generations and destroy their understanding of who they are and from where they come. Degrading victims’ cultural property also affects their identity before the world community and decreases world diversity”).

169. *Id.* at 3. (“Although no one can deny the difference between the torture or murder of a human being and the destruction of cultural property, it re-mains important to recognize the seriousness of the latter, especially given its long-term effects”).

170. Rome Statute, *supra* note 46, at art. 53(1), ¶ 2.

over the crime;<sup>171</sup> (2) the case meets the admissibility requirements of Article 17;<sup>172</sup> and (3) the crime is of *sufficient gravity* to justify further action by the Court.<sup>173</sup>

However, the concept of *gravity* is poorly defined in both the Rome Statute and the ICC's Rules of Procedure and Evidence. Pursuant to Article 53, the Prosecutor must distinguish between "major" and "minor" war criminals,<sup>174</sup> or in some way grade the heinousness of an offense.<sup>175</sup> She must also take into account the number of victims.<sup>176</sup> It is likely that a crime with few victims would not meet the gravity criteria and jurisdiction would remain with the state.<sup>177</sup> Because of the gravity requirement, the threshold for admissibility to the ICC is high.<sup>178</sup> For a determination of gravity, conduct must amount to a systematic or large-scale pattern of incidents; isolated instances of criminal activity are not sufficient.<sup>179</sup>

The gravity-threshold issue was considered when Pre-Trial Chamber I in the Sudan situation issued a "Decision on the

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171. Rome Statute, *supra* note 46, at art. 53(1)(a).

172. Rome Statute, *supra* note 46, at art. 53(1)(b).

173. Rome Statute, *supra* note 46, at art. 53(1)(c).

174. Rome Statute, *supra* note 46, at art. 53(2)(c).

175. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 419 (2000) ("The Statute has always had threaded through it the idea of gravity- that the Court should hear only the most serious cases of truly international concern . . . the 'widespread or systematic' requirement in crimes against humanity and the idea of the 'group' in genocide, suggests that at least one element of gravity is scale-that is, the magnitude or widespread nature of the crimes may be an element of their admissibility before the Court (if not their jurisdiction). Another element might be how heinous the offense is. A final element might be the need to distinguish 'major' war criminals from 'minor' offenders who should be tried locally, as was done at Nuremberg.").

176. See Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-A, Judgment, ¶ 686 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 29, 2004) (listing the number of victims as an aggravating circumstance).

177. *Id.*

178. See *Susana SáCouto & Katherine A. Cleary*, The Gravity Threshold of the International Criminal Court, 23 AM. J. INT'L L. 808, 811 (2008) ("To satisfy the gravity threshold: (i) the relevant conduct must be either systematic or large-scale, and (ii) due consideration must be given to the 'social alarm' such conduct may have caused in the international community. Furthermore, the Chamber held that the perpetrator of the relevant conduct must be among the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court.").

179. *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 Pre-Trial Chamber I, ¶ 46 (Feb. 24, 2006).

Confirmation of Charges” in the case of *Bahar Idriss Abu Garda*.<sup>180</sup> There, the Pre-Trial Chamber noted that the case did not automatically meet the gravity threshold simply because the accused was charged with the most serious crimes.<sup>181</sup> The Court held that not only quantitative, but also qualitative factors must be taken into account.<sup>182</sup> According to the Court, Rule 145(1)(c) of the Rules of Procedure and Evidence could serve as a “guideline.”<sup>183</sup> Several factors are relevant to the qualitative approach:

[T]he extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location.<sup>184</sup>

Thus, in the eyes of the Court, these factors are extremely relevant to determining “gravity” under Article 17(1)(d) of the Statute.

## 2. Establishing Individual Criminal Responsibility and Other Requirements for Prosecution

Both the 1954 Convention and the Convention’s 1999 Protocol contain provisions for establishing individual criminal responsibility for cultural destruction crimes.<sup>185</sup> Additionally, in all of the *ad hoc* and international courts, the burden of proof for statutory crimes must involve individual criminal responsibility.<sup>186</sup> For instance, in *Prosecutor*

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180. *The Prosecutor v. Abu Garda*, Doc. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 30–34 (Feb. 8, 2010).

181. *Id.* at ¶ 30.

182. *Id.* at ¶ 31.

183. INT’L CRIM. CT., RULES OF PROCEDURE AND EVIDENCE 57 (2d ed. 2013) (“In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused . . . to the victims and their families; the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.”).

184. *The Prosecutor v. Abu Garda*, Doc. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 32 (Feb. 8, 2010).

185. See O’Keefe, *Protection of Cultural Property*, *supra* note 59, at 358 (“The 1954 Hague Convention, Additional Protocol I and the Second Protocol to the 1954 Hague Convention (‘Second Protocol’) each contains a provision, or provisions, on individual criminal responsibility for acts inimical to the protection of cultural property in armed conflict.”).

186. See O’Keefe, *Protection of Cultural Property*, *supra* note 59, at 358.

*v. Tihomir Blaškić*<sup>187</sup> and *Prosecutor v. Stanislav Galic*,<sup>188</sup> it was implied that customary international law applicable to both non-international and international armed conflict recognizes individual criminal responsibility “for intentionally launching an attack in the knowledge it will cause . . . damage to civilian objects, including cultural property, which is excessive in relation to the concrete and direct military advantage anticipated.”<sup>189</sup>

Besides focusing on individual criminal responsibility, international courts must also prove that there was a “nexus” between the destruction of property and the particular conflict, whether non-international or international.<sup>190</sup> In *Blaškić*, for example, it was determined that the perpetrator’s conduct had to fit within the “geographical and temporal context” of the conflict.<sup>191</sup> This does not mean that the crimes committed have to take place in the “precise” geographical location;<sup>192</sup> but they must be “closely linked” to the hostilities.<sup>193</sup>

In addition to the “nexus” requirement, *Prosecutor v. Naletilić & Martinović*<sup>194</sup> stated that a cultural-property crime is committed under Article 3(d) of the ICTY Statute when: (i) it meets the general requirements of Article 3 of the Statute; ii) the property destroyed had a religious purpose; iii) the property was not used for military purposes; and iv) the perpetrator acted with the intent to destroy the property.<sup>195</sup>

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187. *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

188. *Prosecutor v. Stanislav Galic*, Case No. IT-98-29, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

189. See O’Keefe, *Protection of Cultural Property*, *supra* note 59, at 353.

190. CAROLINE EHLERT, *PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW*, 214 (Martinus Nijhoff Publishers, 2014).

191. *Prosecutor v. Tihomir Blaškić*, Judgment, Case No. IT-95-14, at ¶¶ 69–71.

192. *Id.*, at ¶ 69.

193. See e.g. Marco Sassoli et al., *How Does Law Protect in War?*, INT’L COMM. OF THE RED CROSS (Feb. 8, 2012) available at: <https://casebook.icrc.org/casebook/doc/case-study/icty-blaskic-case-study.htm> [<https://perma.cc/AM32-8ZN9>] (“In addition to the existence of an armed conflict, it is imperative to find an evident *nexus* between the alleged crimes and the armed conflict as a whole. This does not mean that the crimes must all be committed in the precise geographical region where an armed conflict is taking place at a given moment. To show that a link exists, it is sufficient that: the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”).

194. *Prosecutor v. Naletilić & Martinović*, Case No. IT-98-34, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

195. *Id.* at ¶ 605.

### 3. Actus Reus and Mens Rea

Customary international law accepts that attacks on cultural property, other than those objects that are “specifically protected,”<sup>196</sup> are “not unlawful if and for so long as such property is a military objective.”<sup>197</sup> However, it’s important to note that assessing the proportionality of such an attack is still required.<sup>198</sup> For instance, the Trial Chamber in *Prosecutor v. Jadranko Prlić et al.*<sup>199</sup> noted that the destruction of the Old Bridge in Mostar “had a very significant psychological impact on the Muslim population of Mostar,”<sup>200</sup> due to its “immense cultural, historical and symbolic value.”<sup>201</sup> Despite its being justified by military necessity,<sup>202</sup> the Trial Chamber found that the effect on the civilian population was “indisputable and substantial”<sup>203</sup> and, therefore, disproportionate to the military advantage gained.<sup>204</sup>

Article 3(d) of the ICTY Statute criminalizes the “seizure,” “destruction,” and “wilful damage” done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments, and works of art and science to the extent only that the conduct was

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196. Additional Protocol I, *supra* note 51, at art. 53; INT’L COMM. OF THE RED CROSS, CMT. ON THE ADDITIONAL PROTOCOLS OF 8 JUN. 1977 TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, 647 (Yves Sando, Christophe Swinarski & Bruno Zimmermann eds., 1987), *available at* [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf) [<https://perma.cc/TB7D-F9GG>] (“The Conference rejected the idea which was put forward by some delegations of including any and all places of worship, as such buildings are extremely numerous and often have only a local renown of sanctity which does not extend to the whole nation. Thus the places referred to are those which have a quality of sanctity independently of their cultural value and express the conscience of the people. Article 53 lays down a special protection which prohibits the objects concerned from being made into military objectives and prohibits their destruction. This protection is additional to the immunity attached to civilian objects; all places of worship, regardless of their importance, enjoy the protection afforded by Article 52 (General protection of civilian objects).”).

197. O’Keefe, *Protection of Cultural Property*, *supra* note 59, at 348.

198. Additional Protocol I, *supra* note 51, at art. 51(5)(b).

199. *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013).

200. *Id.* at ¶ 1583.

201. *Id.* at ¶ 1585.

202. Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL. REV. INTELL. PROP. L. 336, 372 (2016).

203. Prlić, IT-04-74-T at ¶ 1584.

204. *Id.* at ¶ 1584.

intentional.<sup>205</sup> The *ad hoc* Tribunals have not specified the extent of destruction required or whether there is a material difference between “destruction” and “damage” for the purposes of being regarded as a war crime. Guénaël Mettraux, however, argues that due to “the very nature of the institutions which are protected under the rule and in view of the object and purpose of the prohibition, the requirement of destruction should be a relatively low one.”<sup>206</sup>

Individual responsibility also requires establishing the requisite *mens rea* that the perpetrator caused destruction or damage wilfully (i.e., deliberately or through recklessness) against the cultural property.<sup>207</sup> For instance, in *Prosecutor v. Mladen Naletilic & Vinko Martinovic*,<sup>208</sup> the Trial Chamber stated that, in order to satisfy the *mens rea* requirement for the destruction of property, “the perpetrator must have acted with the intent to destroy the protected property or in reckless disregard of the likelihood of its destruction.”<sup>209</sup> This requirement was affirmed by the Trial Chamber in *Prosecutor v. Radoslav Brdanin*.<sup>210</sup> According to the *Strugar* Appeals Chamber, “mere negligence” does not suffice.<sup>211</sup> There is significant overlap between Article 3(d) of the ICTY Statute and Article 2(d), which prohibits the extensive destruction and appropriation of property, not justified by military necessity and carried out *unlawfully and wantonly*.<sup>212</sup> However,

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205. ICTY Statute, *supra* note 106.

206. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 95 (1st ed. 2005).

207. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, ¶ 311 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

208. *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003)

209. *Id.*, at ¶ 577.

210. *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-T, Judgment, ¶ 599 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

211. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Judgment, ¶ 270 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

212. *See* ICTY Statute, *supra* note 106 (providing for the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly); *see also* *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Trial Judgment, ¶¶ 337, 341 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (discussing the general prohibition on the destruction of property in occupied territory); *Prosecutor v. Blaškic*, Case No. IT-95-14-T, ¶ 157 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (citing Article 2(d) of the Statute of the Int'l Crim. Trib. for the Former Yugoslavia); *see* Int'l Comm. of the Red Cross Commentary of 1958 (construing Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 973).

the object of Article 3(d) is more specific and is directed at “the cultural heritage of a certain population.”<sup>213</sup>

In *Blaškić*, the ICTY Trial Chamber, with reference to the destruction or wilful damage to institutions dedicated to religion or education, stated as follows:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the attacks. In addition, the institutions must not have been in the immediate vicinity of military objectives.<sup>214</sup>

In *Prosecutor v. Dario Kordić & Mario Čerkez*,<sup>215</sup> it was determined that the act (destruction and damage of religious or educational institutions), when perpetrated with a discriminatory intent, “amounts to an attack on the very religious identity of a people.”<sup>216</sup>

The standards set out in the jurisprudence of the ICTY are assuredly those that the Prosecutor of the ICC would have sought to establish had this case gone on to trial. Al Mahdi’s guilty plea is ostensibly an admission that he possessed the requisite *actus reus* and *mens rea* at the time he perpetrated the crimes.

Timbuktu’s mosques and ancient mausoleums are clearly historic monuments and institutions dedicated to religion.<sup>217</sup> As discussed above, the level of destruction and wanton damage need not have been high in order to be prohibited as an international crime; it is the intent and gravity that matters. In any event, based on video evidence in this case, there would have been no question that the destruction was carried out on a mass scale at the behest of Al Mahdi.

### *B. ICTY and Crimes Against Humanity*

International law makes clear that cultural destruction can constitute a crime against humanity if it is intentional and “widespread or systematic,”<sup>218</sup> which is often the case. Because destruction of

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213. Kordić & Čerkez, IT-95-14/2-T, at ¶ 361.

214. Blaškić, IT-95-14-T, at ¶ 185.

215. Kordić & Čerkez, IT-95-14/2-T.

216. Kordić & Čerkez, IT-95-14/2-T, at ¶ 207.

217. Bianca Britton, *Timbuktu destruction: Militant Ahmad al-Faqi al-Mahdi gets 9 years for war crimes*, CNN (Sept. 27, 2016, 9:22 AM), <http://www.cnn.com/2016/09/27/africa/al-mahdi-timbuktu-sentence/> [<https://perma.cc/FB4X-YM2W>].

218. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Judgment, ¶ 544 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

cultural property is done “with discriminatory intent,”<sup>219</sup> it tends to have a cataclysmic effect on cultural identity. Cultural identity, of course, goes to the heart of defining a community of people. The Nuremberg Trials were quick to recognise that the unlawful destruction and plunder of cultural property amount not only to war crimes on a vast scale, but also to crimes against humanity.<sup>220</sup>

The ICTY did not shy away from generalizing the impact of cultural destruction on a wider global scale, effecting humanity at large. For instance, in the case of *Kordić & Čerkez*, the Trial Chamber stated that “all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.”<sup>221</sup> In *Prosecutor v. Milan Milutinović et al.*,<sup>222</sup> the Trial Chamber wanted to emphasize this point and, thus, made a distinction between elements of Article 3(d) of the Statute (Grave Breaches of the Geneva Convention relating to cultural destruction) and the jurisprudence of cultural-property destruction as an underlying offense for a crime against humanity.<sup>223</sup> Considering prior cases including *Blaškić*, the Trial Chamber in *Stanišić & Župljanin* set forth clear guidance as to how to prove that intentional destruction of cultural property was a crime against humanity.<sup>224</sup> The following elements must be satisfied:

- (a) the destruction or damage of religious or cultural property occurs on a large scale;
- (b) the destruction or damage of religious or cultural property is not justified by military necessity; and
- (c) the perpetrator acted with the intent to destroy or damage the religious or cultural property or in reckless disregard of the likelihood of its destruction or damage.<sup>225</sup>

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219. Seminar Report, *The Protection of Cultural Heritage in Conflict*, BRITISH INST. OF INT'L & COMP. L., Apr. 24, 2013, at 5.

220. See Nuremberg Tribunal, *Nuremberg Judgment*, 41 AM. J. INT'L L. 172, 249 (1947) (referencing the Nazis actions in occupied territories constituted “Crimes against Humanity.”).

221. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-12/2-T, Trial Judgment, ¶ 207 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

222. *Prosecutor v Milan Milutinović et al.*, Case No. IT-05-87-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

223. *Prosecutor v. Stanišić & Župljanin*, Case No. IT-08-91-T, Trial Judgment, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 27, 2013) (citing *Prosecutor v. Šainović et al.*, Case No. IT-05-87-T, Trial Judgment, ¶ 206 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009)).

224. *Stanišić & Župljanin*, Case No. IT-08-91-T, at ¶ 88.

225. *Stanišić & Župljanin*, Case No. IT-08-91-T, at ¶ 88.

Considering the wider impact of these crimes, the Court in *Prosecutor v. Radislav Krstić*<sup>226</sup> determined that deliberate attacks on culture could even form part of the *mens rea* of genocide:<sup>227</sup>

The Trial Chamber . . . points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.<sup>228</sup>

It's interesting to note that Raphael Lemkin, the lawyer and writer who later coined the term genocide,<sup>229</sup> proposed in 1933 that vandalism and destruction of cultural heritage be included among punishable international offenses.<sup>230</sup> He insisted that a racial, national, or religious

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226. *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

227. *Krstić*, Case No. IT-98-33-T, at ¶ 580.

228. *Krstić*, Case No. IT-98-33-T, at ¶ 580.

229. Ana Filipa Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 EUR. J. OF INT'L L. 1163, 1164 (2009).

230. *Id.* at 1176–77 (“Two crimes on his proposed list of crimes to be codified in international law fell into this category [those that shook the very basis of harmony in mutual relations between particular collectivities and which constitute a general transnational danger]: the crimes of barbarity and vandalism. It is worth replicating verbatim his definition of these two crimes enunciated in 1933. He defined the crime of barbarity as follows: Quiconque, par haine à l'égard d'une collectivité de race, de confession ou sociale, ou bien en vue de l'extermination de celle-ci, entreprend une action punissable contre la vie, l'intégrité corporelle, la liberté, La dignité ou l'existence économique d'une personne appartenant à une telle collectivité, est passible, pour délit de barbarie d'une peine de . . . [Whosoever, out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable, for the crime of barbarity, to a penalty . . .]. The crime is extended to include acts against persons who have declared solidarity with the targeted group or have intervened on their behalf. The second crime of vandalism was articulated thus: Quiconque, soit par haine contro une collectivité de race, de confession ou sociale, soit en vue del'extermination de colle-ci, détruit ses oeuvres culturelles ou artistiques, est passible, pour délit de vandalisme, d'une peine de . . . [Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism, to a penalty . . .]. A decade later, Lemkin would fuse these two crimes into his definition of the crime of genocide in his book *Axis Rule in Occupied Europe*.”).

group cannot continue to exist unless it preserves its spiritual and moral unity.<sup>231</sup> Early drafts of the 1948 Genocide Convention included his formulation, but it was left out of the final version.<sup>232</sup> During the Convention's negotiations, the Soviet Union, in its document entitled "Basic Principles of a Convention on Genocide," argued for coverage of measures and actions aimed against the national language or national culture.<sup>233</sup> It referred to this as "national-cultural genocide"<sup>234</sup> and gave as an example the "destruction of historical or religious monuments, museums, documents, libraries and other monuments and objects of national culture or of religious worship."<sup>235</sup> Despite the exclusion of "cultural genocide" in the Genocide Convention, it is clear that the cultural component is relevant "as evidence of the intent to destroy a group."<sup>236</sup> Proof that a perpetrator "was involved in the destruction of cultural monuments or similar acts directed against the culture of the group will aid a tribunal in assessing the elements of intent and motive."<sup>237</sup>

#### IV. POLITICAL WILL AND THE DUTY TO PROTECT

It would be overly optimistic to say that criminal prosecutions alone will prevent future acts of cultural destruction in times of war. The *Al Mahdi* case is the first ICC case to focus on this issue.<sup>238</sup> On the domestic level, legal prohibitions against cultural destruction are reinforced by the requirement that international treaty laws be incorporated into national statutes.<sup>239</sup> For instance, Article 28 of the 1954 Convention requires states "to take, within the framework of their ordinary jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the . . . Convention."<sup>240</sup> States must not only criminalize the violations in their own domestic law but must establish jurisdiction "to try or extradite" the crimes.<sup>241</sup>

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231. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 180 (1st ed. 2000).

232. *Id.* at 187–88.

233. *Id.* at 180.

234. *Id.* at 180.

235. *Id.* at 180–81.

236. *Id.* at 188.

237. *Id.* at 188.

238. Bowcott, *supra* note 8.

239. Henckaerts, *New rules*, *supra* note 110.

240. Henckaerts, *New rules*, *supra* note 110.

241. Henckaerts, *New rules*, *supra* note 110.

Under the Second Protocol (to the 1954 Convention), signatory states have a duty to adopt specific measures that criminalise violations of international humanitarian law under their own domestic law and establish appropriate penalties.<sup>242</sup> This is to ensure that the prohibition to commit any of the violations contained within the Second Protocol will be adequately enforced.<sup>243</sup> However, the reality is that cultural destruction crimes have not generally been incorporated into domestic laws.<sup>244</sup>

Under the Rome Statute, all State Parties are required to incorporate implementing legislation into their national laws.<sup>245</sup> However, even when states like Mali do incorporate protective heritage laws into their domestic legislation, they often lack the ability to enforce them. Enforcement, particularly in conflict environments, can be problematic if not impossible. For instance, Syria and Iraq have national laws to prohibit looting and destruction of antiquities.<sup>246</sup> Given the ongoing conflicts in both states, however, there is no practical means to enforce the law.<sup>247</sup> Malian authorities, too, made little effort in holding to account the perpetrators who committed serious abuses during the 2012–2013 armed conflict.<sup>248</sup> The government of Mali asserted in its July 2012 letter referring the case to the ICC that the “Malian judicial system was unable to prosecute the suspects of the alleged crimes in Northern Mali.”<sup>249</sup> This was because of the weak judicial system, “in part due to unprofessional practices and inadequate budgetary allocations for the criminal justice system.”<sup>250</sup>

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242. Henckaerts, *New rules*, *supra* note 110.

243. Henckaerts, *New rules*, *supra* note 110.

244. See Shoamanesh & Dutertre, *The ICC and Cultural Property*, *supra* note 60 (detailing the gap between domestic and international enforcement of the Hague Convention).

245. Rome Statute, *supra* note 46.

246. David W. Bowker, Laura Goodall, & Rebecca A. Haciski, *Confronting ISIS's War on Cultural Property*, AM. SOC'Y OF INT'L LAW (Jul. 14, 2016), <https://www.asil.org/insights/volume/20/issue/12/confronting-isis-war-cultural-property> [<http://perma.cc/SF43-MGHG>] [hereinafter Bowker].

247. *Id.*

248. See *World Report 2015: Mali*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2015/country-chapters/mali> [<http://perma.cc/8XY7-QQ38>] (last visited Oct. 29, 2016).

249. Renvoi de la situation au Mali [Referral Letter by the Government in Mali], <https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf> [<https://perma.cc/96DU-2WP3>].

250. *World Report 2015: Mali*, *supra* note 248.

Also, the Malian government was simply not able to arrest the rebel groups.<sup>251</sup> It was clear that the Malian government considered the ICC better suited to conduct the investigation and trial.<sup>252</sup> Once the ICC issued an arrest warrant, it took Niger officials only eight days, working cooperatively with Mali, to surrender Al Mahdi to The Hague.<sup>253</sup>

There must exist a broad remit by the international community to assist in protecting cultural heritage. This mandate is beginning to emerge.

Syria may seem an odd example, given the enormous destruction and disarray of the international response; however, groups from within Syria are working hard to respond to the destruction of that country's cultural heritage.<sup>254</sup> Additional security measures have been put in place to protect archaeological sites from illegal excavations and to safeguard museums from looters.<sup>255</sup> The local population is assisting authorities in safeguarding their cultural heritage.<sup>256</sup> A number of other proposals have been put forward including: sending military personnel to guard Syria's most valued cultural property (e.g., World Heritage List sites);<sup>257</sup> implementing trade controls to prevent the Islamic State (ISIS) and its affiliated groups from "looting and trafficking cultural property in market countries [including] Turkey, Switzerland, the United States, the United Kingdom and China;"<sup>258</sup> prosecuting for crimes including

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251. See *World Report 2015: Mali*, *supra* note 248 (describing the provisional release of men involved in the 2012–13 conflict).

252. See *World Report 2015: Mali*, *supra* note 248 (stating that Mali referred "the situation in Mali since January 2012" to the ICC prosecutor for investigation).

253. See Benjamin Durr, *Ahmad Al Mahdi: Who is the first alleged islamist at the ICC?*, JUST. HUB (Feb. 29, 2016, 8:18 AM), <https://justicehub.org/article/ahmad-al-mahdi-who-first-alleged-islamist-icc> [<http://perma.cc/SQQ2-3EVN>] ("When France intervened in Mali in early 2013, al Mahdi left Timbuktu together with the city's Islamist 'governor,' Abou Zeid. One and a half years later, in the night of 10 October 2014, he was captured in an international anti-terrorist operation called 'Barkhane' near the Algerian-Nigerien border. Al Mahdi was part of a six-vehicle convoy, which transported more than a tonne of weapons and was heading from Libya to Mali. A local court in Niger charged him with terrorism, but after the ICC issued its arrest warrant in September 2015, he was transferred to the Netherlands. In the confirmation of charges hearing, judges now have to decide whether al Mahdi will face trial in The Hague.").

254. *Syrian citizens protect their cultural heritage*, UNESCO, <http://www.unesco.org/new/en/safeguarding-syrian-cultural-heritage/national-initiatives/syrians-protect-their-heritage/> [<http://perma.cc/2UMZ-LAT8>] (last visited Oct. 29, 2016).

255. *Id.*

256. *Id.*

257. Bowker, *supra* note 246.

258. Bowker, *supra* note 246.

looting, smuggling and trafficking cultural property;<sup>259</sup> creating joint task forces to coordinate efforts among states to “starve the illicit antiquities market;”<sup>260</sup> and increasing the number of investigations into high-profile criminals involved with the destruction of cultural heritage in order to deter similar acts by other perpetrators.<sup>261</sup>

UNESCO has also launched several appeals for member states to support the preservation of Syrian cultural heritage through earmarked funds and particularly by preventing illicit trafficking of cultural goods.<sup>262</sup> UNESCO has also urged Syria to ratify the 1999 Second Protocol of the 1954 Convention.<sup>263</sup>

*A. The Emergency Safeguarding of the Syrian Cultural Heritage Project*

The European Union has established a project to prepare post-conflict assistance and to try to stop the ongoing loss of Syria’s “rich and unique cultural heritage.”<sup>264</sup>

While much of the destruction in Syria is irreversible, certain measures can help mitigate the long-term effects of cultural-property destruction, including awareness-raising campaigns, strengthening the technical capabilities of cultural heritage professionals, customs officers and knowledge bearers, and coordinating international and national efforts to protect cultural heritage.<sup>265</sup>

Through one prong of a three-pronged approach, UNESCO will monitor and share knowledge and documentation with UNESCO’s partners and stakeholders with the aim of safeguarding Syria’s cultural heritage.<sup>266</sup> This will be done through the Observatory of Syrian Cultural Heritage.<sup>267</sup> This platform will provide more detailed information about the extent of cultural heritage damage and provide information on current projects and initiatives.<sup>268</sup>

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259. Bowker, *supra* note 246.

260. Bowker, *supra* note 246.

261. Bowker, *supra* note 246.

262. World Heritage Comm., UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, at 51, WHC-15/39.COM/19 (Jul. 8, 2015), <http://whc.unesco.org/archive/2015/whc15-39com-19-en.pdf> [<http://perma.cc/PDD2-Z74W>].

263. *Id.*

264. *The Emergency Safeguarding of Cultural Heritage*, UNESCO Observatory of Syrian Cultural Heritage, <http://en.unesco.org/syrian-observatory/emergency-safeguarding-syrian-cultural-heritage-project> [<http://perma.cc/JDU6-GYH9>] (last visited Oct. 25, 2016).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

UNESCO plans to enhance technical assistance and capacity-building for national stakeholders and beneficiaries by doing the following:

- Providing technical support for the establishment of a police database of looted artefacts;
- Training police forces and customs officers in Syria and adjacent countries to fight illicit trafficking of cultural property (and on the specific tools available to facilitate and improve the implementation of the 1970 UNESCO Convention);
- Training national stakeholders to protect moveable heritage and museums during and after the conflict;
- Providing technical assistance and training for the protection of built cultural heritage and planning conservation and restoration works in view of the recovery phase;
- Training of national stakeholders concerning the core concepts and mechanisms of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage; and
- Specialised training of national stakeholders, civil society organisations and communities concerning the creation of inventories for intangible cultural heritage.<sup>269</sup>

#### *B. Iraq Heritage Management Project*

The U.K., via the British Museum, has devised a more ambitious strategy to safeguard Iraqi heritage through the Iraqi Emergency Heritage Management Project.<sup>270</sup> This is a government-backed scheme to protect cultural sites from the destructive forces of war and ISIS terrorists.<sup>271</sup>

This £3 million scheme, run by the British Museum, will field a team of local experts to document vulnerable sites in Iraq and initiate a “process of reconstruction and preservation of some of the world’s most precious cultural artefacts.”<sup>272</sup>

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269. *Id.*

270. Tobias Ellwood et al., *New scheme to protect cultural sites from destructions*, GOV.UK (Oct. 28, 2015), <https://www.gov.uk/government/news/new-scheme-to-protect-cultural-sites-from-destruction> [http://perma.cc/SQT5-LYJT].

271. *Id.*

272. *Id.*

In addition, the British Museum will employ two archaeologists to lead a six-month program in how to manage archaeological sites.<sup>273</sup>

In announcing this new initiative, Tobias Ellwood, Minister for the Middle East and North Africa, described its objectives:

The humanitarian crisis in the Middle East takes priority and the UK is at the forefront of the international effort to support those affected by the conflicts in Syria and Iraq. But we cannot stand by and ignore this appalling, deliberate attempt to erase the rich cultural heritage and sense of belonging for all communities in Iraq and Syria.

The new funding for the British Museum to train Iraqi experts in rescue archaeology will build on the progress we are already making to preserve art and archaeological sites for future generations and promote a sense of Iraqi national identity.<sup>274</sup>

Excavation projects will be created with the State Board of Antiquities of Iraq, which will teach rescue archaeology techniques in the event of conflict.<sup>275</sup> While the present security situation in Iraq prevents any direct intervention to protect sites currently held by ISIS, the project's ultimate objective is to prepare "for the day when the territory is returned to effective and legitimate government control."<sup>276</sup> Consequently, certain measures are now being put in place which will enable the appropriate authorities to record and document the scale and extent of destruction, and that hopefully will assist in the reconstruction and preservation process.<sup>277</sup> While the project cannot halt further attacks on cultural heritage, it can help equip individuals with the necessary skills to conserve and restore the damaged areas, offering far greater protection to sites and objects of global significance.<sup>278</sup>

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273. *British Museum to work with experts from Iraq to set up Emergency Heritage Management programme*, BRITISH MUSEUM, [https://www.britishmuseum.org/about\\_us/news\\_and\\_press/press\\_releases/2015/emergency\\_heritage\\_management.aspx](https://www.britishmuseum.org/about_us/news_and_press/press_releases/2015/emergency_heritage_management.aspx) [http://perma.cc/6F4M-2J3T] (last visited Oct. 29, 2016).

274. Ellwood et al., *New scheme*, *supra* note 270.

275. Simon Stephens, *British to help Iraq reconstruct archaeological sites*, MUSEUMS ASS'N (Oct. 28, 2015), <https://www.museumsassociation.org/museums-journal/news/29102015-bm-to-help-iraq-reconstruct-archaeological-sites> [http://perma.cc/7FBN-T6SQ].

276. *Id.*

277. *British Museum*, *supra* note 273.

278. *British Museum*, *supra* note 273.

## V. CONCLUSION

When the Taliban destroyed the Buddhas of Bamiyan—monumental statues that stood more than 1,500 years in Afghanistan—the world stood by helplessly.<sup>279</sup> More recently, the international community was powerless to prevent the Islamic State (ISIS) from obliterating part of Iraq's cultural heritage in the city of Nimrud, or from destroying the 3,000-year-old Mesopotamian sculptures once held in the Mosul Museum.<sup>280</sup> The brutal demolition of Palmyra and other sites in Syria<sup>281</sup> are a painful reminder of the vulnerability of these ancient sites.

Attacks on cultural heritage should not be seen as isolated incidents but as aggression that has a wider impact on shared history and values. It is a crime that targets “the richness of whole communities”<sup>282</sup> and thus “impoverishes us all and damages universal values we are bound to protect.”<sup>283</sup>

It is imperative that the international community acts to safeguard cultural objects. Heritage sites are indeed more than “just stones.”<sup>284</sup> Rather, they signify the identity and history of a people for all humanity. With solid jurisprudence in this area, international courts can play a role.

The early ICTY decisions were an important step forward in ending impunity. Although the ICC cannot prevent the destruction of cultural treasures during armed conflict, it can insist on accountability. There should be no impunity for this type of crime. The Court *must* prosecute.

While the ICC case against Al Mahdi stands in clear recognition of the severity of the crime of cultural destruction, there remain significant practical difficulties ahead. Since the intentional destruction of cultural

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279. Abbas Naderi & Farangis Najibulla, *Haunted by the Bamiyan Buddhas*, GANDHARA (Mar. 13, 2015), <http://gandhara.rferl.org/a/afghanistan-bamiyan-buddhas/26898975.html> [<https://perma.cc/KC43-FYGL>].

280. See Susannah Cullinane, Hamdi Alkhshali, & Mohammed Tawfeeq, *Tracking a trail of historical obliteration: ISIS trumpets destruction of Nimrud*, CNN (Apr. 13, 2015, 8:43 PM), <http://www.cnn.com/2015/03/09/world/iraq-isis-heritage/> [<https://perma.cc/K9G3-4DY5>].

281. See Athanasios Nakasis & Nikolaos Lianos, *Syria: The Impact of the Civil War on the Cultural Heritage*, ICOMOS, <https://journals.uni-heidelberg.de/index.php/heritage/article/download/20046/13838> [<https://perma.cc/2WT7-YEVA>] (last visited Oct. 29, 2016) (describing the destruction of five World Heritage sites in Syria).

282. Prosecutor's Statement, *supra* note 29.

283. Prosecutor's Statement, *supra* note 29.

284. Alissa Rubin, *Among the Wounded in Syria's War: Ancient History*, N.Y. TIMES (Mar. 7, 2014), <http://www.nytimes.com/2014/03/08/world/middleeast/among-the-wounded-in-syrias-war-ancient-history.html> [<https://perma.cc/5JP3-6BQB>].

property has become one of the primary tactics of ISIS and affiliated groups,<sup>285</sup> the affected areas (namely Syria and Iraq) desperately need greater protection. However, the Court does not presently have statutory jurisdiction over Iraq and Syria because neither state is a party to the ICC.<sup>286</sup> Jurisdiction over cultural destruction crimes committed in both countries could occur through a Security Council referral,<sup>287</sup> but the current political climate makes that highly unlikely.

In the end, I return to those days in Sarajevo, and more recently to a conversation I had with a dear friend who had endured the siege of her city as a young girl. I asked how she now reflects on those 1,425 days, over twenty years ago. She told me this: “There is a shock effect from cultural destruction. It makes you feel so tiny and unimportant; it reduces you to a victim. But although cultural destruction creates an eternal void, the crucial point is to ensure that it does not kill the spirit and the soul of the people.”

Crimes of destroying cultural property aim to do just that—to attack a people by way of their history and institutions. If international justice stands for anything, it should stand for and protect the spirit and soul of those groups most vulnerable.

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285. *Id.*; Bowker, *supra* note 246.

286. *The State Parties to the Rome Statute*, INT'L CRIM. CT., [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [<https://perma.cc/MZH3-42UJ>] (last visited Jan. 2, 2017).

287. Rome Statute, *supra* note 46.