

## ARTICLE

## Prosecution of Cultural Heritage Destruction: Framework, Precedents and Recent Developments in International Criminal Law

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Reports of intentional cultural heritage destruction frequently arise during armed conflicts. The most significant and recent instance was the decimation of Palmyra in Syria by the Islamic State of Iraq and the Levant (ISIL) in 2015. Despite an apparent impotence on the part of the authorities to act in high profile examples of destruction, a robust international law framework does exist to protect cultural heritage. In the groundbreaking International Criminal Court case of *Prosecutor v Al Mahdi*, the Court prosecuted the destruction of cultural heritage for the first time. More importantly, it was the first time a cultural heritage charge has been the core charge in an international criminal proceeding, resulting in a swift trial and a guilty plea by the Defendant. This article examines the background to—and application of—international law that protects cultural heritage and considers the implications of *Prosecutor v Al Mahdi* for future prosecutions.

### I Introduction

The issue of cultural heritage destruction is not a new one. It was formally described as early as 1758:<sup>1</sup>

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1 E de Vattel *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (Apud Liberos Tutor, London, 1758) (translated ed: Charles G Fenwick (translator) E de Vattel *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Carnegie Institution of Washington, Washington, 1916) vol 3 at 293).

For whatever cause a country be devastated, those buildings should be spared which are an honor to the human race and which do not add to the strength of the enemy, such as temples, tombs, public buildings, and all edifices of remarkable beauty. What is gained by destroying them? It is the act of a declared enemy of the human race thus wantonly to deprive men of these monuments of art and models of architecture ...

Ever since our first ancestors created exemplars of artistry in magnificent cave paintings, such as those at Lascaux, this creative spirit has continued throughout all periods and continents, creating culture, identity, history and points of reference for understanding. As such, people seeking to protect their own culture and identity have manipulated culture by destroying other people's frameworks of understanding and identities, as a form of suppression.<sup>2</sup>

Cultural heritage destruction is "sometimes the other face of genocide".<sup>3</sup> Where cultural heritage is destroyed, not only the monument is targeted: the "collective consciousness of the people concerned" is also assaulted.<sup>4</sup> And as German writer Heinrich Heine warned: "Where they have burned books, they will end in burning human beings."<sup>5</sup>

As the silent victim of armed conflict, cultural heritage is garnering increasing global attention. The destruction of the Bamiyan Buddhas in 2001 by the Taliban, on the alleged basis of Islamic iconoclasm, was clearly done "as part of a wider plan to eradicate all memories of non-Muslim culture".<sup>6</sup> Between June and September 2015, the Islamic State of Iraq and the Levant (ISIL) released footage of the group destroying 2,000-year-old ruins in the captured city of Palmyra. Both sites were listed on the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage register.

Cultural heritage is protected through a framework of international law treaties that prohibit and criminalise destruction or damage, with the most contemporary tool being the International Criminal Court (ICC). However, the continuing destruction of heritage sites indicates that these measures are not efficient. Despite having reformed sanctions in place, there have been no cultural heritage prosecutions in the ICC—until now.

On 1 March 2016, the ICC confirmed charges against a Malian man, Ahmad Al Faqi Al Mahdi, in relation to the destruction of ten culturally significant buildings and shrines in Timbuktu, Mali.<sup>7</sup> This marks the first prosecution in the ICC for cultural heritage destruction. Even more significantly, this is the first time that a war crime against cultural heritage has been the core charge in an international criminal proceeding.<sup>8</sup> This groundbreaking case will be a significant precedent for future prosecutions of cultural

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2 François Bugnion "The origins and development of the legal protection of cultural property in the event of armed conflict" (14 November 2004) International Committee of the Red Cross <[www.icrc.org](http://www.icrc.org)>.

3 Bugnion, above n 2.

4 Bugnion, above n 2.

5 Heinrich Heine *Almansor* (1823) (translation: Graham Ward (translator) in *True Religion* (Blackwell Publishing, Oxford, 2003)) at 142. See also Rebecca Knuth *Book Burning and Levelling Libraries: Extremist Violence and Cultural Destruction* (Praeger, Westport (CT), 2006) at 2.

6 Federico Lenzerini "The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage" in Francesco Francioni and James Gordley (eds) *Enforcing International Cultural Heritage Law* (Oxford University Press, Oxford, 2013) 40 at 40.

7 *Prosecutor v Al Mahdi (Confirmation of Charges)* ICC Pre-Trial Chamber I ICC-01/12-01/15, 24 March 2016.

8 Marina Lostal "The first of its kind: the ICC opens a case against *Ahmad Al Faqi Al Mahdi* for the destruction of cultural heritage in Mali" (2 October 2015) Global Policy Forum <[www.globalpolicy.org](http://www.globalpolicy.org)>.

heritage destruction because, in pursuing the case, the ICC has dramatically increased the profile of cultural heritage crime. In line with this, there is a growing realisation generally of the importance of cultural heritage to the lives and identities of people connected to it.<sup>9</sup>

In this article I argue that, despite the disheartening number of destructions in recent times, the *Al Mahdi* case and other precedents show that the international criminal framework of protection is comprehensive and highly developed to prosecute these criminal activities. Unfortunately, the tragic reality is that international criminal law alone is simply insufficient to prevent those who are ideologically motivated.<sup>10</sup>

I develop my argument as follows. Part II defines *cultural heritage* in a legal context and looks at the development of the concept and its inclusion into international law. Part III examines the international law framework by briefly surveying the various protective instruments. Part IV of the article discusses precedents of cultural heritage destruction prosecution in the international law arena. And building upon the precedents discussed, Part V analyses the *Al Mahdi* case and its potential implications, including a discussion on prosecutorial discretion. Finally, in Part VI, I consider the future of cultural heritage protection and prosecution.

## II Defining Cultural Heritage

Cultural heritage is not static.<sup>11</sup> Over the centuries the destruction of cultural heritage has been viewed as a necessary and probable side effect of armed conflict, because to eradicate cultural heritage is to eradicate memory and self-pride.<sup>12</sup> Consequently, cultural heritage has been subject to legal protection since early times.

However, the specific protection of cultural heritage or property has only formed a distinct division of international law relatively recently.<sup>13</sup> The catalyst for this protection was the monumental scale of damage caused throughout World War I and World War II.<sup>14</sup> It became plain that the existing provisions protecting cultural heritage were insufficient. In response to this, a number of States consented to a convention dealing *solely* with cultural heritage protection to prevent recurrences of cultural destruction. Eventually this resulted in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention).<sup>15</sup>

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9 Francesco Francioni “The Human Dimension of International Cultural Heritage Law: An Introduction” (2011) 22(1) EJIL 9 at 9.

10 This article is limited to protection and prosecution considerations in respect of tangible moveable or non-moveable cultural heritage and does not explore intangible or underwater cultural heritage. See Convention on the Protection of Underwater Cultural Heritage 2562 UNTS 3 (adopted 2 November 2001, entered into force 2 January 2009); and Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2440 UNTS 311 (adopted 20 October 2005, entered into force 18 March 2007). Nor is it concerned with private international law issues of title over stolen or illegally exported cultural goods.

11 David Lowenthal “Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism” (2005) 12(3) IJCP 393 at 395.

12 Lenzerini, above n 6, at 40.

13 Francesco Francioni “Cultural Heritage” in R Wolfrum (ed) *The Max Planck Encyclopedia of Public International Law* (online ed, Oxford University Press, 2013) at [1].

14 Bugnion, above n 2.

15 Bugnion, above n 2.

### A Terminology: Cultural heritage versus cultural property

There is division over the terminology used in the two key protective instruments: whereas the 1954 Hague Convention refers to *cultural property*, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 World Heritage Convention) refers to *cultural heritage*. The concept of *cultural* refers to qualifying criteria, such as historical, archaeological, artistic, or ethnographic.<sup>16</sup> However, international law professor Micaela Frulli notes that there is no universally accepted definition *cultural property* and whether this is distinct from *cultural heritage*.<sup>17</sup>

First, the definition of *cultural property* in art 1 of the 1954 Hague Convention includes:<sup>18</sup>

... irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the moveable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments”.

It is clear that buildings containing cultural property, such as museums, are afforded specific legal protection.<sup>19</sup> The other key definition is from art 1 of the 1972 World Heritage Convention which gives three categories of *cultural heritage*: monuments, groups of buildings and sites.<sup>20</sup>

I argue that the key difference between the terminology in the earlier and later instruments is the connotation of *individualistic ownership* as compared with *universal*

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16 Manlio Frigo “Cultural property v. cultural heritage: A ‘battle of concepts’ in international law?” (2004) 86 IRR 367 at 376.

17 Micaela Frulli “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency” (2011) 22 EJIL 203 at 205.

18 Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 240 (signed 14 May 1954, entered into force 7 August 1956) [1954 Hague Convention], art 1.

19 1954 Hague Convention, art 1(b). See UNESCO *Recommendation concerning the Protection and Promotion of Museums and Collections, their Diversity and their Role in Society* (2015). The Recommendation was adopted by Resolution 49 of the 38th session of the UNESCO General Conference in Paris on 17 November 2015.

20 Convention Concerning the Protection of the World Cultural and Natural Heritage 1037 UNTS 151 (adopted 16 November 1972, entered into force 17 December 1975) [1972 World Heritage Convention], art 1; categories: “monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.”

*ownership* and *stewardship*. Most commentators agree that cultural property is a subset of the broader concept of cultural heritage.<sup>21</sup> The latter extends to intangible cultural elements such as dance, music and folklore: it is a burgeoning area of international law which this article could not possibly explore. Thus, cultural heritage connotes a more holistic approach and disbands with notions of *ownership*.

However, some contemporary writers still choose to use the term *cultural property* to indicate *communal property*—an interchangeable synonym for *cultural heritage*.<sup>22</sup> John Merryman has framed the opposing views as those who understand cultural heritage as part of the nation (cultural nationalism) and those who view cultural heritage as part of the heritage of humankind (cultural internationalism).<sup>23</sup> In one article on the issue, Federico Lenzerini argues that the terminology in the 1972 World Heritage Convention:<sup>24</sup>

greatly innovated the international legal perception of the significance of culture through moving from the idea of ‘cultural *property*’ to the more holistic view of ‘cultural *heritage*’ belonging to humanity as a whole ...

Cultural heritage is connected to human rights too: “in as much as it reflects the spiritual, religious, and cultural specificity of minorities and groups”.<sup>25</sup>

In this article I use the broader term—*cultural heritage*. I do so because the term is more closely aligned with the wider and evolving approach taken by the international courts.<sup>26</sup>

### III The International Criminal Law Framework Protecting Cultural Heritage

International criminal law is considered to be a subset of international law which utilises similar sources of law: treaties, customary international law, general principles of law, judicial case law and publications from eminent writers.<sup>27</sup> The objectives of international criminal law are retribution, deterrence, incapacitation, rehabilitation, denunciation and education.<sup>28</sup>

Cultural heritage is protected during wartime largely through treaties and customary international law.<sup>29</sup> In some cases, the treaties themselves have become part of customary

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21 Frigo, above n 16, at 379; Lyndel V Prott and Patrick J O’Keefe “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1(2) IJCP 307 at 307; Roger O’Keefe “The Meaning of ‘Cultural Property’ Under the 1954 Hague Convention” (1999) 46(1) NILR 25 at 26; and Janet Blake “On Defining the Cultural Heritage” (2000) 49 ICLQ 61 at 61.

22 Francesco Francioni “Public and Private in the International Protection of Global Cultural Goods” (2012) 23(3) EJIL 719 at 722.

23 John Henry Merryman “Two Ways of Thinking about Cultural Property” (1986) 80 AJIL 831 at 845–846. See also Francioni, above n 22, at 720–721; and Derek Gillman *The Idea of Cultural Heritage* (Cambridge University Press, New York, 2010) at 1.

24 Lenzerini, above n 6, at 55–56 (emphasis in original).

25 Francioni, above n 22, at 722.

26 Lenzerini, above n 6, at 55–56.

27 Robert Cryer and others *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007) at 6.

28 At 19–23.

29 See generally 6–9.

international law.<sup>30</sup> Issues arise regarding conflict classification because instruments differ in protection during armed conflict versus in peacetime.<sup>31</sup>

Conflict classification is important: crimes against humanity do not necessarily require the existence of an armed conflict, whereas war crimes can only take place in the context of armed conflict. The formal definition of an *armed conflict* is a:<sup>32</sup>

... contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths.

Whether or not an armed conflict exists impacts upon the applicability of international law instruments and whether war crimes can occur. This was the issue that blocked any international prosecution of the destruction of the Bamiyan Buddhas: the Bamiyan Valley was free of hostility—therefore, the cultural heritage destruction was not governed by the laws of armed conflict.<sup>33</sup> Fortunately, customary international law and the 1972 World Heritage Convention fill this gap in the protective shield.

#### A *1874 Project of an International Declaration concerning the Laws and Customs of War*

Many provisions of the Hague Conventions of 1899 and 1907 can be traced back to the *Project of an International Declaration concerning the Laws and Customs of War*.<sup>34</sup> Under art 17 of the 1874 Declaration, “all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes”. The preoccupation at the time was with *buildings* only. Other than being connected to art, science or charity, no further qualifications for protection—such as the age, history, or architectural merit of the buildings—are given. It seems then that the concept and significance of cultural heritage existed, but the scope of protection was narrow and ill-defined.

#### B *1907 Hague Convention respecting the Laws and Customs of War on Land*

Building upon the 1874 Declaration, the 1907 Hague Convention—respecting the Laws and Customs of War on Land—established an exemption for cultural objects in sieges and bombardments. In other words, it enables the usage of cultural heritage places for military purposes.<sup>35</sup> This is clearly a problem where belligerents strategically use protected buildings for military purposes as a base to prevent attack. Also, the cultural heritage

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30 International Committee of the Red Cross “Protection of cultural property in the event of armed conflict” (29 October 2010) <[www.icrc.org](http://www.icrc.org)>.

31 The context of armed conflict prompts a further issue regarding the implication of the common law exception for military necessity.

32 Peter Wallensteen and Margareta Sollenberg “Armed Conflict, 1989–2000” (2001) 38 JPR 629 at 643.

33 Roger O’Keefe “World Cultural Heritage: Obligations to the International Community as a Whole?” (2004) 53(1) ICLQ 189 at 205.

34 *Project of an International Declaration concerning the Laws and Customs of War* (27 August 1874). The text of Declaration can be accessed from the International Committee of the Red Cross website <[www.icrc.org](http://www.icrc.org)>.

35 Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land 205 CTS 277 (signed 18 October 1907, entered into force 26 January 1910), art 27.

definition expanded to include buildings dedicated to religion, historic monuments, and hospitals.<sup>36</sup>

### C 1954 Hague Convention

The 1954 Hague Convention is the principal instrument that deals specifically with cultural heritage destruction. The definition of cultural heritage destruction was expanded further to include manuscripts, books, scientific collections and archives. The ambit of what was considered cultural property also grew under this convention. Buildings were no longer the only protected object—reproductions of the objects defined above were subject to the same protection.<sup>37</sup> Under the 1954 Hague Convention, “[a]ll warring parties, including non-state actors, are bound to observe, as a minimum, the provisions relating to respect for cultural property”.<sup>38</sup> The contracting states must also take measures to safeguard cultural property in case of future armed conflict and not use that property as a sacrificial shield against attack in the event of armed conflict.<sup>39</sup> For example, while using protected buildings for military purposes may deter attack, it is likely to expose the building to greater risk.

Under art 4(2) these obligations can be waived in “cases where military necessity imperatively requires such a waiver”.<sup>40</sup> Unfortunately, the imperative military necessity exception is not defined in the 1954 Hague Convention. Presumably, it is activated by the tactic of using protected buildings for military purposes. Many authors have argued that this exception undermines the regime because it clearly contradicts the parties’ safeguarding obligation.<sup>41</sup> Indeed, the ill-defined concept is dangerously fluid, such that “‘necessity’ too quickly and easily shades into ‘convenience’”.<sup>42</sup>

This ambitious and purposefully drafted protective treaty has received some criticism, especially in relation to the *military necessity* exception which it did not elaborate upon it. Bruce Montgomery argues that this treaty failed woefully in the 1990 Iraqi invasion of Kuwait.<sup>43</sup> Despite being a contracting state to the treaty, Iraq perverted the terms of the 1954 Hague Convention to justify looting thousands of cultural artefacts, special library collections and the emirates’ archives. Moreover, Iraq later abrogated its responsibility under art 4 by removing cultural property to protect it from possible destruction.<sup>44</sup>

Despite the United Nations Security Council sanctions imposed on Iraq for breaching obligations,<sup>45</sup> similar cultural heritage destruction occurred in close succession during the Balkan Wars fought between 1991 and 2001. Merryman argues that the concession to military necessity is inconsistent with the entire premise of the 1954 Hague Convention and is a “relic of an age that treated aggressive war as a legitimate instrument of national policy”.<sup>46</sup> It is, indeed, difficult to envision a situation where attacking the *cultural heritage*

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36 See art 27

37 1954 Hague Convention, art 1.

38 Emma Cunliffe, Nibal Muhsen and Marina Lostal “The destruction of cultural property in the Syrian conflict: legal implications and obligations” 2016 23 IJCP 1 at 7; and 1954 Hague Convention, art 19(1).

39 1954 Hague Convention, arts 3 and 4.

40 1954 Hague Convention, art 4(2).

41 Cunliffe, Muhsen and Lostal, above n 38, at 9.

42 Merryman, above n 23, at 838.

43 Bruce P Montgomery “The Rape of Kuwait’s National Memory” (2015) 22(1) IJCP 61 at 77–78.

44 At 77–78.

45 Global Policy Forum “Sanctions Against Iraq” <[www.globalpolicy.org](http://www.globalpolicy.org)>.

46 Merryman, above n 23, at 840–841.

of all mankind would be demanded by *military necessity*. Modern warfare technology has become so advanced that precision strikes make cultural heritage destruction inexcusable.<sup>47</sup>

New special protection measures for improvised refuges are available by displaying an emblem and entry onto the *International Register of Cultural Property under Special Protection*.<sup>48</sup> Roger O’Keefe calls the special protection regime a “white elephant” because, in reality, it has a very poor success record: only nine sites have ever been registered, including the Vatican and six refuges in the Netherlands.<sup>49</sup> He cites the “cripplingly difficult” criteria for registration and a “tortuous and time-consuming” registration process as the reasons for failure.<sup>50</sup> Compared with the usual procedure of litigation, the procedure to object to a registration application is especially long and convoluted, including multiple deadlines for objection, rebuttal, arbitration and appeal.<sup>51</sup> The World Heritage List, under the auspice of the 1972 World Heritage Convention, applied the lessons from this failed initiative.

#### D *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*

Some commentators argue that the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict is “the most important and appropriate tool” for pursuing war crimes against cultural heritage.<sup>52</sup> Certainly, many of the fishhooks in the original Convention were rectified. The unqualified *military necessity* exception was clarified to state that cultural heritage may only be exposed to a potential destruction in circumstances where “no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage”.<sup>53</sup> This definition *narrows* the exception, but *retains* it nonetheless. This is controversial because it is difficult to envision a situation where the destruction of cultural heritage would be militarily necessary.

After the failure of the original special protection regime and register, a new *enhanced protection* scheme was introduced.<sup>54</sup> Enhanced protection is granted immediately after entry into the *List of Cultural Property under Enhanced Protection*.<sup>55</sup> The entry decisions are made by a new inter-governmental *Committee for the Protection of Cultural Property in the Event of Armed Conflict*.<sup>56</sup> Enforcement is also bolstered. The Protocol establishes

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47 See Roger O’Keefe *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press, Cambridge, 2006) at 2.

48 1954 Hague Convention, arts 11–14.

49 O’Keefe, above n 47, at 141; and Jiří Toman *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and other instruments of international law concerning such protection* (Dartmouth, Aldershot, 1996) at 108.

50 O’Keefe, above n 47, at 141.

51 1954 Hague Convention, art 14.

52 Frulli, above n 17, at 216.

53 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 2253 UNTS 212 (opened for signature 17 May 1999, entered into force 9 March 2004) [1999 Protocol II], art 6.

54 1999 Protocol II, art 10.

55 Article 11(10).

56 Chapter 3.



individual criminal responsibility for five serious violations.<sup>57</sup> Contracting States consent to implement domestic legislation to make the serious violations domestic offences, provide appropriate penalties for the offences and establish jurisdiction over these offences—including “universal jurisdiction for three of the five serious violations”.<sup>58</sup>

Crucially, art 22 extends the application of the Protocol to include non-international armed conflicts, such as a civil war or military coup. This development was hard-fought because there was a concern that the inclusion of internal conflicts would be seen as encroaching on state sovereignty. However, it was ultimately recognised that the majority of cultural heritage destruction occurred in non-international armed conflict.<sup>59</sup>

#### E 1949 Geneva Convention Additional Protocols I and II of 1977

Two additional Protocols were added to the Geneva Convention which contained articles protecting cultural heritage. It is accepted that the principles contained in these additional Protocols (which prohibit attacks on civilians and civilian objects) form part of customary international law.<sup>60</sup>

Without prejudice to the 1954 Hague Convention, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) states that it is prohibited:<sup>61</sup>

- (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (b) to use such objects in support of the military effort;
- (c) to make such objects the object of reprisals.

Similarly, art 16 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) prohibits attacks against cultural heritage and the use of cultural heritage in support of the military effort.<sup>62</sup> Importantly, this prohibition does not override the military necessity exception in the 1954 Hague Convention because these additional Protocols are clear in their deference to the 1954 Hague Convention as the primary instrument.

#### F 1972 World Heritage Convention

The 1972 World Heritage Convention was adopted by UNESCO in 1972. It has proven to be a successful instrument, with an astonishing 189 contracting parties, and still counting.<sup>63</sup>

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57 Article 15.

58 International Committee of the Red Cross “Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999” <[www.icrc.org](http://www.icrc.org)> at 3. See also 1999 Protocol II, art 31.

59 O’Keefe, above n 47, at 247.

60 *Prosecutor v Strugar (Decision on Interlocutory Appeal)* ICTY Appeals Chamber IT-01-42-AR72, 22 November 2002 at [9]–[10].

61 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (adopted 8 June 1977, entered into force 7 December 1978), art 53.

62 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978), art 16.

63 Francioni, above n 22, at 724–725.

Francesco Francioni and Federico Lenzerini attribute its success to its popularity and the high level of involvement by the local population in the nomination of sites for inscription on the World Heritage List. States are eager to participate because inscription heightens their national profile and provides development opportunities in conservation, tourism, and, subsequently, revenue.<sup>64</sup> The state participation aspect is a double-edged sword: state sovereignty is favoured in the instrument and, consequently, a state must give consent for a domestic site to be entered on the list.<sup>65</sup>

#### G 1998 Rome Statute of the International Criminal Court

The 1998 Rome Statute of the International Criminal Court (Rome Statute) is the foundation document for the ICC, an ambitious Court which has been called the “most innovative and exciting development” in international law since the formation of the United Nations.<sup>66</sup> It is the world’s first permanent international criminal court, tasked with helping to end “impunity for the perpetrators of the most serious crimes of concern to the international community” including genocide, war crimes and crimes against humanity.<sup>67</sup>

Following World War II, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted.<sup>68</sup> Subsequently, the need for a permanent international court to deal with atrocities was recognised. This is the context from which the Rome Statute emerged.<sup>69</sup>

Customary international law was used as a reference point when drafting the Rome Statute, in conjunction with the jurisprudence that emerged from ad hoc tribunals.<sup>70</sup> The Rome Statute explicitly protects cultural heritage under art 8, deeming its destruction to be a war crime. Cultural heritage destruction as a war crime means: “[e]xtensive destruction and appropriation of property, not justified by *military necessity* and carried out unlawfully and wantonly”.<sup>71</sup> Again, the controversial *military necessity* exception survives to continue undermining the regime.

A more controversial issue is whether cultural heritage destruction is a *crime against humanity* under art 7 as a form of persecution. In the Rome Statute *persecution* is defined as the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group”.<sup>72</sup> It requires the precondition of being “a widespread or systematic attack directed against any civilian population, with knowledge”.<sup>73</sup> In light of the fact that cultural heritage destruction is ultimately an attack on the identity of a group, I argue that cultural heritage destruction could constitute a

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64 Francesco Francioni and Federico Lenzerini “The Future of the World Heritage Convention: Problems and Prospects” in *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, Oxford, 2008) 401 at 402.

65 1972 World Heritage Convention, art 11(3).

66 William A Schabas *An Introduction to the International Criminal Court* (3rd ed, Cambridge University Press, New York, 2007) at 57.

67 International Criminal Court “Understanding the International Criminal Court” <www.icc-cpi.int> at 1.

68 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (adopted 9 December 1948, entered into force 12 January 1951), art 2.

69 International Criminal Court, above n 67, at 3.

70 Schabas, above n 66, at 312–313.

71 Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute], art 8(2)(a)(iv) (emphasis added).

72 Rome Statute, art 7(2)(g).

73 Rome Statute, art 7(1).

crime against humanity. Indeed, this issue is discussed in relation to the *Al Mahdi* case later in this article.

Additionally, the ICC has a unique, “radical and unprecedented” feature—a genuinely independent Office of the Prosecutor empowered to select cases and suspects to prosecute.<sup>74</sup> Prosecutorial discretion in the ICC has created controversy too and is also discussed in relation to the *Al Mahdi* case.

#### H *Customary international law*

Customary international law consists of rules from general practices that come to be accepted as law. In order for a rule to be considered part of customary international law, it must be “reflected in state practice” and the international community must believe “that such practice is required as a matter of law”<sup>75</sup>—also known as *opinio juris*. In principle, international treaties are only binding upon a state if that state has ratified it. They also rarely cover non-international conflict.<sup>76</sup> Therefore, the existence of customary international law—which is binding on states regardless of ratification or whether the conflict is international—is crucial because treaty law leaves large gaps in legal protection.

Some treaties themselves have become customary international law.<sup>77</sup> Indeed, François Bugnion argues that cultural property is unquestionably within the ambit of customary law because “[w]hen a cultural object is destroyed, it is always people who are the real target.”<sup>78</sup> Importantly, a recent study by the International Committee of the Red Cross suggests that the basic principles of the 1954 Hague Convention have become accepted as customary law and are, therefore, applicable in internal conflicts.<sup>79</sup>

#### I *International humanitarian law*

International humanitarian law (IHL) is the area of international law concerning the conduct of armed conflict. It aims to minimise the effects of armed conflict, especially for civilians. It also binds parties involved in a conflict—international and non-international—to “respect cultural property and promote its protection”.<sup>80</sup> Violation of IHL obligations amount to a war crime and, in certain cases, may constitute a crime against humanity.<sup>81</sup>

It has been noted that although iconoclasm is not a specific crime, it can be covered under general IHL because destroying religious sites and objects effectively removes a community’s ability to participate in cultural life.<sup>82</sup> Therefore, religious sites and objects receive the same protection as secular cultural heritage.

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74 Rome Statute, art 42(1). See also Schabas, above n 66, at 354.

75 International Committee of the Red Cross “Customary international humanitarian law” (29 October 2010) <[www.icrc.org](http://www.icrc.org)>.

76 Cunliffe, Muhesen and Lostal, above n 38, at 4–5.

77 At 5.

78 Bugnion, above n 2.

79 Cunliffe, Muhesen and Lostal, above n 38, at 8; and Jean-Marie Henckaerts “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict” (2005) 87(857) IRRC 175 at 175–212.

80 Cunliffe, Muhesen and Lostal, above n 38, at 2; and Henckaerts, above n 79, at 175–212.

81 Cunliffe, Muhesen and Lostal, above n 38, at 2.

82 At 8.

#### J *2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage*

The 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage was drafted specifically in response to the tragic destruction of the Bamiyan Buddhas and as an expression of concern over the increasing prolificacy of intentional destruction.<sup>83</sup> It recalls the principles in the 1954 Hague Convention, customary international law and the Rome Statute, and reminds States of peacetime obligations to take safeguarding measures. The final clause importantly addresses public awareness:<sup>84</sup>

States should take all appropriate measures to ensure the widest possible dissemination of this Declaration to the general public and to target groups, inter alia, by organizing public awareness-raising campaigns.

This clause demonstrates the growing recognition that treaties cannot be effective if groups are not aware of their existence. Encouraging public awareness campaigns will address any underlying ignorance as to the significance of cultural heritage. Although declarations are not binding on states, they can prompt adoption of a treaty or domestic statute and be relevant in proving the *opinio juris* for customary international law.<sup>85</sup> The declaration certainly represents yet another step forward in combating such destruction.

#### K *Summary*

The body of international law introduced in this Part has been developing incrementally for a considerable number of years now. The profile and scope of protection of cultural heritage has increased with each new instrument and this is best reflected in the basic principles of cultural heritage protection, which have now become part of customary international law.

### IV Cultural Heritage Prosecution Precedents

The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up to deal with war crimes and crimes against humanity. This ad hoc tribunal functioned over a specific time period and geographic area, and made several successful cultural heritage prosecutions. There were a string of related cases against military leaders involved in the shelling of the Old Town of Dubrovnik in the former Republic of Yugoslavia during the 1990s. Since then, the ICTY has proudly highlighted its significant role in “cementing the legal foundation for accountability for the destruction of cultural heritage”.<sup>86</sup>

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) empowers the prosecution of “grave breaches of the Geneva Conventions of 1949”, which importantly includes “extensive destruction and appropriation of property,

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83 Francesco Francioni “Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity” (2004) 25 Mich Intl L 1209 at 1214.

84 *UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage* (2003), cl 10. The Declaration was adopted by Resolution 33 of the 32nd session of the UNESCO General Conference in Paris on 17 October 2003.

85 Cunliffe, Muhesen and Lostal, above n 38, at 14.

86 The Hague “ICTY paved way for accountability for attacks on cultural heritage” (press release, 10 June 2016).

not justified by military necessity and carried out unlawfully and wantonly”.<sup>87</sup> Even more specifically, under art 3—relating to the *violation of the laws or customs of war*—the Tribunal is empowered to prosecute for:<sup>88</sup>

- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; ...

This is the most comprehensive definition and scope of protection of cultural heritage to exist, which is reflected in the rich jurisprudence provided by the ICTY. In the following sections I turn to discuss select cases in relation to destruction in Dubrovnik. I aim to demonstrate how the international law framework has been used to prosecute cultural heritage destruction.

#### A Prosecutor v Jokić

The ICTY indicted Miodrag Jokić on destruction charges in relation to hundreds of shells fired under his command. Jokić’s shells struck institutions in the Old Town of Dubrovnik dedicated to religion, charity, education, arts and sciences, as well as historic monuments.<sup>89</sup> Jokić was proven fully aware of the Old Town’s UNESCO status and knew that several buildings were marked with the mandated symbols under the 1954 Hague Convention.<sup>90</sup> The Old Town was put on the World Heritage List in 1975.<sup>91</sup> The Chamber established that there was no *military necessity* justification, given that no military objectives existed in the vicinity of the 52 affected buildings.<sup>92</sup>

The Chamber found Jokić guilty of art 3 violations of the law relating to unlawful attack on civilian objects and the destruction of heritage institutions. The Chamber specifically noted that attacking protected cultural heritage is prohibited regardless or whether any damage is caused,<sup>93</sup> and that war crimes are no less serious than crimes against humanity.<sup>94</sup>

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87 Statute of the International Criminal Tribunal for the former Yugoslavia, annexed to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704 (1993), as amended 7 July 2009 by SC Res 1877, S/RES/1877 (2009) [ICTY Statute], art 2(d). The Statute was adopted by the United Nations Security Council on 25 May 1993 with SC Res 827, S/RES/827 (1993). The latest compilation of the Statute with its amending resolutions can be accessed from the International Criminal Tribunal for the former Yugoslavia website <www.icty.org>.

88 ICTY Statute, arts 3(b)–(d).

89 *Prosecutor v Jokić (Sentencing Judgement)* ICTY Trial Chamber I IT-01-42/1-S, 18 March 2004 at [22] and [27].

90 At [23].

91 At [49].

92 United Nations International Criminal Tribunal for the former Yugoslavia “Case Information Sheet: ‘Dubrovnik’ (IT-01-42) Pavle Strugar” <www.icty.org> at 5.

93 *Prosecutor v Jokić (Sentencing Judgment)*, above n 89, at [50].

94 At [43].

Jokić's culpability was partially derived from art 7(1) of the ICTY Statute (aiding and abetting), which formed *individual* criminal responsibility; and partially under art 7(3), which related to *superior* criminal responsibility.<sup>95</sup> *Superior* criminal responsibility attaches to persons who:<sup>96</sup>

... knew or had reason to know that the subordinate was about to commit such acts or had done so and ... failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

This generally provided military personnel with the authority to prevent or initiate cultural heritage destruction.

In relation to the *gravity* of the offence, the prosecution noted that:<sup>97</sup>

... he who [...] allows a projectile to fire without knowing exactly who will be hit bears perhaps sometimes a heavier responsibility than a one-to-one face-to-face crime. It's the distance, the sanitisation, that perhaps adds a dimension of horror to the crime.

As the ICTY can only impose sentences of imprisonment,<sup>98</sup> the Trial Chamber sentenced Jokić to seven years of imprisonment.<sup>99</sup> This reflected their finding that the crime represented a "violation of values especially protected by the international community".<sup>100</sup>

#### B Prosecutor v Pavle Strugar

This is another ICTY case in relation to the shelling of the Old Town. Pavle Strugar's criminal liability resulted from his failure to take adequate measures to stop the shelling of the Old Town or to ensure that those responsible for the attack were disciplined. The Chamber was clear that the special protected status of Dubrovnik meant that the entire town, including the walls, could be characterised as *cultural heritage*.<sup>101</sup> The Trial Chamber found that Jokić—rather than Strugar—was the immediate commander of those responsible; and Strugar was Jokić's superior, thus "one step further removed".<sup>102</sup>

On the basis of superior criminal liability,<sup>103</sup> the Trial Chamber found Strugar guilty of destruction or wilful damage done to heritage according to Article 3(d).<sup>104</sup> In determining whether Strugar met the elements of art 3(d), the Trial Chamber referred to the definitions in the above protection instruments.<sup>105</sup> The Chamber concluded that the elements for the crime of destruction of cultural heritage, in the absence of military necessity, were established.<sup>106</sup> The requisite actus reus of "ordering" and mens rea of awareness of the

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95 At [57].

96 ICTY statute, art 7(3).

97 *Prosecutor v Jokić (Sentencing Judgment)*, above n 89, at [39].

98 ICTY Statute, art 24(1).

99 *Prosecutor v Jokić (Sentencing Judgment)*, above n 89, at [116]. Sentence was confirmed by the Appeals Chamber on 30 August 2005.

100 At [46].

101 United Nations International Criminal Tribunal for the former Yugoslavia, above n 92, at 5.

102 At 7.

103 See ICTY Statute, art 7(3).

104 At 7.

105 *Prosecutor v Strugar (Judgment)* ICTY Trial Chamber II IT-01-42-T, 31 January 2005 at [298]–[307].

106 At [330].

“substantial likelihood that it would be committed in the execution of the order” existed.<sup>107</sup> The defence gave evidence that there had been little or no damage to the Old Town.<sup>108</sup> The Chamber considered this to be a serious understatement on the evidence.<sup>109</sup>

Significant emphasis was put on that fact that Dubrovnik was of “great importance to the cultural heritage of every people” and that the *victim* can thus be understood collectively as *a people*.<sup>110</sup> Here, while the Chamber diverges and develops the traditional view that human rights are only justiciable when a breach affects specific individuals,<sup>111</sup> *Strugar* confirms that customary rules have developed specifically to protect cultural heritage.<sup>112</sup>

Despite initially pleading not guilty, the Trial Chamber convicted and sentenced Strugar to eight years imprisonment, later reduced to 7.5 years by the Appeals Chamber in 2008.<sup>113</sup>

### C *Genocide and persecution bases*

Expert witness Andrés Riedlmayer<sup>114</sup> explains that during the Balkan Wars, the rubble of razed mosques was frequently taken to landfill so that civilians did not have access to materials that would enable rebuilding.<sup>115</sup> He quotes an interview with the regional police chief, Simo Drljaca, appointed by Radovan Karadzic:<sup>116</sup>

“With their mosques, you must not just break the minarets,” he said, “You’ve got to shake up the foundations because that means they cannot build another. Do that, and they’ll want to go. They’ll just leave by themselves.”

Sebastián Green Martínez presents an alternative basis for prosecuting cultural heritage destruction under the auspice of *persecution* as a crime against humanity. He refers to a number of ICTY cases where cultural heritage destruction was understood as persecution.<sup>117</sup> However, using persecution as a basis to prosecute can be problematic because one must meet a higher mens rea requirement. The accused must have an intention to destroy or damage, or to act in reckless disregard of the likelihood of such damage.<sup>118</sup> In contrast, the mens rea elements of cultural heritage destruction as a war

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107 At [332]–[333].

108 At [177].

109 At [178].

110 At [232].

111 See Lenzerini, above n 6, at 53.

112 *Prosecutor v Strugar (Judgment)*, above n 105, at [230].

113 United Nations International Criminal Tribunal for the former Yugoslavia “Case Information Sheet: Prosecutor v Pavle Strugar” <www.icty.org> at 1.

114 *Prosecutor v Šešelj (Decision on the Admission of Evidence Presented during the Testimony of Andrés Riedlmayer)* ICTY Trial Chamber III IT-03-67-T, 14 April 2010.

115 Andrés J Riedlmayer *Destruction of Cultural Heritage in Bosnia-Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities* (Cambridge MA, 2002).

116 Chuck Sudetic “Conflict in the Balkans; Serbs’ Gains in Bosnia Create Chaotic Patchwork” (21 August 1992) *The New York Times* <www.nytimes.com> as cited in Riedlmayer, above n 115, at 12. The *New York Times* article includes the relevant parts of the interview with Simo Drljaca.

117 Sebastián A Green Martínez “Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?” (2015) 13 JICJ 1073 at 1085; and *Prosecutor v Krajišnik (Judgment)* ICTY Trial Chamber I IT-00-39-T, 27 September 2006 at [840].

118 *Prosecutor v Milutinović (Judgment)* ICTY Trial Chamber IT-05-87-T, 26 February 2009 at [206] and [210]; O’Keefe, above n 47, at 385; and International Criminal Court “Elements of Crimes” (11 June 2010) <www.icc-cpi.int>.

crime only require awareness of the protected status of the heritage.<sup>119</sup> Additionally, many commentators make reference to “cultural cleansing” and so it would seem that bringing cultural heritage destruction charges on the basis of genocide may be possible.<sup>120</sup>

In the *Prosecutor v Blaskić*, the ICTY Trial Chamber noted that cultural heritage destruction could be a modality of persecution for crimes against humanity under art 5(h) because persecution:<sup>121</sup>

may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instill within humankind ... persecution may thus take the form of confiscation or destruction of private dwellings or business, symbolic buildings or means of subsistence.

However, when the ICTY in *Prosecutor v Krstić* considered whether genocide could be a modality for the commission of cultural heritage destruction, the Tribunal denied that this could occur, stating that:<sup>122</sup>

... customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.

This is in line with the definition of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>123</sup> which has been reproduced in the ICTY Statute and the Rome Statute.<sup>124</sup> During the drafting of the Convention, the concept of *cultural genocide*—to mean the elimination of a group’s identity without physical destruction—was rejected as not being within the scope of genocide proper and was deliberately abrogated.<sup>125</sup> In any case, the act of destroying cultural heritage can be evidence of the mens rea required for genocide.<sup>126</sup>

#### D Summary

The Balkan wars have shown that cultural heritage is inextricably linked to identity, cultural values and *way of life*.<sup>127</sup> The ICTY cases dramatically raised the profile of cultural heritage

119 International Criminal Court, above n 118, at 15–16.

120 See Office of the Prosecutor “Prosecutor Serge Brammertz in Mostar today” (press release, 6 October 2015).

121 *Prosecutor v Blaškić (Judgement)* ICTY Trial Chamber IT-95-14-T, 3 March 2000 at [227].

122 *Prosecutor v Krstić (Judgement)* ICTY Trial Chamber IT-98-33-T, 2 August 2001 at [580].

123 Convention on the Prevention and Punishment of the Crime of Genocide, art 2.

124 ICTY Statute, art 4(2); and Rome Statute, art 6.

125 *Prosecutor v Krstić (Judgment)*, above n 122, at 202, n 1284; and Lenzerini, above n 6, at 54. See generally Alain Aeschlimann “Genocide, a ‘serious crime’: the 1948 Convention” (29 March 2004) International Committee of the Red Cross <www.icrc.org>. Including “cultural genocide” was again attempted in the Declaration on the Rights of Indigenous People but was omitted in the final version because of ambiguities in the meaning and scope. See Shamiran Mako “Cultural Genocide and Key International Instruments: Framing the Indigenous Experience” (2012) 19 IJCG 175.

126 *Prosecutor v Krstić (Judgment)*, above n 122, at [580]; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgment* [2007] ICJ Rep 43 at [344].

127 At 58.



protection, strengthened protective norms relating to non-international conflicts and demonstrated that these international instruments do indeed *have teeth*.<sup>128</sup> Indeed, the ICTY cases have provided rich jurisprudence about the operation of the international framework in prosecution and paved the way for international court prosecution of cultural heritage destruction in the future. No doubt they will be of enormous assistance to the ICC prosecution in the upcoming Al Mahdi case.<sup>129</sup> Notable key developments in these cases include: the development of the concept of collective victims; the inclusion of persecution, but exclusion of genocide, as prosecution bases; and the confirmation that cultural heritage protection is part of customary international law.

## V Significant Development: *Prosecutor v Al Mahdi*

On 24 March 2016, the ICC Pre-Trial Chamber I issued a decision confirming charges against Ahmad Al Faqi Al Mahdi for the commission of war crimes under art 8 of the Rome Statute in relation to the destruction of protected cultural heritage in Timbuktu, Mali.<sup>130</sup> The Office of the Prosecutor had been watching the situation in Mali since early 2012 and issued a public statement on 24 April 2012 reiterating that Mali was a State Party to the Rome Statute. Accordingly, the ICC had jurisdiction over potential war crimes, crimes against humanity or genocide committed in Mali or by Malian nationals.<sup>131</sup>

Al Mahdi pleaded guilty at trial on 22 August 2016 and was convicted and sentenced on 27 September 2016, setting a record for the shortest trial to date at the ICC and making Al Mahdi the first defendant to enter a guilty plea.<sup>132</sup> This case is timely in light of the vicious trend of destruction in Syria and Iraq at the hands of ISIL,<sup>133</sup> where the razing of Palmyra in 2015 echoes the chilling 2001 detonation of the Bamiyan Buddhas.

I explain the background to the situation in Mali, the case before the ICC tribunal, and the charges laid against Al Mahdi. I also consider the significance of prosecution under war crimes as opposed to crimes against humanity, as well as prosecutorial discretion issues. Finally, I comment upon the significance of this successful conviction for possible future cases in relation to Palmyra, as well as issues facing the ICC in relation to cultural heritage prosecution.

### A Background

In January 2012, a non-international conflict broke out in Mali with different radical rebel groups taking control of northern Mali. Rebel groups, such as Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), took control of Timbuktu for approximately ten months.<sup>134</sup>

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128 Montgomery, above n 43, at 79.

129 See Lenzerini, above n 6, at 58.

130 *Prosecutor v Al Mahdi (Confirmation of Charges)*, above n 7.

131 International Criminal Court Office of the Prosecutor “Statement from the Office of the Prosecutor of the International Criminal Court regarding the situation in Mali” (24 April 2012) <[www.icc-cpi.int](http://www.icc-cpi.int)>.

132 *Prosecutor v Al Mahdi (Trial Hearing)* ICC Courtroom I ICC-01/12-01/15, 22 August 2016 at 7; and *Prosecutor v Al Mahdi (Judgment and Sentence)* ICC Trial Chamber VIII ICC-01/12-01/15, 27 September 2016.

133 Lostal, above n 8.

134 International Criminal Court Office of the Prosecutor *Situation in Mali: Article 53(1) Report* (16 January 2013) at [3].

During this period, Ansar Dine and AQIM imposed: a local government; an Islamic tribunal; a morality brigade (Hisbah); and an Islamic police. Al Mahdi himself was part of Ansar Dine, head of the Hisbah, involved in the Islamic tribunal and seen as an expert on religious matters.<sup>135</sup>

The fate of the mausoleums was in the Hisbah's realm. The prosecution's evidence demonstrates that "Al Mahdi was the author of the sermon given on the Friday before the destruction of the Buildings/Structures started" and that, in his "capacity as head of the *Hisbah*, [he] played a crucial role in implementing the decision to destroy the Buildings/Structures".<sup>136</sup> In addition, Al Mahdi approved the use of a bulldozer in one instance, and physically assisted in the destruction of the mausoleums by using a pick axe, despite his full awareness of the buildings' protected status.<sup>137</sup> Furthermore, there is evidence that he was present at each site of destruction and gave comments of justification to the media.<sup>138</sup>

Immediate global condemnation followed. The United Nations Security Council quickly adopted a condemnatory resolution, urged protection, and stressed liability under the Rome Statute for such a violation.<sup>139</sup> On 13 July 2012, the Malian Government referred the crimes committed in Timbuktu and the North by Ansar Dine and AQIM to the ICC. The Malian Government stated that the situation had made the administration of justice impossible before national courts,<sup>140</sup> and requested an investigation into alleged crimes against humanity and war crimes pursuant to arts 7 and 8 of the Rome Statute.<sup>141</sup> As Mali has ratified the Rome Statute, the ICC had jurisdiction over war crimes, crimes against humanity and genocide committed from 1 July 2002 onwards, in Mali or by its nationals.<sup>142</sup> At the outset of the referral, Prosecutor Fatou Bensouda stressed that the deliberate destruction of Muslim saints' shrines may be a war crime under art 8.<sup>143</sup>

## B Charges

The charging document states that Al Mahdi is criminally responsible for the intentional destruction of buildings dedicated to religion, as well as historic monuments, these acts being prohibited under art 8(2)(e)(iv) of the Rome Statute. The prosecution argues criminal responsibility under five modes of liability: for being a direct perpetrator physically taking part in the attacks; for being a direct co-perpetrator; for soliciting and inducing the commission of the crime; for facilitating the commission of the crimes by aiding and abetting or similar assistance; and for contributing to the commission by a group acting with a common purpose.<sup>144</sup> These charges are symbolically loaded because Timbuktu is

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135 *Prosecutor v Al Mahdi (Confirmation of Charges)*, above n 7, at [45].

136 At [47] and [49].

137 At [51] and [57].

138 At [52] and [54].

139 See SC Res 2056, S/RES/2056 (2012).

140 International Criminal Court Office of the Prosecutor, above n 134, at [17].

141 Green Martínez, above n 117, at 1074.

142 International Criminal Court Office of the Prosecutor, above n 134, at [5].

143 Green Martínez, above n 117, at 1074; and International Criminal Court "ICC Prosecutor Fatou Bensouda on the Malian State referral of the situation in Mali since January 2012" (press release, 18 July 2012) <[www.icc-cpi.int](http://www.icc-cpi.int)>.

144 Rome Statute, arts 25(3)(a)-(d); and *Prosecutor v Ahmad Al Faqi Al Mahdi (Prosecution Charges)* ICC Pre-Trial Chamber I ICC-01/12-01/12, 17 December 2015 at [1]-[3].

known as the “city of 333 saints” and Al Mahdi is charged with the destruction of nine of the saints’ mausoleums and one mosque door. The charges indicate he has virtually destroyed part of the city’s identity. It is also undisputed that none of the targeted buildings constituted a military objective.<sup>145</sup>

### (1) War crimes versus crimes against humanity

In a postscript written following the breaking news of the destruction in Mali, prolific cultural heritage commentator and International Law Professor Federico Lenzerini argued that it would be appropriate for the ICC to “follow the example of the ICTY and consider the destruction of the ancient cultural heritage in the city as a crime against humanity in addition to being a war crime”.<sup>146</sup> However, at the outset of the investigation, the Office of the Prosecutor abandoned the enquiry into crimes against humanity,<sup>147</sup> stating that:<sup>148</sup>

At this stage, the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali. This assessment may be revisited in the future.

An element of war crimes is that they must be committed as part of an armed conflict (international or non-international).<sup>149</sup> However, armed conflict is not a prerequisite to a crime against humanity being committed. The core element of a crime against humanity is that they are directed against a civilian population and so a crime against humanity must be “part of a widespread or systematic attack directed against any civilian population”.<sup>150</sup> Importantly, this can refer to *any* civilian population, not only the civilian population of an occupied territory.<sup>151</sup> Therefore, this category could be used to prosecute cultural heritage crimes in peacetime.<sup>152</sup>

Green Martínez argues that the ICC could have chosen to prosecute the Malian cultural heritage destruction as persecution, which is a crime against humanity under the Rome Statute, because all of the specific elements of the crime of persecution are present.<sup>153</sup> The early dismissal of crimes against humanity means that cultural heritage destruction as a crime against humanity has not been tested in this case. While the short timeframe within which this case was concluded does refute complaints of the ICC’s inefficiency, the haste may have resulted in jurisprudence on this novel issue that is less rich than it could have been. In any case, the efficiency was impressive and will likely serve to bolster faith in the ICC.

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145 *Prosecutor v Al Mahdi (Confirmation of Charges)*, above n 7, at [41].

146 Lenzerini, above n 6, at 63.

147 Green Martínez, above n 117, at 1074; and International Criminal Court Office of the Prosecutor, above n 134, at [8] and [128].

148 International Criminal Court Office of the Prosecutor, above n 134, at [128].

149 Rome Statute, art 8; and Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law – Volume I: Rules* (Cambridge University Press, New York, 2005) at 568.

150 Rome Statute, art 7(1).

151 O’Keefe, above n 47, at 384.

152 At 384–385; and Frulli, above n 17, at 217.

153 See Green Martínez, above n 117, at 1074–1075.

## (2) Prosecutorial discretion

A highly controversial aspect of the Rome Statute was the allowance of a Prosecutor to initiate investigations subject to judicial constraints, rather than political constraints.<sup>154</sup> James Goldston defines prosecutorial discretion as the “authority *not* to assert power, or not to assert it to the full extent authorized by law”.<sup>155</sup> Under the Rome Statute, there are three methods by which a case can come before the ICC: United Nations Security Council referral; state referral; and the Prosecutor’s *proprio motu* authority.<sup>156</sup> In conjunction with the doctrine of complementarity, which puts an important caveat on exercising jurisdiction only when a state is “unwilling or unable genuinely to carry out the investigation or prosecution”, the Prosecutor can initiate investigations *proprio motu*.<sup>157</sup> This limit on prosecutorial discretion is needed due to the lessons learned from the Nuremberg trials where prosecutors were not independent from the interests of their own States.<sup>158</sup>

Although the Mali situation was referred to the ICC by the Malian government, the Prosecutor has discretion over the specific prosecutions to be made within a given situation.<sup>159</sup> The ICC Prosecutor has a difficult task because they are essentially deciding the “political question of the extent of society’s interest in seeking criminal punishment”.<sup>160</sup> A previous ICC President has commented that the ICC is a “judicial institution operating in a political world”.<sup>161</sup> Goldston suggests that the Court has not been entirely successful in distinguishing the two.<sup>162</sup> In any case, the ICC maintains that it is an exclusively judicial institution, not subject to any political control.<sup>163</sup>

Prosecuting cultural heritage destruction in the face of human devastation is a fraught political issue. Indeed, archaeologists are increasingly uneasy with preserving cultural heritage while “neglecting the plight of living people”.<sup>164</sup> Attempting to rank rights would, of course, place cultural heritage protection below basic needs, such as shelter and food. However, this kind of “ranking” incorrectly assumes that cultural heritage protection and human rights are independent—as I have already mentioned, cultural heritage is part of the wellbeing of people.<sup>165</sup>

Similarly, the Office of the Prosecutor has faced public backlash over the decision to prosecute Al Mahdi for cultural heritage destruction when many other atrocities happened in Mali. Despite the Prosecution painting the picture of Al Mahdi as being a key figure in the destruction, some commentators have instead argued that Al Mahdi is a *small fish* of

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154 Alexander KA Greenawalt “Justice Without Politics? Prosecutorial Discretion and the International Criminal Court” (2007) 39 NYU J Intl L & Pol 583 at 585.

155 James A Goldston “More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court” (2010) 8 JICJ 383 at 389; and Kate Stith “The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of discretion” (2008) 117 Yale LJ 1420 at 1422.

156 Rome Statute, arts 13(a)–(c). See also Chris Gallavin “Prosecutorial Discretion within the ICC: Under the Pressure of Justice” (2006) 17 Crim LF 43 at 43.

157 Rome Statute, art 17(1)(a); and Gallavin, above n 156, at 45.

158 William Schabas “Prosecutorial Discretion v Judicial Activism at the International Criminal Court” (2008) 6 JICJ 731 at 732; and Goldston, above n 155, at 8.

159 Rome Statute, arts 15, 53 and 54.

160 Goldston, above n 155, at 389.

161 Sang-Hyun Song “International Criminal Court-centred International Criminal Justice and Its Challenges” (2016) 17 MJIL 1 at 12.

162 Goldston, above n 155, at 1.

163 International Criminal Court, above n 67, at 5.

164 Alexander Bauer “Editorial: The Destruction of Heritage in Syria and Iraq and Its Implications” (2015) 22 IJCP 1 at 3.

165 At 3.

relatively low authority and that the “one case so far in the Malian situation, is against one zealous local preacher”.<sup>166</sup>

Goldston notes that the ICTY and International Committee for the Red Cross strategies have expressly prioritised the prosecution of senior leaders in crimes.<sup>167</sup> Similarly, the ICC Office of The Prosecutor has stated that they will “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes”.<sup>168</sup> However, they also acknowledge that in some cases they may go wider than high-ranking officers to investigate “officers lower down the chain of command is necessary for the whole case”.<sup>169</sup>

That said, prosecutorial discretion is not so straightforward. Because the ICC can only prosecute so many offenders, the Prosecutors’s task of selection is vital. Here Prosecutor Bensouda is, in effect, making an example of Al Mahdi. But the Prosecutor cannot make an individual charging decision without assessing whether a State’s efforts to prosecute criminal conduct was so inadequate that the mandate of the ICC was engaged.<sup>170</sup> Alexander Greenawalt notes that that question “involves precisely the kind of complex political calculations that the structure of the ICC was ostensibly designed to avoid”.<sup>171</sup> The international guidelines for prosecutors direct them to: “(a) carry out their functions impartially” and “(b) act with objectivity”.<sup>172</sup> However, common sense suggests that law cannot operate in a vacuum and neither can the Prosecutor. A small degree of politics in prosecutorial discretion is unavoidable.

Another potential encroachment upon the independence of the Prosecutor is the fact that they are elected by an absolute majority of the Assembly of States Parties to the Rome Statute, which is a political body.<sup>173</sup>

The Prosecutor must also grapple with the debate over prioritising interests of *justice* versus interests of *peace*.<sup>174</sup> In *Al Mahdi*, Prosecutor Bensouda’s stance is clear: the ICC is a judicial institution and considering interests of peace is the edict of other institutions.<sup>175</sup> She notes that, historically, “peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated”.<sup>176</sup> Cultural heritage scholars will be anxious to see how Prosecutor Bensouda’s stance and the *Al Mahdi* case shape the prosecutorial landscape in this area.

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166 Janet Anderson “Is the Malian Islamist now at the ICC really such a big fish?” (1 March 2016) International Justice Tribune <[www.justicetribune.com](http://www.justicetribune.com)>.

167 Goldston, above n 155, at 8.

168 International Criminal Court Office of the Prosecutor *Paper on some policy issues before the Office of the Prosecutor* (September 2003) at 7.

169 At 7.

170 James Stewart “Transitional Justice in Colombia and the Role of the International Criminal Court” (13 May 2015) International Criminal Court <[www.icc-cpi.int](http://www.icc-cpi.int)>.

171 Greenawalt, above n 154, at 633.

172 “Guidelines on the Role of Prosecutors” in *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August—7 September 1990: Report prepared by the Secretariat* A/CONF.144/28/Rev.1 (1991) 189 at [13].

173 Rome Statute, art 42(4); and Andrew J Walker “When a Good Idea is Poorly Implemented: How the International Criminal Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees” (2004) 106 W Va L Rev 245 at 263.

174 See William Schabas “Transitional Justice and the Norms of International Law” (8 October 2011) Japanese Society of International Law <[www.jsil.jp](http://www.jsil.jp)>.

175 Fatou Bensouda “International Justice and Diplomacy” (19 March 2013) New York Times <[www.nytimes.com](http://www.nytimes.com)>.

176 Bensouda, above n 175.

## VI The Future of Cultural Heritage Protection and Prosecution

The majority of media reports and commentators have heralded the *Al Mahdi* case as being a giant leap forward in cultural heritage protection and prosecution. Prosecutor Bensouda took a very bold stance against wanton destruction and was rewarded with a guilty plea and successful conviction. However, the ICC is battling some disheartening statistics. To date, the ICC has opened eight situations, 21 cases, and indicted 36 people, but has made only two convictions.<sup>177</sup> *Al Mahdi*'s conviction raises this total to three. Commentators have suggested that if the ICC is not able to prosecute, then an ad hoc tribunal would enable the United Nations to enforce IHL with non-member states.<sup>178</sup>

The provisions in the international criminal framework could be viewed as an *ambulance at the bottom of the cliff*. The framework functions ex post facto, and, typically, the cultural heritage has already suffered.<sup>179</sup> Roger O'Keefe argues that diplomatic pressure is the only practicable option available when cultural heritage destruction is imminent.<sup>180</sup> This seems harsh and an indicator that the treaty and case law framework are failing. However, O'Keefe also reminded that the underlying reason for destruction is frequently religious fanaticism or other social reasons,<sup>181</sup> and when this is the root cause international criminal law is, of course, deficient.

A fundamental aim of international criminal law is to set a general example to deter the future perpetration of crimes. The *Al Mahdi* case presents an opportunity for the ICC to "re-shape the current landscape of non-compliance with the treaties addressing cultural heritage".<sup>182</sup> Although prosecution asked for a sentence of between nine and 11 years,<sup>183</sup> after considering the mitigating factors, especially his cooperation and guilty plea, the Chamber sentenced *Al Mahdi* to nine years imprisonment.<sup>184</sup>

### A Future prosecutions for Palmyra?

The *Al Mahdi* charges were confirmed four years after the destruction. Accordingly, there is hope that his case could lead to ISIL being referred to the ICC in relation to attacks on Palmyra in Syria.<sup>185</sup> The successful arrest and conviction of *Al Mahdi* is promising. If the jurisdictional barriers preventing prosecution of ISIL can be overcome, then charges for cultural heritage destruction are likely forthcoming.<sup>186</sup>

The body of international criminal law surrounding cultural heritage protection and prosecution is intentionally bolstered by the ICC's decision to tackle this case. As Matt Brown argues, international criminal law "suffers from a fragmentation and hierarchical approach between instances of international armed conflict, non-international armed

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177 Duncan McCargo "Transitional Justice and Its Discontents" (2015) 26(2) J Democr 5 at 8.

178 Cunliffe, Muhesen and Lostal, above n 38, at 20.

179 O'Keefe, above n 47, at 208.

180 At 208.

181 Roger O'Keefe, Professor of Public International Law at University College London "International Law and the protection of cultural property in war" (UCL Lunch Hour Lecture, University College London, London, 4 February 2016).

182 Lostal, above n 8.

183 *Prosecutor v Al Mahdi (Judgment and Sentence)*, above n 132, at 106.

184 At 109.

185 Maria Papaioannou "The Buddhas of Bamiyan, Timbuktu, Palmyra: What next?" (20 November 2015) Cambridge International Law Journal <www.cilj.co.uk>.

186 Matt Brown "Guest Post: Promising Development in Protecting Cultural Heritage at the ICC" (30 September 2015) Opinio Juris <www.opiniojuris.org>.

conflict and internal disturbances”.<sup>187</sup> Accordingly, this case may help to consolidate the developing principles and give consistency and clarity to the protection the law provides in different types of conflict.

It is important to note that the ICC cannot prosecute ISIL as a group, because the Court only prosecutes individuals, not groups or States.<sup>188</sup> Additionally, a referral and investigation into the situation must first be opened—and this has not happened. Furthermore, Syria is not a State Party to the Rome Statute. In 2014 the United Nations Security Council attempted to adopt a resolution that would refer the situation in Syria to the ICC. However, this was prevented by the veto of China and the Russian Federation in a frustrating stalemate.<sup>189</sup>

Nevertheless, there was renewed hope in 2015 when a United Nations commission of inquiry called for a special ad hoc tribunal based on the successful ICTY example.<sup>190</sup> According to Carla Del Ponte, one of the commissioners and a former chief prosecutor of the ICTY, an ad hoc tribunal could be faster and more efficient in preparing a lengthy list of potential war criminals, as opposed to prosecuting a few key figures.<sup>191</sup> There could, therefore, be developments in this area in the near future.

## VII Conclusion

The law has been working to end cultural heritage destruction for centuries. As international law has developed, a vast protective framework has emerged, including a specific convention dealing solely with the issue. The grim reality is that laws cannot stop those motivated by malicious ideologies and those who “convinced of their impunity, show contemptuous disregard for law itself”.<sup>192</sup> Practical steps that can be taken include diplomatic pressure and, crucially, promoting the ratification of protective instruments and encouraging States to implement domestic legislation to aid their own judiciary in prosecution.<sup>193</sup> I contend that it is not the framework that is weak—rather, the “implementation and the will of states to adopt it and abide by it”.<sup>194</sup> As Lyndel V Prott writes, “[i]ts weakness is that of international law generally.”<sup>195</sup>

The ICTY cases provided a solid footing for other international criminal courts to build upon. Considering it has been almost fifteen years since the ICTY trials, the *Al Mahdi* case

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187 Brown, above n 186.

188 International Criminal Court, above n 67, at 5.

189 United Nations “Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution” (22 May 2014) <www.un.org>.

190 See United Nations Human Rights Office of the High Commissioner “Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic” (17 March 2015) <www.un.org>. The referral recommendations of this Statement were reiterated in another recent report. *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* A/HRC/31/68 (2016).

191 Paulo Pinheiro and others “Commission of Inquiry on the Syrian Arab Republic – Press Conference (Geneva, 17 March 2015)” UN Web TV (17 March 2015) <www.webtv.un.org>.

192 O’Keefe, above n 47, at 2.

193 Frulli, above n 17, at 216.

194 Lyndel V Prott “Protecting Cultural Heritage in Conflict” in Neil Brodie and others (eds) *Archaeology, Cultural Heritage and the Antiquities Trade* (University Press of Florida, Gainesville, 2006) 25 at 33.

195 At 33.

shines a timely spotlight on the issue.<sup>196</sup> In a recent statement, Registrar John Hocking of the ICTY said:<sup>197</sup>

Where there is cultural destruction there may be genocide. Where there is cultural cleansing there may be ethnic cleansing. From Dubrovnik to Timbuktu, we cannot afford to downplay crimes against cultural heritage ...

By prosecuting the cultural heritage destruction in Mali, the ICC is making a strong statement to States that wanton destruction of this kind will not be tolerated. The *Al Mahdi* case builds upon a burgeoning body of ICTY jurisprudence which has seen successful prosecutions and the imposition of superior criminal liability on the accused.

These recent developments give renewed hope that members of ISIL can be charged with similar crimes for the destruction in Palmyra, Syria. However, Syria is not a party to the ICC statute—though mechanisms do exist to push prosecutions to the ICC. Therefore, establishing an ad hoc regional court like the ICTY may be more effective. The ICTY itself has been very successful, boasting 80 convictions, as compared to the ICC's three convictions since its inauguration in 1998 (including *Al Mahdi*).

However, the *Al Mahdi* case is not without issues. It is arguable that the ICC has missed an opportunity to prosecute the destruction as a war crime, as opposed to a crime against humanity. Additionally, the quick resolution of the case may have limited the value of the decision.

Finally, the ICC and the Office of the Prosecutor faced criticism for using prosecutorial discretion to select a cultural heritage prosecution as opposed to a heinous crime against humanity. Accordingly, the choice in prosecuting cultural heritage destruction over another crime is enormously significant and the case is important on this ground alone. If nothing else, the mere existence of the *Al Mahdi* case raises the profile of cultural heritage destruction exponentially around the world.

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196 Papaioannou, above n 185.

197 United Nations International Criminal Tribunal for the former Yugoslavia “ICTY paved way for accountability for attacks on cultural heritage” (10 June 2016) <[www.icty.org](http://www.icty.org)>.