

The Prosecutor v. Ahmad Al Faqi Al Mahdi: Cultural Property and World Heritage in International Criminal Law

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I. INTRODUCTION

In a time when the brutal destruction of cultural heritage is being wielded as a powerful weapon by groups like ISIS against communities around the world, the protection of cultural heritage in the international context has become more crucial than ever. Accordingly, the *Al Mahdi* case¹ currently before the ICC marks the first time that war crimes for the destruction of cultural heritage have been the main charge in an international criminal case.

This marks a promising and timely development in the protection of cultural heritage in the international criminal context. Although charges for the destruction of cultural heritage have been brought in other international criminal cases, they have always been auxiliary to other charges for more “serious” crimes. In bringing this case, however, the ICC Prosecutor emphasized the importance of the charges against Al Mahdi:

Let us be clear: what is at stake is not just walls and stones. The destroyed mausoleums were important, from a religious point of view, from an historical point of view, and from an identity point of view.²

But the question arises: important from whose perspective? Such cultural sites could be deemed important from a universal perspective as part of the “world cultural heritage” common to all of humanity, or its importance could be established relative to a certain community or population to whose identity the cultural site is crucial. In this paper I argue that, in determining whether future cases based on the war crime of destruction of cultural property should be

¹ Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15 ICC [*hereinafter* Al Mahdi].

² *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi*, INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR (March 1, 2016), available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> (last visited May 15, 2016) [*hereinafter* Statement].

brought before the ICC, the Prosecutor and Chambers should utilize a relativist approach to identifying the gravity of the destruction in question.

I begin in Part II by summarizing the debate between universalism and cultural relativism and its application to war crimes in the international criminal law context. I then identify existing international protections for cultural heritage and define the scope of cultural heritage in the international sphere. In Part IV I provide a brief summary of the most significant international criminal cases concerning cultural heritage destruction to date. In Part V, I explore the approach taken by the Prosecutor in the *Al Mahdi* case, with particular attention to her justifications for the charges. Finally, in Part VI I analyze the possibility of future cases on the destruction of cultural heritage in the context of admissibility at the ICC, and argue for a relativist approach to determining the “gravity threshold” for admissibility in such cases.

II. UNIVERSALISM AND CULTURAL RELATIVISM IN INTERNATIONAL CRIMINAL LAW

The debate between universalism and cultural relativism has played a major role in the development of international criminal law. This debate, often grounded in the language and context of international human rights, occurs along a spectrum, with one end being represented by those who believe that one possesses human rights simply because one is a human being (regardless of location, culture, or background), and the other extreme by those who argue that human rights vary depending on the culture to which an individual belongs.³ In other words, this debate examines the merits of approaching international legal issues from the perspective of

³ Ida L. Bostian, *Cultural Relativism in International War Crimes Prosecutions: The International Criminal Tribunal for Rwanda*, 12:1 ILSA J. Int'l & Comp. L. 1 (2005), at 4.

humanity as a whole, versus approaching the issue from a more localized, culturally-based approach.

In the international criminal context, this issue often arises regarding the establishment, operation and legitimacy of international criminal tribunals, and the role that cultural differences should or will play in this process.⁴ However, it should also play a crucial role in the definition of crimes under the jurisdiction of such tribunals, and how we interpret those definitions. It is generally accepted by both universalists and cultural relativists that there are certain crimes, such as slavery or genocide, which are universal and which found the basis for international criminal law.⁵ However, as one author notes, “the specifics of what acts are universally prohibited, and when they are prohibited, are seldom articulated.”⁶ The elements of these crimes that are articulated in the statutes or treaties defining international criminal jurisdiction are often very vague and subjective. The jurisprudence of various international criminal courts and tribunals fails to clarify such elements, as each successive court tends to redefine crimes with new elements or slight variations and apply these definitions in inconsistent or varying ways.⁷

We therefore must decide how to determine what acts and circumstances fulfill the elements of a certain crime, and how such circumstances should be evaluated by a prosecutor in deciding to bring a case or by a court in deciding its admissibility. For example, we are provided little guidance as to what exactly justifies a charge of the war crime of directing attacks against buildings dedicated to religion and historic monuments which are not military objectives. Prosecutors enjoy significant prosecutorial discretion in determining whether to bring a case, and therefore have the ability to interpret such provisions as they see fit. Judges, however, are also

⁴ Bostian, *supra* note 3.

⁵ Bostian, *supra* note 3, at 6-7.

⁶ Bostian, *supra* note 3, at 7.

⁷ *Id.*

under the obligation to interpret such provisions in determining whether a certain case meets the admissibility requirements of the Court.

This is where the universalism versus cultural relativism debate comes into play. Should the courts and prosecutors analyze the circumstances of a case from a universalist perspective, looking at its effect or significance for humanity as a whole? Or should they approach the issue through a relativist perspective, focusing on the importance or impact of the circumstances of the case on the immediate victims and their local communities?

III. PERMANENT INTERNATIONAL CULTURAL HERITAGE PROTECTIONS

The various international legal protections afforded to cultural heritage form the foundation for cultural heritage protection in the international criminal law sphere. Although these protections occur in different subject areas, they work together and influence each other to create a dynamic if incomplete system for the international protection of cultural heritage.

a. 1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land

The 1907 Regulations concerning the Laws and Customs of War on Land, an Annex to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land,⁸ contain several provisions that protect cultural heritage during warfare. Article 27 of the Regulations, which relates to active hostilities, requires that “[i]n sieges and bombardments all necessary steps ... be

⁸ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907), 187 CTS 227; 1 Bevens 631, *entered into force* 26 January 1910 [*hereinafter* 1907 Hague Convention IV].

taken to spare, as far as possible, 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.”⁹ Article 56, which applies to military authority over territory of a hostile state, specifies that “[t]he 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” and that “[a]ll 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.”¹⁰

Although the Convention has only thirty eight State Parties, in 1946 the Nuremberg Tribunal stated that “by 1939 ... [the] rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war.”¹¹ These provisions were therefore binding on all nations, as they embodied customary international law. These protections do not appear to be limited to such buildings or monuments which have a cultural, religious, or historical importance to humanity as a whole; it simply protects any historic monuments and buildings which are “dedicated to” religion, art or science.

b. 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict

Another protection for cultural heritage in wartime is the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict, which was promulgated under the auspices of

⁹ 1907 Hague Convention IV, *supra* note 8.

¹⁰ *Id.*

¹¹ *Judgement: The Law Relating to War Crimes and Crimes Against Humanity*, THE INTERNATIONAL MILITARY TRIBUNAL FOR GERMANY (Nuremberg, 30 September 1946), available at <http://avalon.law.yale.edu/imt/judlawre.asp> (last visited May 16, 2016).

the United Nations Educational, Scientific and Cultural Organization (UNESCO) in response to the devastating destruction of cultural heritage that took place during World War II.¹² The Convention has been widely ratified, with 127 State Parties to date.¹³

Although the Convention's preamble specifies that it was guided by the principles of the 1907 Hague Convention,¹⁴ it seems to take a more universalist approach, protecting “movable or immovable property *of great importance to the cultural heritage of every people*” [emphasis added] including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical or archaeological interest, as well as scientific collections of all kinds.¹⁵ The Convention's preamble, however, equivocates this view, specifying that “damage to cultural property *belonging to any people whatsoever* means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world” [emphasis added].¹⁶

Ultimately the Convention requires the “safeguarding of and respect for” such cultural property by State Parties, including by parties to a non-international armed conflict within the territory of a State Party.¹⁷ This entails both refraining from using such property or its immediate surroundings for purposes that are likely to expose it to destruction or damage during armed conflict, and refraining from acts of hostility directed against such property that do not constitute

¹² Convention for the Protection of Cultural Property in Armed Conflict (The Hague, 14 May 1954), 249 UNTS 240, *entered into force* 7 August 1956 [*hereinafter* Cultural Property Convention].

¹³ *Legal Instruments: Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention. The Hague, 14 May 1954*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION (UNESCO), available at <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E&order=alpha> (last visited May 16, 2016).

¹⁴ Cultural Property Convention, *supra* note 12, at Preamble.

¹⁵ Cultural Property Convention, *supra* note 12, at Art. 1; *see also* *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, American Society of International Law, ELECTRONIC INFORMATION SYSTEM FOR INTERNATIONAL LAW (2013), available at http://www.eisil.org/index.php?t=link_details&id=568&cat=876 (last visited May 16, 2016).

¹⁶ Cultural Property Convention, *supra* note 12, at Preamble.

¹⁷ Cultural Property Convention, *supra* note 12, at Art. 19.

military objectives.¹⁸ It also mandates the marking of such property with special insignia, although such marking is not required for the protection of the property under the Convention to take effect.

c. Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict

The Second Protocol, which has sixty eight State Parties, was added to the Convention in 1999 to enhance the protections afforded to cultural property during international and non-international armed conflicts. It established a new system in which cultural property “of the greatest importance for humanity” can be placed under “enhanced protection,” as long as it is adequately protected by domestic law and not used for military purposes.¹⁹ The granting of “enhanced protection” to cultural property is made by the Committee for the Protection of Cultural Property in the Event of Armed Conflict, an intergovernmental committee established by Article 24 of the Second Protocol. The Committee is comprised of twelve State Parties, whose representatives should be qualified in the fields of cultural heritage, defense or international law.²⁰ This approach endorses a universalist point of view by asserting that cultural property with importance to humanity as a whole deserves greater protection than cultural property with a more localized significance.

¹⁸ Cultural Property Convention, *supra* note 12, at Art. 4.

¹⁹ 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), *entered into force* 9 March 2004 [*hereinafter* Second Hague Protocol], at Art. 10.

²⁰ Second Hague Protocol, *supra* note 19, at Art. 24.

The Second Protocol also defines the conditions in which individual criminal responsibility should attach to the lack of respect for cultural property during armed conflict. Article 15 of the Protocol specifies five “serious violations” which State Parties undertake to criminalize, establish jurisdiction over, and provide appropriate penalties for through domestic legislation. These violations are as follows:

- (a) making cultural property under enhanced protection the object of attack;
- (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
- (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- (d) making cultural property protected under the Convention and this Protocol the object of attack;
- (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.²¹

The Protocol establishes universal jurisdiction amongst its State Parties for the first three of the five serious violations—Article 15, section 1, subparagraphs (a) through (c)—by requiring each State Party to establish jurisdiction over alleged offenders of these subparagraphs who are present in its territory.²² The Convention’s structure of criminal responsibility clearly gives elevated importance to the “enhanced protection” category of cultural property discussed above, as it requires universal jurisdiction for attacks on or military use of any such property.

The “serious violations” requiring universal jurisdiction, however, are not limited to the “enhanced protection” sphere. The third universal jurisdiction category applies to “extensive destruction or appropriation of cultural property protected under the Convention,” even if such

²¹ Second Hague Protocol, *supra* note 19, at Art. 15.

²² Second Hague Protocol, *supra* note 19, at Art. 16(1)(c).

property is not recognized as being “of the greatest importance for humanity.”²³ In this way, the Protocol’s criminal responsibility structure allows for a more relativist approach, recognizing that the extensiveness of destruction can also warrant the imposition of the most serious category of individual criminal responsibility due to its impact on the local community, as opposed to the destroyed property’s significance to the global population as a whole.

d. Protocol I to the 1949 Geneva Conventions

The First Protocol to the 1949 Geneva Conventions, adopted in 1977, reaffirms and further develops the cultural property protections regarding the conduct of hostilities that were articulated in the 1907 Hague Convention. Article 53 of the First Protocol states that, without prejudice to the provisions of the 1954 Hague Convention and “other relevant instruments,” it is prohibited to:

- (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; or
- (c) to make such objects the object of reprisals.²⁴

This Protocol’s definition of protected cultural objects and places of worship is rather vague, specifying only that they must “constitute the cultural or spiritual heritage of peoples.” This may open the door for a more relativist approach to enforcement based on the importance of the sites or objects to the local people who identify with them instead of their importance to the world’s

²³ Second Hague Protocol, *supra* note 19, at Art. 15(1)(c).

²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), 1125 UNTS 3, *entered into force* 7 December 1978 [*hereinafter* Geneva Protocol I], at Art. 53.

peoples as a whole. The vague nature of the Protocol is likely due to the broad scope of influence of the Geneva Conventions, which are considered international customary law. This means that the Conventions and their Protocols are binding on any state, whether or not it has acceded to or ratified the Conventions.

e. Protocol II to the 1949 Geneva Conventions

The Second Protocol to the Geneva Conventions extends the provisions of the Geneva Conventions and their First Protocol to non-international armed conflicts.²⁵ Prior to this Protocol, only Article 3, which was common to all of the 1949 Geneva Conventions, applied to conflicts that did not occur between states.²⁶ Article 16 of the Second Protocol extends Article 53 of the First Protocol, stating that “[w]ithout prejudice to the provisions of the [1954] Hague Convention ... it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.” In using a vague definition of cultural objects and places of worship identical to that used in the First Protocol, this Article reproduces the possibility of a relativist application in the context of non-international armed conflicts.

f. 1972 World Heritage Convention

²⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977), 1125 UNTS 609, *entered into force* 7 December 1978 [*hereinafter* Geneva Protocol II].

²⁶ It should be noted, however, that the provisions of the Second Protocol are limited to a more narrow range of non-international armed conflicts than common Article 3. *See* Geneva Protocol II, *supra* note 25, at Art. 1.

The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage,²⁷ also known as the World Heritage Convention, establishes a list of sites (known as “World Heritage Sites”) which receive special national and international protections due to their cultural or natural significance. The Convention has been widely ratified, with 191 State Parties as of August 2014.²⁸ Currently, there are 1,031 properties on the World Heritage List, spanning 163 State Parties. Of these properties, 802 are of cultural significance and thirty two are of “mixed” cultural and natural significance.²⁹

Each site protected under the Convention is officially inscribed on the “World Heritage List” by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (also known as the World Heritage Committee)³⁰ after being identified and nominated by the State Party in whose territory it lies. Through the Convention, the State Parties “recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.”³¹ Among others, the protections afforded to this “world heritage” include a periodic reporting requirement on the state of conservation of each World Heritage Site by the State Party in whose territory it lies, and an agreement by each State Party “undertakes not to take any deliberate measures which might damage directly or indirectly the [World Heritage Site] situated on the territory of other States Parties to this Convention.”³²

²⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage (23 November 1972), 1037 UNTS 151; 27 UST 37; 11 ILM 1358 (1972), *entered into force* 15 December, 1975 [*hereinafter* World Heritage Convention].

²⁸ *World Heritage Convention: States Parties, Ratification Status*, UNESCO WORLD HERITAGE CENTRE (2016), available at <http://whc.unesco.org/en/statesparties/> (last visited May 16, 2016).

²⁹ *World Heritage List*, UNESCO WORLD HERITAGE CENTRE (2016), available at <http://whc.unesco.org/en/list/> (last visited May 16, 2016).

³⁰ World Heritage Convention, *supra* note 27, at Art. 8.

³¹ World Heritage Convention, *supra* note 27, at Art. 6(1).

³² World Heritage Convention, *supra* note 27, at Art. 6(3).

In order for a nominated site to be inscribed as a World Heritage Site and receive the protection of the Convention, the World Heritage Committee must consider it to have “outstanding universal value” according to criteria which the Committee is empowered to establish.³³ These criteria are delineated in the Operational Guidelines for the Implementation of the World Heritage Convention.³⁴ Drawing on Article 1 of the Convention, the Guidelines specify that “cultural heritage” for the purposes of the Convention includes:

- (a) 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*;
- (b) 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*;
- (c) sites: works of man or the combined works of nature and of man, and areas including archaeological sites *which are of Outstanding Universal Value from the historical, aesthetic, ethnological or anthropological points of view* [emphasis added].³⁵

These criteria reinforce the explicit requirement of “Outstanding Universal Value” for inscription on the World Heritage List. The Guidelines go on to define “Outstanding Universal Value” as “cultural ... significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.”³⁶ This clear universalist approach precludes the inscription of sites whose significance is more specific to the identity of a given community, area or region. The World Heritage List is reserved only for those sites which a group of countries on the World Heritage Committee, detached from the context of

³³ World Heritage Convention, *supra* note 27, at Art. 11(2).

³⁴ *The Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO WORLD HERITAGE COMMITTEE (8 July 2015), available at <http://whc.unesco.org/en/guidelines/> (last visited May 16, 2016) [*hereinafter* Operational Guidelines].

³⁵ Operational Guidelines, *supra* note 34, at para. 45.

³⁶ Operational Guidelines, *supra* note 34, at para. 49.

the sites and their importance to the identity of the local community, recognizes as significant in a global, universal way.

g. The Rome Statute

Protections for cultural heritage can also be found in the Rome Statute, which established the International Criminal Court.³⁷ The Statute defines the Court's structure, jurisdiction, and mandate. The Statute establishes jurisdiction over four crimes³⁸: genocide,³⁹ crimes against humanity,⁴⁰ war crimes,⁴¹ and the crime of aggression.⁴² Each of these crimes requires the presence of different elements, which are also laid out in the Statute.

The Court has jurisdiction over war crimes, which require a nexus to an armed conflict, that are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”⁴³ Article 8(2)(e) of the Rome Statute provides that war crimes over which the International Criminal Court has jurisdiction include:

Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ...

(iv) [i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.⁴⁴

³⁷ Rome Statute of the International Criminal Court (Rome, 17 July 1998), UN Doc. A/CONF.183/9 of 17 July 1998, *entered into force* 1 July 2002 [*hereinafter* Rome Statute].

³⁸ Rome Statute, *supra* note 37, at Art. 5.

³⁹ Rome Statute, *supra* note 37, at Art. 6.

⁴⁰ Rome Statute, *supra* note 37, at Art. 7.

⁴¹ Rome Statute, *supra* note 37, at Art. 8.

⁴² A definition of this crime has not yet been adopted; *See* Rome Statute, *supra* note 37, at Art. 5(2).

⁴³ Rome Statute, *supra* note 37, at Art. 8(1).

⁴⁴ Rome Statute, *supra* note 37, at Art. 8(2)(e)(iv).

This provision evokes the more relativist definition of protected objects in the 1907 Hague Convention, as it does not condition protection of these sites on a threshold of special significance or importance to humanity as a whole.

This relativist reading of the provision is supported by an examination of the work of the United Nations Preparatory Committee on the Establishment of an International Criminal Court, which was tasked with producing a draft statute for the establishment of a permanent international criminal court. In its third gathering, the Committee noted the work of its Working Group on the Definition of Crimes, which produced a draft text of the definition of war crimes.⁴⁵ This draft text provided a detailed proposed definition for war crimes related to historic monuments and cultural property:

[M]aking the clearly recognized historic monuments, works of art or places of worship *which constitute the cultural or spiritual heritage of peoples* and to which special protection has been given by special arrangement, for example, *within the framework of a competent international organization*, the object of attack, causing as a result, extensive destruction thereof, where there is no evidence of the use by adverse party of such objects in support of a military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives [emphasis added].⁴⁶

This definition reflects the language of Protocols I and II of the Geneva Conventions, which provide the possibility for a relativist approach based on the requirement of significance to the heritage of peoples, but not necessarily to all peoples. The draft also provided a broader version of the definition:

⁴⁵ *Decisions Taken by the Preparatory Committee at its Session Held From 11 TO 21 February 1997*, UNITED NATIONS PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (12 March 1997), UN Doc. A/AC.249/1997/L.5, available at <http://www.iccnw.org/documents/DecisionsTaken11to21Feb97.pdf> (last visited May 17, 2016) [*hereinafter* 3rd Preparatory Committee Decisions].

⁴⁶ 3rd Preparatory Committee Decisions, *supra* note 45, at 20.

[I]ntentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, unless such property is used in support of the military effort.⁴⁷

This definition would do away with the cultural significance requirement, conditioning criminal responsibility only on the dedicated purpose and use of the targeted buildings, similar to the 1907 Hague Convention. The Working Group, however, recommended that the Committee reserve further consideration of this definition of war crimes for a future time.⁴⁸

During its fifth meeting, the Preparatory Committee revisited the issue, working through its Working Group on Definitions and Elements of Crimes.⁴⁹ The Working Group recommended a new draft text of the article defining war crimes for inclusion in the final draft convention for an international criminal court, explicitly superseding the first proposed definition discussed above. The new definition provided two options to be considered for inclusion in the convention:

(g) Option I[:] ... intentionally directing attacks against 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;

Option II[:] ... intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.⁵⁰

The only difference between these two options is the reference to educational purposes in Option II. Both options clearly reflect the broad version of the definition above, similar to the

⁴⁷ *Id.*

⁴⁸ 3rd Preparatory Committee Decisions, *supra* note 45, at Annex I, para. 2.

⁴⁹ *Decisions Taken by the Preparatory Committee at its Session Held From 1 TO 12 December 1997*, UNITED NATIONS PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (18 December 1997), UN Doc. A/AC.249/1997/L.9/Rev.1, available at <http://www.iccnw.org/documents/DecisionsTaken18Dec97Eng.pdf>, (last visited May 17, 2016) [*hereinafter* 5th Preparatory Committee Decisions].

⁵⁰ 5th Preparatory Committee Decisions, *supra* note 49, at Annex I.

1907 Hague Convention, by focusing on the dedicated purpose of buildings instead of their perceived significance. This represents an explicit rejection by the Preparatory Committee of the prior definition requiring that the buildings and monuments in question “constitute the cultural or spiritual heritage of peoples.” The second option was adopted by the Rome Conference and included in the final version of the Rome Statute, with only minor changes to the language regarding military necessity.⁵¹ Clearly, the drafters of the Rome Statute its State Parties intended the war crime of directing attacks against buildings dedicated to religion and historic monuments which were not military objectives under Article 8(2)(e)(iv) to allow for a broad interpretation of protected targets based on their dedicated purpose and use by the local community, without being limited by a reference to their regional or universal significance.

IV. CULTURAL HERITAGE IN INTERNATIONAL CRIMINAL LAW

The war crime of directing attacks against buildings dedicated to religion and historic monuments has been charged in several international criminal law cases. Although this charge tends to be auxiliary to other more “serious” crimes, the effect of such charges and the resulting international criminal law jurisprudence plays an important role in the international protection of secular cultural heritage.

a. Strugar⁵² and Jokić⁵³

⁵¹ See Rome Statute, *supra* note 37, at Art. 8(2)(e)(iv).

⁵² Prosecutor v. Pavle Strugar, Case No. IT-01-42 ICTY (31 Jan. 2005) [*hereinafter* Strugar].

⁵³ Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1 ICTY (18 March 2004) [*hereinafter* Jokić].

These cases arose under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY). Strugar and Jokić, members of the Yugoslav People's Army (JNA), were both charged with the war crime of destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science in connection with the shelling of the Old Town of Dubrovnik during the breakup of the former Yugoslavia.⁵⁴ These charges were brought by the Prosecutor under Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia.⁵⁵ Article 3(d) gave the Tribunal jurisdiction over violations of the laws or customs of war including:

seizure of, destruction or wilful [*sic*] damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.⁵⁶

In bringing these charges, the Prosecutor noted that at the time of its shelling, “[t]he Old Town of Dubrovnik was an UNESCO World Cultural Heritage Site in its entirety” and that “[a] number of the buildings in the Old Town and the towers on the city walls were marked with the symbols mandated by the [1954] Hague Convention.”⁵⁷ Jokić’s The Second Amended Indictment asserted that he was aware of the town’s status as a UNESCO World Cultural Heritage Site at the time he ordered its shelling, which resulted in the destruction of six significant buildings in the Old Town in their entirety.⁵⁸ In Strugar’s Third Amended Indictment, the Prosecution emphasized that Dubrovnik “contain[ed] a significant number of historic

⁵⁴ Judgement, *Strugar* (IT-01-42), Trial Chamber, 31 January 2005 [*hereinafter* Strugar Judgement]; Judgement, *Jokić* (IT-01-42/1), Trial Chamber, 18 March 2004 [*hereinafter* Jokić Judgement].

⁵⁵ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (25 May 1993), UN Doc. SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993) [*hereinafter* ICTY Statute].

⁵⁶ ICTY Statute, *supra* note 55, at Art. 3(d).

⁵⁷ Second Amended Indictment, *Jokić* (IT-01-42/1) The Office of the Prosecutor, 27 Aug. 2003 [*hereinafter* Jokić Second Indictment], at para. 9.

⁵⁸ Jokić Second Indictment, *supra* note 57, at para. 18-20.

monuments, works of art or places of worship which constitute the cultural and spiritual heritage of peoples” and pointed out that, according to a study conducted by Institute for the Protection of Cultural Monuments in conjunction with UNESCO, “of the 824 buildings in the Old Town, 563 (or 68.33 per cent) had been hit by projectiles[,] ... 314 direct hits were recorded on building facades and on the paving of streets and squares[,] ... [and [s]ix buildings were completely destroyed by fire.”⁵⁹

In issuing its judgment, the *Strugar* Trial Court found that since the Old Town of Dubrovnik in its entirety had been inscribed on the World Heritage List in 1979, “every building of the Old Town, including its walls, [could] be properly characterised as cultural property” and was therefore within the scope of Article 3(d) of the Statute.⁶⁰

Significantly, the *Strugar* Court conducted a review of international cultural heritage protections including the 1907 Hague Convention, the 1954 Hague Convention, and Additional Protocols I and II to the Geneva Conventions, holding that “despite terminological differences, [these] texts share a similar notion of cultural heritage” and that “[a]ccordingly, property considered protected within the meaning of Article 3(d) of the Statute is all property alternatively protected within the meaning of one of the above-mentioned instruments.”⁶¹ The *Strugar* Trial Chamber seems to equate the cultural property protected under Article 3(d) of the ICTY Statute with the cultural property protected under the myriad international cultural heritage protections discussed above. It is therefore unclear whether future protection under Article 3(d) or similar provisions, such as Article 8(2)(e)(iv) of the Rome Statute, would require the cultural property in question to possess a “great importance to the cultural heritage of every people” as required by

⁵⁹ Third Amended Indictment, *Strugar* (IT-01-42) The Office of the Prosecutor, 10 December 2003 [*hereinafter* *Strugar* Third Indictment], at para. 28-9.

⁶⁰ *Strugar* Judgement, *supra* note 54, at para. 327.

⁶¹ *Strugar* Judgement, *supra* note 54, at para. 307.

the 1954 Hague Convention, or constitute the “cultural and spiritual heritage of peoples” as required for protection under Protocols I and II of the Geneva Conventions.

Similarly, the *Jokić* Trial Chamber, held that:

[T]he crime of destruction or wilful [*sic*] damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science subsumes the fact that the Old Town was an undefended and culturally valuable site, thus especially protected under international law. It therefore finds that this *special status of the Old Town has already been taken into consideration in the definition and evaluation of the gravity of the crime* and should not be considered also in aggravation [emphasis added].⁶²

In other words, the ICTY Trial Chamber in *Jokić* considered the World Heritage Status of Old Town Dubrovnik to be a significant factor in the definition of the site as protected under Article 3(d), and in the assessment of the gravity of the crime.

b. Prlić et al.⁶³

This case also arose under the jurisdiction of the ICTY. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić, all members of the Croatian Defence Council (HVO), were charged with (*inter alia*) the war crime of destruction or willful damage to institutions dedicated to religion or education in violation of the laws or

⁶² Jokić Judgement, *supra* note 54, at para. 67.

⁶³ Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić, Case No. IT-04-74-T ICTY (29 May 2013) [*hereinafter* Prlić et al.].

customs of war during the breakup of the former Yugoslavia.⁶⁴ This charge was pursuant to Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia.⁶⁵

In bringing these charges, the Prosecutor noted the accused's participation in the deliberate destruction or significant damage to ten mosques or religious properties in East Mostar, Bosnia, and in the intentional destruction of the Stari Most ("Old Bridge"), a historic and culturally-significant "international landmark" crossing the Neretva River between East and West Mostar in Bosnia.⁶⁶ This destruction occurred with a nexus to the non-international armed conflict in the former Yugoslavia: as part of an HVO offensive, an HVO tank fired continuously at the Old Bridge throughout the day of 8 November 1993 until it was unusable and on the verge of collapse. The Bridge ultimately collapsed the following morning.⁶⁷ The Mostar Bridge was inscribed as a UNESCO World Heritage Site in 2005, after its reconstruction.⁶⁸

In issuing its judgment, the Trial Chamber found that the ten mosques in East Mostar were destroyed or significantly damaged by the HVO's shooting and shelling, and that the HVO had deliberately targeted the ten mosques.⁶⁹ It also noted that "None of the parties disputed or debated the remarkable unique character of the Old Bridge."⁷⁰ It recognized "the exceptional character" and the "historical and symbolic nature" of the Bridge, detailing its history ("built by architect Hairudin and almost 500 years old") and noting its importance "both for the inhabitants

⁶⁴ Second Amended Indictment, *Prlić et al.* (IT-04-74-T) The Office of the Prosecutor, 11 June 2008 [*hereinafter* Prlić Second Indictment], para. 118.

⁶⁵ ICTY Statute, *supra* note 55, at Art. 3(d).

⁶⁶ Prlić Second Indictment, *supra* note 64, at para. 116.

⁶⁷ *Judgement Summary for Jadranko Prlić and Others*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (29 May 2013), available at http://www.icty.org/x/cases/prlic/tjug/en/130529_summary_en.pdf (last visited May 17, 2016), at 3.

⁶⁸ Judgement Vol. 6, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claud Antonetti, *Prlić et al.* (IT-04-74-T), Trial Chamber, 29 May 2013 [*hereinafter* Judgement Vol. 6], at 305.

⁶⁹ Judgement Vol. 2, Prlić et al. (IT-04-74-T), Trial Chamber, 29 May 2013 [*hereinafter* Judgement Vol. 2], at para. 1377.

⁷⁰ Judgement Vol. 2, *supra* note 69, at para. 1281.

of the town of Mostar to which it gave its name and for ... the Balkan region.”⁷¹ The Chamber also recognized that the Bridge “symbolised the link between the communities [of East and West Mostar], despite their religious differences” and that, although it was “one of the major symbols of the Balkan region,” it held particular value and symbolic importance for the Bosnian Muslim community.⁷² Its destruction, according to the Chamber, “had a significant psychological impact on the Muslim population in Mostar.”⁷³

The Trial Chamber expressed surprise that the destruction of the Old Bridge of Mostar was alleged by the Prosecution chose only as "destruction or willful [*sic*] damage to institutions dedicated to religion or education" and not as the destruction of "historic monuments" under Article 3 (d) of the Statute.⁷⁴ Ultimately, the Chamber held that “the Defence teams were not sufficiently informed that the destruction of the Old Bridge of Mostar could be alleged” under Count 21 because it only dealt with institutions dedicated to religion or education; the Trial Chamber therefore found that it was “unable to take into account the destruction of the Old Bridge of Mostar—an historic monument of major historical and symbolic value, in particular for the Muslim community” under Count 21.⁷⁵

In his separate and partially dissenting opinion, Presiding Judge Jean-Claude Antonetti expressed similar surprise that the Prosecution failed to assert the Bridge’s destruction as a “historic monument” separately from other instances of the destruction of “institutions dedicated to religion or education” under Article 3(d) ⁷⁶of the Statute. He cited the Bridge’s symbolism and

⁷¹ Judgement Vol. 2, *supra* note 69, at para. 1282.

⁷² *Id.*

⁷³ Judgement Vol. 2, *supra* note 69, at para. 1356.

⁷⁴ Judgement Vol. 3, *Prlić et al.* (IT-04-74-T), Trial Chamber, 29 May 2013 [*hereinafter* Judgement Vol. 3], at para. 1611.

⁷⁵ *Id.*

⁷⁶ Judgement Vol. 6, *supra* note 68, at 302-3.

importance as a secular “cultural landmark” and its “fame following its inclusion on the UNESCO World Heritage List,” and argued that the Bridge already had international legal protection under the 1954 Hague Convention and the 1949 Geneva Conventions, among others.⁷⁷

V. THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI⁷⁸

In contrast to the cases discussed above, the *Al Mahdi* prosecution marks the first time that attacks against cultural heritage constitute the main charge in an international criminal case.⁷⁹ Significantly, the attacks in question were once again almost exclusively directed towards designated World Heritage sites.

Ahmad Al Faqi Al Mahdi, also known as Abu Tourab,⁸⁰ was a member of Ansar Dine, an armed Islamist group whose aim is to impose sharia law throughout Mali.⁸¹ In early 2012, Ansar Dine joined a rebellion in Northern Mali led by the National Movement for the Liberation of Azawad (MNLA). After the rebels forced the Malian military to retreat south, armed confrontations between rebel groups began and the MNLA was driven out of Mali’s main urban

⁷⁷ *Id.*

⁷⁸ Al Mahdi, *supra* note 1.

⁷⁹ 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* (Oct 2, 2015), available at <https://www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html> (last visited April 2, 2016); see also *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*, INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR (September 26, 2015); Open Society Justice Initiative, *Ahmad Al Faqi Al Mahdi at the ICC: Confirmation of Charges* (February 2016), available at <https://www.opensocietyfoundations.org/sites/default/files/briefing-almahdi-icc-confirmation-charges%2020160225.pdf> (last visited April 2, 2016) [*hereinafter* Open Society Justice Initiative].

⁸⁰ Open Society Justice Initiative, *supra* note 79, at 1.

⁸¹ Also known as Ansar Eddine. *Situation in Mali: Article 53(1) Report*, International Criminal Court, Office of the Prosecutor (January 16, 2013)[*hereinafter* Article 53(1) Report]; see also Open Society Justice Initiative, *supra* note 79, at 2.

centers. Ansar Dine, in conjunction with Al Qaeda in the Islamic Maghreb (AQIM), gained control of Timbuktu in April 2012.⁸²

During the occupation of Timbuktu, which ended in January 2013, Ansar Dine and AQIM established an Islamic tribunal, morality brigade (*Hisbah*), and police force to enforce sharia law.⁸³ According to the prosecution, in April 2012 Al Mahdi was appointed head of the *Hisbah*, which was charged with regulating the morality of the people of Timbuktu and suppressing any “visible vice” perceived by the city’s occupiers.⁸⁴ Al Mahdi allegedly set up the structure of the *Hisbah* and oversaw its operation until September 2012. Due to his reputation as an expert in religious matters, Al Mahdi was also allegedly involved with other structures created by the occupiers, including the Islamic tribunal.⁸⁵

During the course of the occupation between approximately June 30 and July 11, 2012, members of the *Hisbah*, possibly alongside members of AQIM, destroyed a series of historic and religious buildings and monuments in Timbuktu that they considered to be idolatrous and a “visible vice.”⁸⁶ Al Mahdi is said to have been consulted about the destruction of these structures prior to the attacks and been involved in preparations and planning for the attacks.⁸⁷ Al Mahdi subsequently participated in and oversaw the attacks as head of the *Hisbah*, “going to the places they attacked with vehicles, weapons, and tools such as pickaxes and iron bars” and ensuring the execution of the planned destruction.⁸⁸

⁸² *Charge brought by the Prosecution against Ahmad AL FAQI AL MAHDI*, ICC-01/12-01/15-70-AnxA, INTERNATIONAL CRIMINAL COURT (December 17, 2015) [*hereinafter* Charges], at 3; *see also* Article 53(1) Report, *supra* note 81, at para. 28.

⁸³ Charges, *supra* note 82, at 3.

⁸⁴ Charges, *supra* note 82, at 4.

⁸⁵ *Id.*

⁸⁶ Charges, *supra* note 82, at 4, 6; *see also* Open Society Justice Initiative, *supra* note 79, at 3.

⁸⁷ Charges, *supra* note 82, at 5.

⁸⁸ Charges, *supra* note 82, at 5-6.

In connection with these events, Al Mahdi has been charged with the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments which were not military objectives, as set out in Article 8(2)(e)(iv) of the Rome Statute.⁸⁹ The prosecution asserts that he is criminally responsible under Article 25(3)(a) of the Rome Statute as a direct co-perpetrator for his physical participation in the attacks; under Article 25(3)(b) for soliciting and inducing the commission of the crimes; and under Article 25(3)(c) for aiding, abetting, or otherwise assisting in the commission of the crimes; and under Article 25(3)(d) for contributing in any other way to the commission of the crimes by a group of persons acting with a common purpose.⁹⁰ The buildings Al Mahdi is charged with attacking are the historic Sidi Yahia Mosque and the mausoleums of nine Sufi Muslim saints: the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; the Alpha Moya Mausoleum; the Sheikh Mouhamad El Micky Mausoleum; the Sheikh Abdoul Kassim Attouaty Mausoleum; the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; the Bahaber Babadié Mausoleum; and the Ahamed Fulane Mausoleum.⁹¹ According to the prosecution, these buildings were a cherished part of the community and embodied the heritage and identity of Timbuktu, known as the “City of 333 Saints.”⁹² All but one of the structures were designated World Heritage sites.

In bringing this case, ICC prosecutor Fatou Bensouda focused on the importance of such structures and monuments to the community’s identity. She emphasized that “[t]he charges we have brought against Ahmad al-Faqi al-Mahdi involve most serious crimes . . . They are about

⁸⁹ Charges, *supra* note 82, at 8.

⁹⁰ Charges, *supra* note 82, at 3, 8-9.

⁹¹ Charges, *supra* note 82, at 8.

⁹² *Id.* at 5.

the destruction of irreplaceable historic monuments, and they are about a callous assault on the dignity and identity of entire populations, and their religious and historical roots.”⁹³ She argued that “[s]uch an attack against buildings dedicated to religion and historic monuments ... destroy[s] the roots of an entire people and profoundly and irremediably affect[s] its social practices and structures.”⁹⁴ She then described the importance of the mausoleums in the everyday lives of the citizens of Timbuktu, noting that after their destruction “[i]t became impossible for the inhabitants of Timbuktu to devote themselves to their religious practices ... [which] were deeply rooted in their lives ... [and] signified the deepest and most intimate part of a human being: Faith.”⁹⁵ Interestingly, Ms. Bensouda took care to articulate a relativist perspective, stating that “this case is not about determining who was right or wrong from a religious point of view. The bottom line is that the attacked monuments had a religious use and had an historic nature: this is all that matters. To intentionally direct an attack against such monument is a war crime under the Rome Statute, regardless of the judgement by other people on the religious practices by the inhabitants of Timbuktu.”⁹⁶

Ms. Bensouda also noted, however, that the mausoleums were of historical and cultural importance for the entire world, noting that “with one exception, all of sites in Timbuktu had been designated by UNESCO as World Heritage sites” because they “constituted a chapter in the history of humanity.”⁹⁷ She emphasized that “cultural heritage is the mirror of humanity” and that “[s]uch attacks [against cultural heritage] affect humanity as a whole,” arguing that, after the

⁹³ Statement, *supra* note 2.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

destruction of the mausoleums in historic Timbuktu, “humanity's collective conscience was shocked by the senseless destruction of its common heritage.”⁹⁸

The ICC Pre-Trial Chamber I subsequently confirmed the charges against Al Mahdi, finding that the prosecution had submitted sufficient evidence to establish substantial grounds to believe that Ahmad Al Faqi Al Mahdi committed the crime with which he is charged.⁹⁹ In doing so, it emphasized the recognized global significance of the mausoleums, noting that “at the time of the destruction, all cemeteries in Timbuktu, including the Buildings/Structures within those cemeteries, were classified as [W]orld [H]eritage and thus under the protection of UNESCO” and that, prior to their destruction, the mausoleums had been listed as part of UNESCO’s list of World Heritage in danger.¹⁰⁰ However, the Pre-Trial Chamber seemed to link the international importance of the sites with their significance to the local community, stating that “[t]he unanimous outcry of the international community and individuals concerned substantiates the Prosecutor’s allegation as to the seriousness of the acts.”¹⁰¹

VI. ANALYSIS

The character of such justifications becomes important in analyzing the likelihood of future international criminal cases for the destruction of cultural heritage, and the admissibility of such future cases at the ICC. Article 17(1)(d) of the Rome Statute states that in order for a case before the ICC to be admissible, it must be “of sufficient gravity to justify further action by the

⁹⁸ *Id.*

⁹⁹ *Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-84-Red, INTERNATIONAL CRIMINAL COURT, PRE-TRIAL CHAMBER I (March 24, 2016) [*hereinafter* Confirmation of Charges].

¹⁰⁰ Confirmation of Charges, *supra* note 99, at para. 36.

¹⁰¹ Confirmation of Charges, *supra* note 99, at para. 39.

Court.”¹⁰² Although this “gravity threshold” determination must ultimately be made by the Court if the admissibility of a case is in question, an analogous determination is made by the Office of the Prosecutor in deciding whether to open an investigation into a situation in the first place.¹⁰³ This means that the Prosecutor’s gravity analysis of a set of facts will determine whether a case based on those facts is brought before the ICC.

It should be noted that such a decision by the Office of the Prosecutor has only been disputed once, in the first ICC decision on the “sufficient gravity” standard needed to merit ICC investigation. Here, the Pre-Trial Chamber found that the Prosecutor’s gravity threshold determinations are owed no deference and are subject to independent judicial oversight.¹⁰⁴ If this ruling survives appellate review, it could limit the influence of the Prosecutor’s Office in relation to the Court in determining which situations meet the “gravity threshold,” particularly when situations are referred to the court.¹⁰⁵ In making such a determination, however, the Court would likely follow a process similar to that followed by the Prosecutor, as it did in this case.

In general, the Office of the Prosecutor specifies that its “assessment of gravity of crimes includes both quantitative and qualitative considerations based on the prevailing facts and circumstances.”¹⁰⁶ Although neither the Rome Statute nor its drafting history provides guidance for which cases or situations meet this gravity threshold, Regulation 29(2) of the Regulations of the Office of the Prosecutor stipulates that “the nonexhaustive factors that guide the Office’s

¹⁰² Rome Statute, *supra* note 37.

¹⁰³ Margaret M. de Guzman, *What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation*, 19:19 ASIL INSIGHTS (Aug 11, 2015), available at <https://www.asil.org/insights/volume/19/issue/19/what-gravity-threshold-icc-investigation-lessons-pre-trial-chamber> (last visited May 15, 2016).

¹⁰⁴ *Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation*, Case No. ICC-01/13-34 ICC, INTERNATIONAL CRIMINAL COURT, PRE-TRIAL CHAMBER I (July 16, 2015) [*hereinafter* Comoros], at para. 15.

¹⁰⁵ De Guzman, *supra* note 103.

¹⁰⁶ Article 53(1) Report, *supra* note 81, at 29.

assessment [of gravity] include the scale, nature, manner of commission of the crimes, and their impact.”¹⁰⁷ But how should these factors be analyzed in the context of the war crime of destruction of cultural property under Article 8(2)(e)(iv)? Should gravity be determined through a universalist perspective, examining the effect the destruction has on humanity as a whole? Or should it occur through a relativist perspective, examining the effect that the destruction of such property has on the local community or the group of people that most identify with it?

In the *Al Mahdi* case, the Prosecutor’s Office concluded that the destruction of religious and historical sites in Timbuktu “appears grave enough to justify further action by the Court” and eventually brought charges against Al Mahdi based on this determination.¹⁰⁸ In reaching its conclusion, the Office of the Prosecutor mentioned the World Heritage status of the Timbuktu sites in its analysis of three out of the four factors listed above, indicating a rather universalist approach.

First, it notes that the attacks were conducted against “at least nine mausoleums out of 16 mausoleums listed in the UNESCO’s World Heritage List, two great mosques out of three great mosques listed in the UNESCO’s World Heritage List, and two historical monuments, in the city of Timbuktu.”¹⁰⁹ Here, it seems that the analysis of the scale of destruction was conducted not in reference to the city’s cultural heritage *per se*, but instead as a proportion of the buildings that had been designated World Heritage sites.

Second, in its analysis of the nature of the destruction, the Office specifically analogizes the objects covered under Article 8(2)(e)(iv) of the Rome Statute to the “cultural or spiritual heritage” that is afforded special protection under Additional Protocol I to the 1949 Geneva

¹⁰⁷ De Guzman, *supra* note 103; Article 53(1) Report, *supra* note 81, at 29.

¹⁰⁸ Article 53(1) Report, *supra* note 81, at 32.

¹⁰⁹ Article 53(1) Report, *supra* note 81, at 31.

Conventions.¹¹⁰ This Protocol “covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people.”¹¹¹ Without specifically discussing any other indicators of cultural, religious or historical significance of the sites to Timbuktu, the Office of the Prosecutor concludes that they “undoubtedly” meet these criteria since they have been on the World Heritage list since 1988.¹¹²

Finally, in analyzing the impact of the situation, the Prosecutor notes that “the destruction of religious and historical World Heritage sites in Timbuktu appears to have shocked the conscience of humanity,” and cites the UN Secretary General’s recognition of the sites as “part of the indivisible heritage of humanity.”¹¹³ Here, it seems that the Prosecutor’s Office analyzed the situation’s impact not on the immediate victims of the destruction (the inhabitants of Timbuktu), but on the inhabitants of the world as a whole.

The Prosecutor’s analysis in the *Al Mahdi* case, taken in conjunction with the *Jokić* Judgment, the *Strugar* Judgement, and Judge Antonetti’s partially dissenting opinion in *Prlić et al.*, clearly signifies that international criminal law has used World Heritage status as a proxy for gravity in the commission of the war crime of intentionally directing attacks against cultural heritage. In other words, the “gravity threshold” for future ICC cases based on the destruction of cultural property (like the *Al Mahdi* case) would clearly be met by the “outstanding universal value” of a World Heritage Site. But would a site or sites *have* to be recognized by UNESCO as having “outstanding universal value” in order for their destruction to merit a case before the ICC? Should it?

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Article 53(1) Report, *supra* note 81, at 32.

Based on the text of Article 8(2)(e)(iv) of the Rome Statute and the more relativist definition of cultural property on which the Preparatory Committee settled, it seems that a prosecution for the destruction of cultural heritage relating to an armed conflict could occur for sites that aren't inscribed as World Heritage Sites, particularly when the destruction occurs on a large, widespread scale and is committed as part of a plan or policy.¹¹⁴ This is because the text of the Statute focuses on the dedication and use of the site in question, not on its wider significance to global or local culture. However, such cases have rarely been pursued in the international criminal law context; charges of cultural property destruction have largely been limited to cases involving World Heritage sites.

This pattern could be due to uncertainty regarding the “gravity” of the destruction of sites which have not been inscribed on the World Heritage List. Although the issue has never been directly addressed, I argue that the widespread destruction of cultural sites, even if they are not World Heritage Sites, could (and should) meet this gravity threshold. The Pre-Trial Chamber reviewing the Prosecutor’s determination of gravity in the *Comoros* case found that “[t]he physical, psychological or emotional harm suffered by the direct and indirect victims of the identified crimes must not be undervalued and *needs not be complemented by a more general impact of these crimes beyond that suffered by the victims*” [emphasis added].¹¹⁵ In so finding, the Court established that “the significant impact of such crimes on the lives of the victims and their families . . . is, as such, an indicator of sufficient gravity.”¹¹⁶ Although this determination was made in reference to a different crime base and set of circumstances, it could open the door for a more relativistic “gravity threshold” analysis in the cultural heritage context. In other

¹¹⁴ Rome Statute, *supra* note 37, at Art. 8(1).

¹¹⁵ *Comoros*, *supra* note 104, at para. 47.

¹¹⁶ *Id.*

words, the Office of the Prosecutor (or the Court itself) could be more amenable to finding “sufficient gravity” for a charges of cultural heritage destruction based on the impact of the destruction on the immediate victims of the crime—the local community whose identity the cultural heritage site contributed to—without requiring “a more general impact” on the cultural heritage or identity of the world as a whole.

Such a relativistic approach would be beneficial for the protection of communities through international criminal law, especially in light of the modern proliferation of non-international armed conflicts which are more locally- or regionally-concentrated and may therefore be less likely to involve sites of global significance. Cultural buildings and monuments represent “an essential part of the collective memory of a community,”¹¹⁷ and their destruction can have devastating consequences to the identity of a local population whether or not their significance is recognized as part of the wider “world cultural heritage.” Accordingly, it seems illogical to condition the gravity of a charge of destruction of cultural property on the property’s “universal value” when the primary victims are those within the local community whose collective identity (in the form of its cultural heritage) has been destroyed. Finally, we should be particularly aware of acts of cultural heritage destruction and prosecute accordingly, as such acts are often connected with other more “serious” crimes. As the ICTY Trial Chamber noted in its conviction of Radislav Krstić in connection with the Srebrenica genocide, “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property

¹¹⁷ John Darlington, *Timbuktu Shrines Trial: Why the Destruction of Cultural Heritage is History Repeating Itself*, NEWSWEEK, Mar. 5, 2016, available at <http://www.newsweek.com/timbuktu-shrines-international-criminal-court-433384> (last visited May 17, 2016).

and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”¹¹⁸

An illuminating example can be found in the recent destruction of cultural sites by ISIS. In addition to its destruction of well-known World Heritage Sites including the ancient cities of Palmyra and Aleppo, ISIS has consistently attacked cultural heritage and archaeological sites that are not part of the World Heritage List but that hold special significance to local communities and populations.¹¹⁹ In a statement made in conjunction with the Director-General of UNESCO and the UN and League of Arab States Joint Special Representative for Syria, United Nations Secretary-General Ban Ki-moon stated that, “[a]s the people of Syria continue to endure incalculable human suffering and loss, their country’s rich tapestry of cultural heritage is being ripped to shreds.”¹²⁰ The Joint Statement highlighted the extent of the destruction caused by ISIS and its link to the increasingly-serious nature of the conflict:

There are alarming reports that Syrian heritage has been deliberately targeted for ideological reasons. Human representations in art are being destroyed by extremist groups intent on eradicating unique testimonies of Syria’s rich cultural diversity. ... The destruction of such precious heritage gravely affects the identity and history of the Syrian people. ... The protection of cultural heritage, both tangible and intangible, is inseparable from the protection of human lives, and should be an integral part of humanitarian and peacebuilding efforts.¹²¹

This situation illustrates the importance of a relativist approach to the war crime of destruction of cultural property in the international criminal context. Under a universalist approach, a case at the ICC could only be brought for the destruction of sites with universal

¹¹⁸ Judgment, *Prosecutor v. Radislav Krstić* (IT-98-33), Trial Chamber, 2 Aug. 2001, at para. 580.

¹¹⁹ *Statement by UN Secretary-General Ban Ki-moon, UNESCO Director-General Irina Bokova and UN and League of Arab States Joint Special Representative for Syria Lakhdar Brahimi: The destruction of Syria’s cultural heritage must stop*, (12 Mar. 2014), available at <http://www.un.org/sg/statements/index.asp?nid=7521> (last visited May 17, 2016).

¹²⁰ *Id.*

¹²¹ *Id.*

value, such as the ancient cities of Aleppo and Palmyra.¹²² This, however, would fail to capture the most serious element of ISIS's actions: their ideological motives and their effect on the identity of the Syrian population. It is this ideological element of cultural heritage destruction which is reflective of the more "serious" crimes that are protected under international criminal law, and it is this element that should be recognized and punished.

VII. CONCLUSION

The relativist approach to determining the merits and admissibility of charges of intentionally directing attacks against cultural heritage under Article 8(2)(e)(iv) at the ICC provides a promising alternative to the established practice of international criminal courts and tribunals, which have used the "outstanding universal value" recognized through status as a World Heritage Site as a proxy for the gravity required for admissibility. This approach would also be more consistent with the text and legislative history of the provision in the Rome Statute, which declined to define protected objects with reference to their cultural or spiritual significance and instead defined them based on their dedication or use.

Crimes against cultural heritage must be taken seriously, due to their correlation with other more tangible crimes that are also under the jurisdiction of the ICC. These issues are likely to become increasingly relevant to ICC practice in the years to come, considering the recent rise in the systematic destruction of cultural heritage in the context of armed conflict by groups like ISIS. In order to acquire justice for the populations that are being subjected to such destruction and ensure that such destruction does not lead to yet more heinous crimes, the international

¹²² Excepting jurisdictional roadblocks to bringing cases against members of ISIS at the International Criminal Court.

criminal law community must advocate for a more relativist approach to the prosecution of cultural heritage destruction.