

DESTRUCTION OF CULTURAL PROPERTY UNDER INTERNATIONAL CRIMINAL LAW

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‘It’s broken.

Broken? A museum piece? How did it happen?

I threw it down the air shaft. There is a concrete floor below.

Are you totally crazy? Why?

So that no one else would ever see it.”

—Ayn Rand, *The Fountainhead*

I. INTRODUCTION

It is said that when Winston Churchill was asked to cut the funding for arts in favour of war efforts and funds, he simply proclaimed “*then what are we fighting for?*”¹ Regardless of the correctness in attribution of credit, this statement is indicative of the importance of our culture even during adverse times. Culture is often immortalized in the form of heritage monuments, artifacts, temples, and statues. Therefore when there is an attack on such properties, it is an attack on the identity that a cultural group carries. Such attacks are meant to weaken the presence of a long lived culture so as to establish the perpetrators’ ideologies and ideas. In one landmark event, the Khmer Rouge spree sought to establish a ‘Year Zero’ by destroying thousands of Cambodian temples, literature and religious items and even disassembling of the Phnom Penh stone was one such drive to establish

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¹ Dave Powell, *Opinion: Funding the arts and humanities is worth fighting for*,³ (2017).

supremacy.² Unfortunately, it was not an isolated instance. Subsequent destruction has been observed in diverse parts of the world making it a truly universal problem.

Cultural property should be protected, not because it comprises of beautiful objects, but because loss of heritage results in reduction in the inability to understand the cultures gone by. Our knowledge of the past is threatened by such plunders. Cultural attacks tend to hurt as much as any other form of attack and create feelings of violation among people through the stripping of their age old identities. Once destroyed, there is little that can be done to restore the invaluable resources that certain cultural objects possessed. Often the restoring measures take a long time and are fraught with controversies and expenses. Further it cannot be denied that destruction of cultural heritage can result in increased animosities that entail countermeasures and greater conflicts that may form a vicious cycle of destruction and counter destruction.³

Various treaties within the international legal framework address destruction of cultural property and subsequent prosecution under criminal law. Most of such treaties however are confined only to occurrences during armed conflicts. Notably, destruction of cultural property in peacetime is notably addressed by the 1972 World Heritage Convention and the 2003 UNESCO declaration, with the latter having developed in the aftermath of the Buddhas of Bamiyan destruction by Taliban⁴.

This article, therefore, inevitably finds greater reference and reliance on destruction during armed conflict while touching upon the contours of destruction during peacetime and concludes by throwing light on the current development of events, and suggests a way ahead. The section on cultural property in times of war, discusses various legal instruments, the military necessity defense,

² Sarah J. Thomas, *Prosecuting the crime of destruction of cultural property: Introduction to the destruction of cultural property in Cambodian context*, pg 1, Genocide Watch, available at http://www.genocidewatch.org/images/Cambodia_Prosecuting_the_Crime_of_Destruction_of_Cultural_Property.pdf, last seen on 12/5/2017..

³ See generally, Jennifer Otterson Mollick, *The Fate of Cultural Property in Wartime: Why it Matters and What Should be Done*, Carnegie Council for Ethics in International Affairs, (September 17, 2013) available at http://www.carnegiecouncil.org/publications/ethics_online/0085, last seen on 12/5/2017.

⁴Nasir Behzad and Daud Qarizdah, *The Man Who Helped Blow Up the Bamiyan Buddhas*, BBC Afghan, (March 12, 2015),available at <http://www.bbc.com/news/world-asia-31813681>, last seen on 12/5/2017.

and the role of ad hoc tribunals and the International Criminal Court. The International Criminal Court had for the first time in the case concerning *Ahmad Al Mahdi*⁵ considered destruction of cultural property as war crimes. The following section on cultural property during peacetime discusses various peacetime threats to cultural property such as illegal antiquities, economic development and environmental degradation. The article finally concludes by drawing inferences and putting forth lessons to be learnt in the aftermath of cultural destruction in recent times and its relevance vis-à-vis human life.

II. CULTURAL PROPERTY IN THE TIMES OF WAR

Cultural property becomes strategically important in times of war. It offers many strategic advantages to armies particularly for the purpose of fulfilling military objectives. The tall and thick walls of old forts can provide protection with the considerable height of such structures allowing for surveillance of approaching threat. Cultural property becomes vulnerable to exploitation by militant forces particularly during periods of war since these time periods are marked by lawlessness.

The protection of cultural property is provided for by various legal instruments which have been in existence since the nineteenth century⁶. The ratification of these treaties varies and this in turn affects the kind of protection a country is required to afford to its cultural property. The general conduct of states in this respect was first codified in the First Hague Convention and later the Second Hague Convention in 1899 and 1907 respectively.⁷ The 1907 Hague Convention is now accepted as forming a part of customary international law.⁸ With regard to Customary International Law status of the Hague Convention on land warfare of 1907, the International Military Tribunal (IMT) at Nuremberg stated as follows:

⁵ The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15.

⁶ Ashlyn Milligan, *Targeting Cultural Property: The Role of International Law*, 4 Journal of Public and International Affairs, 85,93 (2008) <https://www.princeton.edu/jpia/past-issues-1/2008/5.pdf>, last seen on 12/5/2017.

⁷ Convention (IV), The Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, (18/10/ 1907) (available at <https://www.icrc.org/ihl/INTRO/195>, last seen on 12/5/2017.

⁸ Laws and Treaties Protecting Cultural Property. available at <http://uscbs.org/1899---1907-hague-conventions.html>, last seen on 12/5/2017.

“The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption...but by 1939 these rules...were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.”⁹

However, cultural property specifically, was identified only in the 1954 Hague Convention¹⁰ and its First Protocol¹¹ which systematically and briefly discusses the manner of import and export of cultural property during an armed conflict, among other provisions.¹² It is important to acknowledge UNESCO’s leading role in efforts in formulation of a broad set of instruments for protection of cultural property. While all the member states of the United Nations are yet to ratify the aforementioned treaties, the provisions of these treaties have found a place in the laws and practice of *ad hoc* tribunals such as International Criminal Tribunal for the former Yugoslavia (ICTY) and permanent institutions like the International Criminal Court.¹³

2.1. Blue Shield Symbol

The cultural counterpart of the Red Cross, the Blue Shield symbol was specified by the 1954 Hague Convention.¹⁴ Normally repeated three times, it is used to identify immovable cultural property so to ensure their transportation as per the prescribed conditions.¹⁵ The symbol alone can be used to identify such cultural property which is not under special protection and for identification of such

⁹Nuremberg, ‘Judgment’, France and Ors v. Goring (Hermann) and ors, [1946] 22 IMT 203, (Reproduced in *American Journal of International Law* (1947) vol.41, p.172, at pp. 248-249).

¹⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, (14/5/1954). (, available at http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html, last seen on 12/5/2017.

¹¹ Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, (14/5/1954) available at http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html, last seen on 12/5/2017.

¹² Ibid Part I.

¹³ Caroline Ehlert, *Prosecuting the Destruction of Cultural Property in International Criminal Law- With a Case Study on the Khmer Rouge’s Destruction of Cambodia’s Heritage*, 230 (2014).

¹⁴ Article 16: Emblem of Convention, 1954 Hague Convention

¹⁵ Article 17.1(a) and (b): Use of Emblem, 1954 Hague Convention

persons who are involved in the protection of cultural property.¹⁶ Further, the use of the symbol is restricted to an armed conflict¹⁷ and its display is to be accompanied by a prescribed authorisation.¹⁸

2.2. Importance of emblem in armed conflicts for prosecuting crimes

The use and misuse of emblems and signs has been discussed in various cases.¹⁹ One important case in this regard is the one against Jadranko Prlic which was dealt with by the ICTY Trial Chamber.²⁰ The Praljak Defence cited the requirement²¹ under Hague Regulations wherein protected buildings are to have ‘distinctive’ and ‘visible’ signs.²² Although the Chamber conceded to the fact that Article 27 and other articles²³ of 1954 Hague Convention provides for the use of distinctive signs, this did not result in the success of the claim of the defence. The Chamber drew upon the exception of cultural property being turned into a military objective, and provided that in all other cases omission in the use of sign did not strip the property of the protection generally afforded to it under the law. The UNESCO World Heritage status itself can suffice in the absence of the emblem. In the case of *Prosecutor v Pavle Strugar*²⁴ when determining whether there was a deliberate intent to destroy cultural property, Old Town’s status as a UNESCO World Heritage site was relied upon. The intent was derived there from and it was pointed out that the UNESCO emblems were visible at the time of the attack.²⁵ Thus, the emblem has become an important symbol and has been relied upon repeatedly to safeguard the cultural heritage of mankind.

¹⁶ Ibid, at 17.2(a), (b) & (c).

¹⁷ Ibid, at 17.3.

¹⁸ Ibid, at 17.4.

¹⁹ Martina Lostal, *Syria’s world cultural heritage and individual criminal responsibility*, 5 International Review of Law, 7,10 (2015), <http://www.qscience.com/doi/abs/10.5339/irl.2015.3>, last seen on 12/5/2017.

²⁰ *Prosecutor v. Prlic et al.* [2013] Case no. IT-04-74-T, Judgment, (Vol. 1 of 6), In Trial Chamber III, (May 29, 2013) paras 177, 178 on page 60.

²¹ 1907 Hague Convention. Article 27 provides:

In sieges and bombardments all necessary steps must be 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.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

²² Supra 12.

²³ See Article 6, 16 & 17 of 1954 Hague Convention 1907.

²⁴ *Prosecutor v. Pavle Strugar*, Case no. IT-01-42-T, (January 31, 2005), In Trial Chamber II, para 329.

²⁵ Ibid.

2.2.1. *The Military Necessity Defence*

At times, an army may be at war at a place which has an important cultural heritage site in the vicinity. Members of an army, for instance, may hide in a temple of cultural importance to gain a strategic benefit over the rival army. In such situations, the army might have to bomb some portions of the temple in an effort to either safeguard their own troop or to attack the rival army. When all resources of an army have been exhausted, using cultural property as a shield might be the only option left. While formulating an escape route, blasting a part of structures (which constitute cultural property) to keep the enemy at bay is not an uncommon strategy considered by military forces. However, the exceptional amount of responsibility, planning and execution required is undeniable. One might argue here that giving utmost importance to cultural heritage is an unnecessary burden which creates problems for the military while dealing with issues of national and international importance. However, it is argued by the author that a military is only successful in winning a war when it restores not just the sovereignty but also the social, economic and cultural stability of a country or community.

Necessity means simply what is required to achieve an objective. Military necessity can therefore be understood as a requirement to do some harm to cultural property in pursuance of a greater good. It may be worthwhile to mention here that such necessity is not just limited to harm caused to cultural property, but encompasses other attacks on civilians and civilian objects.²⁶ Further, such necessity is established only if it is for a military purpose and is within the boundaries of law. The defence of military necessity exists under various laws. The Additional Protocol I²⁷ provides conditions for when a property constitutes a military objective. Under Article 52(2) of the said Protocol, there are two requirements. First, if the nature, location or purpose of the property can be translated into a military action²⁸ and second, if there is some 'military advantage' obtainable by such destruction or

²⁶ Françoise Hamson, *Military Necessity*, Crimes of War (2011), available at <http://www.crimesofwar.org/a-z-guide/military-necessity/>.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (8/6/1977).

²⁸ *Ibid*, at Additional protocol I 52(2).

control of such a property, then the property shall be considered to be a military objective.²⁹ Further it is provided that there can be attacks only if they are military objects, otherwise they would fall under the category of civilian objects.³⁰

2.2.2. *Role of Ad Hoc Tribunals*

In 1993, the United Nations Security Council constituted the International Criminal Tribunal for the Former Yugoslavia (ICTY).³¹ This was a step towards correcting the state of crimes which were persisting in the territories of Bosnia, Croatia and Herzegovina.³² When the former Yugoslavia was struck by conflict, the beautiful city of Dubrovnik was attacked by hundreds of rockets. This had a severely damaging effect on one of the buildings in the old town, the City Centre.³³ The developments in Dubrovnik culminated in the noted *Pavle Strugar* trial that led to a seven year imprisonment sentence for the General.³⁴

In many ways the ICTY paved the way for other *ad hoc* tribunals in conflicted regions like Cambodia, East Timor, Iraq, Rwanda and Sierra Leone.³⁵ Although these tribunals are constituted on an *ad hoc* basis, they have become important sources of legal precedent. They are helping to fill in the gap that has existed due to the acute lack of precedents in the area of cultural property destructions in specific and war crimes in general. Resultantly, they have been able to surpass the challenge of limited jurisdictions, and authoritativeness.³⁶ At times ICTY has taken a fresh and independent perspective on independent issues. One example of such perspective is the interpretation of the

²⁹ Ibid, at Additional protocol I 52(2).

³⁰ Ibid, at Additional protocol I 52(1).

³¹ United Nations ICTY, available at <http://www.icty.org/en/documents>, last seen on 12/5/2017.

³² *About the ICTY*, United Nations International Criminal Tribunal for former Yugoslavia, <http://www.icty.org/en/about> last seen on 12/5/2017.

³³ Major Yvette Foliant, *Cultural Property Protection Makes Sense: A way to Improve Your Mission*, Civil Military Cooperation Centre of Excellence (CCOE) 41 (1st ed., 2015).

³⁴ Supra note 23 at p.1, para 4.

³⁵ L.J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, 27 (2005).

³⁶ Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50:4 Virginia Journal of International Law, 50th Anniversary Commemorative Essay, 818 (2010), available at <http://www.vjil.org/articles/military-necessity-and-humanity-in-international-humanitarian-law-preserving-the-delicate-balance>, last seen on 12/5/2017.

common Article 3³⁷ to the four Geneva Conventions by the ICTY. While International Court of Justice found the common Article 3³⁸ ‘constitute(d) a minimum yardstick’ for international armed conflict,³⁹ the ICTY went ahead and accepted it completely without leaving any room for ambiguity.⁴⁰ Thus, a central role has been played by these *ad hoc* tribunals which have given the world some long lasting international law principles, clarifying rules and ambiguities. Such has been the impact of these tribunals that recently an *ad hoc* International Art Crime Tribunal has also been advocated for, particularly to address the Munich Gurlitt pictures.⁴¹ It is proposed that such a tribunal should be assisted by noted persons of art and history, who can help in identifying the true worth of art which can then lead to the determination of the extent of criminal responsibility.⁴² It suffices to say that *ad-hoc* tribunals are bringing about more than *ad-hoc* changes for restoration of justice as far as destruction of cultural property and entailing criminal liability and responsibility is concerned.

2.2.3. Role of International Criminal Court

³⁷ Conflicts not of an International Character: Article 3.

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) Taking of hostages;
 - (c) Outrages upon personal dignity and degrading treatment;
 - (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

³⁸Ibid.

³⁹*Nicaragua v The United States of America*, 1986 ICJ Rep. 14 para 218.

⁴⁰*The Prosecutor v Mladen Naletilic aka “Tuta”, Vinko Martinovic aka “Stela”* (Trial Judgment), IT-98-34-T, International Tribunal for the former Yugoslavia (ICTY) 31 March, 2003, para 228.

⁴¹*Open Letter to Chancellor Angela Merkel from Judge Arthur Tompkins, New Zealand, An ad-hoc International Art Crime Tribunal to resolve the fate of the Munich Gurlitt pictures?*, Cultural Property & Archaeology Law (November 21, 2013), available at <https://culturalpropertylaw.wordpress.com/2013/11/21/an-ad-hoc-international-art-crime-tribunal-to-resolve-the-fate-of-the-munich-gurlitt-pictures/>, last seen on 12/5/2017.

⁴²Ibid.

The International Criminal Court is a permanent institution that has been established and exists by virtue of the Rome Statute of the International Criminal Court.⁴³ It is not a creation of United Nations (UN) but a treaty i.e. Rome Statute, and therefore, does not need the special mandate of the UN in order to function.⁴⁴ It exercises jurisdiction over persons ‘for the most serious crimes of international concerns’.⁴⁵ There are four categories of crimes over which this international legal personality⁴⁶ exercises jurisdiction. These are namely, the crimes of genocide, crimes against humanity, war crimes and the crime of aggression.⁴⁷ Although the term ‘cultural property’ or ‘cultural heritage’ is not defined or mentioned in the statute, the meaning of ‘war crimes’ under Article 8 accounts for buildings of cultural importance. In essence, Article 8(2)(e) (iv) provides as follows:

“(2) *war crimes means* [..]

(e) *Other serious violation 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) *Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected provided they are not military objectives⁴⁸.*”

It is under this provision that the situation in Mali has been able to invoke jurisdiction of the International Criminal Court (ICC).⁴⁹ ICC Prosecutor opened investigations⁵⁰ into the war crimes in Mali on 16th January, 2013 on receiving a reference⁵¹ by the Malian Government.⁵²

⁴³ Article 1, Rome Statute of International Criminal Court.

⁴⁴ Questions and Answers: Opening of an ICC investigation in Mali, ICC-PIDS-Q&A/MAL-001/13_Eng (Updated January 16, 2013), International Criminal Court, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/QandAMaliEng.pdf last seen on 12/5/2017.

⁴⁵ Ibid.

⁴⁶ Article 4, Rome Statute ICC.

⁴⁷ Article 5, Rome Statute ICC.

⁴⁸ Article 8(2)(e)(iv), Rome Statute ICC.

⁴⁹ Marina Lostal, *The first of its kind: the ICC opens a case against Ahmad Al Faqi Al Mabdi for the destruction of cultural heritage in Mali*, (02/10/2015), Global Policy Forum, available at <https://www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html>, last seen on 12/5/2017; *Mali: UN bails war crimes trial for suspect in destruction of historic monuments*, (26/09/2015), UN News Centre, available at <http://www.un.org/apps/news/story.asp?NewsID=51983#.VpNy1PI97IV>, last seen on 12/5/2017; Matt Brown, *Guest Post: Promising Development in Protecting Cultural Heritage at the ICC*, *OpinioJuris* (30/09/2015), available at <http://opiniojuris.org/2015/09/30/guest-post-promising-development-in-protecting-cultural-heritage-at-the-icc/>, last seen on 12/5/2017.

For a substantial period of time Mali has been subjected to international armed conflict. The Northern region of ‘Azawad’ comprises of three main regions namely Kidal, Gao and Timbuktu. The ethnic group called Tuareg initially resided herein. Many people of this ethnic group had fled to Libya and were recruited to the Libyan army in 2008 during a rebellion period. Post the Gadhafi regime, they returned home to be welcomed by the Malian authorities and were given new weapons and access to an arsenal on the condition of joining the national army of Mali. However, these new resources and powers were used to launch a new movement by the Tuareg rebels against the Bamako government known as MNLA i.e. National Movement for the Liberation of Azawad. They accepted military aid from groups such as Ansar Dine, Al-Daeda in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (MUJAO) which had their own motives to do so.⁵³ This movement for an independent state of Azawad succeeded briefly before these groups backtracked on their agendas. This resulted in further unrest and clashes between different armed groups which were trying to gain control over the northern territory. The government attempted to control the situation with the aid of France.⁵⁴

⁵⁰ Article 53(1) (Rome Statute ICC): The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

⁵¹ Article 13 of Rome Statute states : The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State party in accordance with article 14.

⁵² International Criminal Court, Press release: 16/01/2013, ICC Prosecutor opens investigation into war crimes in Mali: “The legal requirements have been met. We will investigate”, ICC-OTP-20120116-PR869, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr869.aspx

⁵³ David J. Francis, *The regional impact of the armed conflict and French intervention in Mali, Report*, Norwegian Peacebuilding Resource Centre (NOREF), (April, 2013) available at http://www.peacebuilding.no/var/ezflow_site/storage/original/application/f18726c3338e39049bd4d554d4a22c36.pdf, last seen on 12/5/2017.

⁵⁴ Situation in Mali, Article 53(1) Report, (16/01/2013), Office of the Prosecutor, International Criminal Court, 4, available at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf, last seen on 12/5/2017.

The International Criminal Court analyzed the level of intensity, the level of organization of parties, geographical and temporal scope of armed conflict and many other factors to assess the situation. Two sites of cultural importance in the northern territory of Mali were affected by the armed conflict which ensued. The first is Timbuktu and the second is the Tomb of Askia. Both of these are world heritage sites and at present are listed among the world heritage sites that are in danger as per Article 11(4) of the 1972 World Heritage Convention.⁵⁵ During the conflict, although the Tomb of Askia, a 17 metre pyramidal structure built by the Emperor of the same name in his capital Gao, escaped unscathed, the mausoleums and mosques of Timbuktu however had to bear the brunt of the conflict. The ICC was tasked with taking a decision on the attacks on this city which includes the large mosques and sixteen cemeteries and mausoleums.

The situation in Mali was assigned to Pre-Trial Chamber I which in its proceedings issued a warrant of arrest against Mr. Ahmad Al Mahdi Al Faqi on 18th September, 2015 for war crimes pertaining to historic buildings of cultural and heritage value.⁵⁶ Following his surrender by authorities of Niger in September 2015, on October 6, 2015 the ICC found evidence on the charges against Mr. Al Faqi wherein he was alleged to be criminally responsible for the attacks on the Heritage buildings of Timbuktu.⁵⁷ Following this, the confirmation charges⁵⁸ hearing was to be held on 18th January, 2016 which was then postponed to 1st March⁵⁹.

The purpose of confirmation charges is to assess and determine whether the crimes charged have actually been committed by the accused. Following such confirmation the case was transferred to

⁵⁵ The 48 properties which the World Heritage Committee has decided to include on the list of World Heritage in danger in accordance with Article 11(4) of the Convention, available at <http://whc.unesco.org/en/danger/> last seen on 12/5/2017.

⁵⁶ Arrest Warrant, available at <https://www.icc-cpi.int/iccdocs/doc/doc2068383.pdf> last seen on 12/5/2017. (Available in French only).

⁵⁷ Pre-Trial, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, (October 6, 2015), ICC-PIDS-CIS-MAL-01-01/15_Eng, The buildings included (1) the mausoleum Sidi Mahmoud Ben Omar Mohamed Aquit, (2) the Mausoleum Sheikh Mohamed Mahmoud Al Arawani, (3) the mausoleum Sheikh SidiMokhtar Ben SidiMuhammed Ben Sheikh Alkabar, (4) the mausoleum Alpha Moya, (5) the mausoleum Sheikh Sidi Ahmed Ben Amar Arragdi, (6) the mausoleum Sheikh Muhammed El Micky, (7) the mausoleum Cheick Abdoul Kassim Attouaty, (8) the mausoleum Ahamed Fulane, (9) the mausoleum BahaberBabadie and (10) SidiYahia mosque.

⁵⁸ Rome Statute ICC, Article 61: Confirmation of the charged before trial.

⁵⁹ Al Mahdi case: Confirmation of charges hearing to open on 1 March 2016, ICC-CPI-20160113-PR1182, Press Release: 13/01/2016, available at https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1182.aspx, last seen on 12/5/2017.

the Trial Chamber to conduct the subsequent phase i.e the Trial.⁶⁰ After following the sequence of several relevant procedures like the holding of first status conference and appointment of legal representative of victim, the trial was held in August 2016⁶¹. On 27th September 2016, a judgment and sentence was delivered by the Chamber comprising of Judge Raul C. Pangalangan, Presiding Judge, Judge Antoine Kesia-MbeMindua and Judge Bertram Schmitt.⁶² Mr. Al Mahdi was declared to be guilty of the war crime of attacking historic and religious buildings in Timbuktu and was sentenced to nine years imprisonment as punishment.⁶³

While determining the role of Mr. Mahdi, the Chamber took into account various factors in the light of Article 25(3)(a) of the ICC Statute (co-perpetration) and other modes of liability.⁶⁴ Among the various factors,⁶⁵ the important ones were his overall responsibility for execution of the attack, his active and participative presence at attack sites that led to destruction of at least five sites and his being the head of the *Hesbah*. *Hesbah* was one of the four primary institutions established by Ansar Dine and AQIM upon occupying Timbuktu.⁶⁶ The Chamber noted that this conflict was of a non-international nature due to absence of foreign intervention.⁶⁷ Apart from the fact that Mr. Mahdi pleaded guilty, there were other factors which contributed to determination of his sentence. His initial reluctance to follow the plan to destroy the shrine, his good behaviour during the period of detention and his knowledge contributed to him receiving only 9 years of sentence⁶⁸ which happened to be the lowest sentence given by the International Criminal Court till that date.⁶⁹ This

⁶⁰ Part 6 of the Rome Statute ICC, The Trial (Article 62- Article 76).

⁶¹Case Information Sheet; Situation in the Republic of Mali; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*; ICC-01/12-01/15; ICC-PIDS-CIS-MAL-01-08/16_Eng; Updated (October 7, 2016), page 2 <https://www.icc-cpi.int/mali/al-mahdi/documents/almahdieng.pdf> last seen on 12/5/2017.

⁶² Ibid.

⁶³ Situation in the Republic of Mali, In the Case of the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, (September 27, 2016), page 49 https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF last seen on 12/5/2017.

⁶⁴ Rome Statute ICC, Article 25 (3): *In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:*

(a) *Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.*

⁶⁵ Supra note 58 at paras 52, 53, 54, 55 and 56).

⁶⁶ Ibid.

⁶⁷i (Supra 58, at p.27 para 50).

⁶⁸T(Supra 58 at p.47 para 109).

⁶⁹ See generally, Marina Lostal, *The ICC convicts Al Mahdi for the destruction of cultural heritage in Mali*, Global Policy Forum, (October 19, 2016) <https://www.globalpolicy.org/home/52882-the-icc-convicts-al-mahdi-for-the-destruction-of-cultural-heritage-in-mali-.html> last seen on 12/5/2017.

case thus marked many firsts including the fact that Article 65 of the Statute which covers proceedings on an admission of guilt was applied for the first time.⁷⁰

This is a very important case as it was the first time⁷¹ that war crimes of destruction of cultural property were directly considered in international criminal proceedings. It is hoped that this initiative will go a long way in deterring future atrocities and vandalism as far as cultural heritage is concerned.

III. PROSECUTION FOR DESTRUCTION IN PEACETIME

While there are many laws to protect and prosecute destruction in the times of an armed conflict, the world is equipped with only a handful of tools to address the issue of cultural property destruction in peacetime. Notably, the 1972 World Heritage Convention and the 2003 UNESCO Declaration⁷² come to mind. Out of the two, the latter solely imposes individual criminal liability⁷³ for such destruction. The UNESCO declaration recalls many other conventions while considering protection of cultural heritage during peacetime.⁷⁴ It may be seen as a holistic treaty on the protection of cultural property in modern times. Although it is not a binding treaty, it is a testament to the international attention to peacetime destruction and makes way for future binding legal provisions.

Another aspect of peacetime destruction is trade in illegal antiquities. Smugglers and international dealers committing such actions are liable to be held individually responsible in criminal proceedings

⁷⁰Supra, 58 at p.11 para 21.

⁷¹ John Kirby, Department Spokesperson, Washington DC, ICC Announces Case on Destruction of Cultural Sites in Mali, Press Statement, (October 1, 2015), US Department of State, available at <http://www.state.gov/r/pa/prs/ps/2015/10/247741.htm>, last seen on 12/5/2017.

⁷² UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, (17 October, 2003).

⁷³ Article VII, UNESCO Declaration.

⁷⁴ 1972 Convention for the Protection of the World Cultural and Natural Heritage; 1965 Recommendation on International Principles Applicable to Archaeological Excavations; 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works; 1972 Recommendations concerning the Protection, at National Level, of the Cultural and Natural Heritage; 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

and thereby come within the purview of international legal framework. However, one seldom hears about prosecution because of the difficulty in proving and attributing such crimes.⁷⁵ Today, Iraq and Syria are among the nations which are worst hit due to continuous smuggling of antiquities. However, both these countries are not a signatory to ICC's founding Rome Statute, and therefore, any intervention by the ICC in such cases is not possible without a mandate from the UN Security Council.⁷⁶

Economic development, iconoclasm, natural disasters, environmental degradation, and tourism are certain other additional peacetime threats to cultural heritage.⁷⁷ We may take into consideration the demolition of a 200 year old Ottoman castle in Saudi Arabia which was undertaken by the authorities despite protests by Turkey. The Authorities felt that there was a need to build residential complexes to accommodate the ever increasing influx of Muslims visiting Mecca for pilgrimage.⁷⁸ Recent earthquakes at Haiti in 2010 and Nepal in 2015 and their devastating effects on the cultural heritage of these nations were also recognised by the World Heritage Committee.⁷⁹

Sustainable development is a goal for almost all the countries around the world. However, while the host countries are undertaking efforts and bearing the costs of preservation of the heritage sites within their national territory, the lack of support from other countries through criminalizing of acts of cultural destruction and attacks on cultural property is a serious impediment in this fight. While natural disasters leave us vulnerable, tourism and environmental degradation are phenomenon arising out of the system of globalisation and liberalisation. While the world grapples with the lack of binding laws in this regard, the antipathy of authorities is another cause of grave concern.

⁷⁵ Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, Chicago Public Law and Legal Theory Working Paper No. 141. Available at <https://www.law.uchicago.edu/files/files/141.pdf>, last seen on 12/5/2017.

⁷⁶ Jason Burke, *ICC Ruling for Timbuktu Destruction 'Should be Deterrent for Others'*, The Guardian, (September 27, 2016), <https://www.theguardian.com/world/2016/sep/27/timbuktu-shrines-icc-sentences-islamic-militant-nine-years-destruction-ahmad-al-faqi-al-mahdi>, last seen on 12/5/2017.

⁷⁷ WangkeoKanchana, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28:183 Yale J. of Int'l L., 185,192, <https://www.ilsa.org/jessup/jessup17/Batch%201/28YaleJIntL183.pdf>, last seen on 12/5/2017.

⁷⁸ EdekOsser, *Why is Saudi Arabia Destroying the Cultural Heritage of Mecca and Medina*, The Art Newspaper, (November 19, 2015), <http://theartnewspaper.com/comment/comment/why-is-saudi-arabia-destroying-the-cultural-heritage-of-mecca-and-medina/> last seen on 12/5/2017.

⁷⁹ Bonn Declaration on World Heritage, WHC-15/39.COM/19,39th Session of World Heritage Committee,(July 8, 2015) p.131, <http://whc.unesco.org/archive/2015/whc15-39com-19-en.pdf> last seen 12/5/2017.

IV. CONCLUSION

It is widely believed that by affording such protection the military objectives are put at a strategic disadvantage for armed forces. However it is also to be noted that if mankind stresses only upon war, hatred and division, then mutual respect and tolerance between nations, and ultimately world peace will be compromised. No doubt, the presence of cultural heritage serves as a reminder of the mutual coexistence which has sustained interactions between countries since historical times. Although, the treaty provisions are yet to yield the desired results, it should not be a reason for abandoning the pursuit of the goal of protection envisioned under them.

The decision makers should ensure that there is a presumption against destroying relics. Further, the international significance of such properties should be properly deliberated upon. While affording protection it should not be forgotten that needs of the living people come first. Therefore, there should be minimal prosecution for destruction of cultural heritage when done for pressing economic concerns of a country. The *corpus juris* is devoid of substantive provisions to address the illicit trafficking in artistic and archaeological assets. This calls for renewed reflection by national and international actors on the ways to introduce a new protocol to address the specific issues of peacetime destruction. On the positive side however, the Mahdi judgment has opened doors for convicting political leaders or rather the ‘big fish’ in the cultural-politico environment.

To conclude, with regard to the cultural crimes in Mali, the Office of the Prosecutor in its public statement rightly proclaimed:

“.....It is rightly said that “cultural heritage is the mirror of humanity.” Such attacks affect humanity as a whole. We must stand up to the destruction and defacing of our common heritage.”⁸⁰

⁸⁰ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the transfer of the first suspect in the Mali investigation: “Intentional attacks against historic monuments and buildings dedicated to religion are grave crimes”, Statement, (26/09/2015), International Criminal Court, available at https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-26-09-2015.aspx last seen on 11/02/2016.