

PROSECUTING HERITAGE DESTRUCTION

Joseph Powderly

On the opening of the case against Ahmad al-Faqi al-Mahdi for his role in the destruction of mausoleums in Timbuktu, Mali, the then chief prosecutor of the International Criminal Court (ICC), Fatou Bensouda, reflected on the importance of pursuing international criminal accountability for heritage destruction. In her view, the case against al-Mahdi was historic “in view of the destructive rage that marks our times, in which humanity’s common heritage is subject to repeated and planned ravages.” She concluded that heritage destruction is “a crime that impoverishes us all and damages universal values we are bound to protect.”¹ The protection and realization of universal values sit at the very heart of the purposive foundations of international criminal law. Since the inception of the notion of international criminal accountability, the courts and tribunals that have been tasked with its delivery have recognized that acts that threaten and destroy the heritage of peoples cannot be left unpunished. The prosecution of heritage destruction before international criminal courts and tribunals, from the International Military Tribunal at Nuremberg (IMT) in 1945–46 to the present day ICC, has made an important contribution to ending impunity for heritage destruction, and has significantly advanced the development of international law in this area.

This chapter offers an account of the history of international criminal legal efforts to prosecute heritage destruction. In doing so, it reflects on significant jurisprudential milestones, and the manner in which the law in this area has evolved from the post–World War I era, through to the contemporary developments before the ICC, in order to demonstrate the significance of this body of jurisprudence and its future potential.

The Origins of International Criminal Accountability for Heritage Destruction

The prohibition of the intentional, wanton destruction of tangible cultural heritage has an unimpeachable pedigree as one of the founding principles of the law of armed conflict. The Lieber Code of 1863, the Union Army and President Abraham Lincoln's laudable, if admittedly naïve, attempt to limit the ravages of the American Civil War, precipitated a paradigm shift away from the mere moral condemnation of the destruction and appropriation of cultural property toward express legal proscription. Article 35 of the code is unambiguous: "Classical works of art, libraries, scientific collections, or precious instruments ... must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded." The prescriptive, deterrent objective of the code is reflected in Article 44, which makes clear that the intent was not only to prohibit such conduct, but to actively ascribe a penal basis for individual responsibility.²

While law and practice often offer disparate narratives—there is little to suggest that any member of the Union Army was in fact punished for cultural heritage destruction—the influence of the Lieber Code on efforts aimed at codifying the laws of armed conflict at the level of international law can hardly be underestimated. However, it was not until the adoption of the Hague Conventions and annexed regulations of 1899 and 1907 (the "Hague Rules"), that the protection of tangible cultural heritage in armed conflict was codified in the form of binding international rules.³ While Articles 27 and 56 of the 1907 Hague Convention IV regulations provide for minimum protections for immovable cultural objects (subject to considerations of military necessity) in the context of the conduct of hostilities and situations of occupation, respectively, the question of the specific applicability of individual criminal responsibility remained ambiguous, not to say controversial. Article 56 adopted verbatim the text of Article 8 of the 1874 Brussels Declaration⁴ to the effect that all acts of seizure, destruction, or willful damage, "be made the subject of legal proceedings," but the suggestion that this implied the imposition of individual criminal responsibility was contestable.

The opaque threat of criminal sanction contained in the Hague Rules clearly did little to curtail the rampant destruction of cultural heritage characteristic of World War I. Wanton destruction of precious cultural heritage sites exemplified by the infamous burning of the library of the Catholic University of Louvain and the razing of the Cloth Hall at Ypres, both in Belgium, and the bombardment of the cathedral in Rheims, France were contemporaneously held up as emblems of the indiscriminate barbarity of German military tactics, and have since been etched in historical memory. In the aftermath of the burning of Louvain, the British prime minister, Herbert Asquith, referred to it as "the greatest crime committed against civilization and culture since the Thirty Years' War—a shameless holocaust of irreparable treasures lit up by blind barbarian vengeance."⁵ However, mere condemnation is a

poor alternative to criminal accountability, a fact not lost on the Allied powers, who, in the context of the plenary meeting of the Preliminary Peace Conference convened in Paris in January 1919, established a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.

The wide-ranging mandate of the commission included ascertainment of “the facts as to breaches of the laws and customs of war,” and determination of “the constitution and procedure of a tribunal appropriate for the trial of these offences.” What we witness in the mandate of the commission is the first meaningful elaboration of the very idea of international criminal justice, and in particular that violations of the laws and customs of war entail individual criminal responsibility prosecutable before a dedicated international tribunal. Sub-Commission III was tasked with drafting a list of offenses for which, in its view, individual criminal responsibility should be sought. The subcommission returned a list of some thirty-two offenses, constituting the first effort aimed at elaborating what in common legal parlance are referred to as “war crimes.” Included in the subcommission’s list was the offense of “wanton destruction of religious, charitable, educational, and historic buildings and monuments.”⁶ The express focus of the offense on immovable cultural heritage is consistent with those references contained in the Hague Rules, the Brussels Declaration, the Lieber Code.

The final text of the 1919 Treaty of Versailles included a number of provisions relating to individual criminal responsibility generally. However, the promise of the treaty in this area would never be fulfilled. The purported demand of the Allied powers for criminal accountability would rapidly wane in the face of the political and economic pragmatism invited by pan-European postwar social instability. The compromise (and largely symbolic) proceedings in 1921 that would come to be known as the Leipzig War Crimes Trials would be remembered as a combination of farce, parody, and tragedy rather than a landmark moment in the history of international criminal justice.⁷ And of the twelve trials completed, none addressed charges relating to the destruction of cultural heritage. While the trials stand as a precedent that international criminal justice would much rather forget, they, alongside the Treaty of Versailles, nonetheless set down the principle that violations of the laws and customs of war carry individual criminal responsibility enforceable both domestically and before internationally constituted courts and tribunals. Such a principle would be central to the establishment of the International Military Tribunal at Nuremberg (IMT) in the immediate aftermath of World War II.

Prelude to Nuremberg: The UNWCC and Crimes against Cultural Heritage

Before discussing the advances in accountability for looting and destruction of cultural heritage brought about by the Trial of the Major War Criminals before the IMT, it is worth considering the associated but parallel activities of the United Nations War Crimes Commission (UNWCC). The UNWCC’s determination to unravel and offer

clarity on key questions relating to individual criminal responsibility for international crimes has until relatively recently only been accounted for in the footnotes of the history of international criminal justice. The true contribution of the UNWCC was gradually revealed once its extensive archive, controlled by the US government, was made available to researchers in 2011.⁸

Established in October 1943 on the initiative of seventeen Allied states, the UNWCC was envisaged as a means by which to assist states in the preparation of cases involving the commission of war crimes. As such, the UNWCC was viewed as complimentary to domestic legal processes, and took on an important advisory function wherein it made, “recommendations to member Governments on questions of law and procedure in order to carry out the objects of the Allied nations.”⁹ From the archive, it is evident that the UNWCC was actively involved in compiling case files and lists of possible suspects relating to the commission of crimes against cultural heritage. These activities focused predominately on the large-scale looting of cultural objects by German forces across occupied Europe. The archives reveal that the UNWCC actively cooperated and collaborated with Allied efforts to safeguard cultural monuments and sites, and to identify, track down, and return looted cultural objects. For example, it exchanged information with the Monuments, Fine Arts, and Archives (MFAA) program, which fell under the authority of the Civil Affairs and Military Governments sections of the Allied Armies.

More significant from a prosecutorial perspective is the UNWCC’s interaction with the Inter-Allied Commission on the Protection and Restitution of Cultural Material, known as the Vaucher Commission, after its chairman Professor Paul Vaucher, the cultural attaché to the French Embassy in London. The commission was established in April 1944 by the Conference of Allied Ministers of Education—the precursor to the UN Educational, Scientific and Cultural Organization (UNESCO). The primary objectives of the Vaucher Commission were: i) “to collect from all available sources the fullest possible information as to the damage, destruction, and looting of monuments, works of art and cultural material of all sorts in the occupied countries,” ii) “to act as a pool for all such information,” and iii) “to offer its services in any other useful capacity to such military or civil authorities as may now or hereafter be concerned with the public administration of any liberated territory or of any enemy territory which may be occupied by Allied Forces.” In its work, the commission focused on the compilation of extensive indexes documenting sites subject to looting or to the destruction of cultural material, and indexes listing objects looted or disappeared. However, of particular relevance for the UNWCC was the commission’s index of individuals suspected of having been involved in the looting or destruction of cultural property across occupied Europe. While the Vaucher Commission was only operational for some eighteenth months—its final report was submitted in December 1945—it nonetheless succeeded in gathering copious amounts of valuable information

with direct relevance to the prosecution of cases involving the looting and destruction of cultural heritage. For instance, its final report documents that it circulated some “2,000 confidential dossiers relating to looters” to military authorities and other relevant bodies.¹⁰

The minutes of the Vaucher Commission reveal that it welcomed a delegation from the UNWCC in March 1945, which met to discuss the modalities of potential cooperation between the two bodies. Cecil Hirst, then chair of the UNWCC, had previously met with Vaucher Commission secretary CP Harvey on two occasions. During these meetings Hirst explained that the UNWCC was “inclined to widen the scope of its activities, and was taking an increased interest in crimes against artistic property.” He was particularly eager to be granted access to the information compiled by the Vaucher Commission, especially its list of suspects. The minutes reveal that several members of the commission were wary at the prospect of handing over swathes of material to the UNWCC, concerned at the possibility of cherry-picking information and suspects.¹¹

Despite misgivings, the Vaucher Commission agreed to assist the UNWCC and to open up its files. To this end, in April 1945, Wing-Commander Llewellyn-Jones selected forty cases from the commission’s trove of material, all of which pertained to the looting of cultural objects in occupied Poland.¹² Of these, four were selected by Llewellyn-Jones as test cases. In the months after the selection of the test cases, the minutes reveal the eagerness of the membership of the Vaucher Commission to be further informed of the progress and status of the cases. However, neither the archives of the commission nor those of the UNWCC reveal what ultimately happened to them.¹³ Sadly, the trail runs cold on this fascinating collaboration.

It will be some time before we have a clear picture of the full extent of the impact of the work of the UNWCC on the prosecution of crimes against tangible cultural heritage. Prior to the opening of its archives, most insights into its work were gleaned from the series of law reports it published between 1947 and 1949. Referred to as the *Law Reports of the Trial of War Criminals*, they set out in fifteen volumes to summarize a selection of the cases prosecuted in domestic jurisdictions that were driven by, and which benefitted from, the work of the UNWCC.¹⁴ Most notable from the perspective of the prosecution of crimes against cultural heritage is the trial of Arthur Greiser before the Supreme National Tribunal of Poland. Greiser was the former Gauleiter and Reichsstatthalter (regional Nazi leader and governor) of the Wartheland, the part of occupied Poland incorporated formally into Germany during the war. His indictment was seminal because it laid charges relating to the widespread destruction of Polish heritage undertaken as part of, and in tandem with, a campaign of genocide and persecution.¹⁵ The indictment also charged Greiser with involvement in the conception and implementation of so-called “denationalization” policies, the purpose of which was the eradication of individual and collective identity

and the imposition of a homogenized, assimilated, “German” society on the occupied population.¹⁶ The case addressed the destruction of both tangible and intangible cultural heritage and had an impact on early conceptualizations of the notion of cultural genocide, illustrating for the first time the unmistakable link between acts of heritage destruction and genocidal intent.

The UNWCC’s role in forging accountability efforts for crimes against culture constitutes something of a hidden history. More prominent in orthodox accounts of the evolution of international criminal law in this sphere is the legacy of the IMT and its prosecution of, among others, Alfred Rosenberg, the architect and overseer of the Third Reich’s systematic crimes against culture.

Nuremberg, Rosenberg, and Crimes against Culture

Under Article 6.b of the London Charter, which established the IMT, the tribunal had jurisdiction over violations of the laws and customs of war, part of which was “the plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”¹⁷ The primary focus of the evidence relating to the looting and destruction of cultural sites and objects centered on Rosenberg, who among other roles oversaw the “Einsatzstab Rosenberg” (Special Staff Rosenberg).¹⁸ The US prosecution team at Nuremberg presented the Einsatzstab as “an organization which planned and directed the looting of cultural treasures of nearly all Europe.”¹⁹

The sheer scale of looting defied accurate quantification and description with the prosecution relying on estimates drawn from seized German records. In an effort to give the judges a sense of both the scale of the looting and the cultural value of the objects stolen, the prosecution selected a number of images from the carefully compiled catalogues maintained by the Einsatzstab Rosenberg, sharing them with the courtroom via projector. The prosecution displayed thirteen images, ranging from Vecchio’s *Portrait of a Woman*, and Reynolds’ *Portrait of Lady Spencer*, to *The Three Graces* by Rubens, as well as a selection of jewelry, a silver-inlaid Louis XIV cabinet, and a Gobelin tapestry.²⁰

Notably, the IMT proceedings placed a much greater focus on the looting of cultural objects compared with evidence relating to the destruction of cultural property and sites. The consequences of the Nazi pursuit of total war in the wanton destruction of cities and the devastation of public and private property are certainly accounted for, as are policies relating to denationalization and Germanization, but there is little specificity to the prosecution case or the final judgment with regard to the destruction of monuments, or the destruction of buildings and sites of cultural value,²¹ and as a consequence neither is an especially rich source of legal guidance in this area.

While the judgment may be lacking in elemental specificity, it is certainly not lacking in principle. Indeed, this was recognized during the drafting of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, with the *travaux préparatoires*, or drafting history, noting that the IMT had “introduced the principle of punishing attacks on the cultural heritage of a nation into positive international law.”²² In expressing this principle, the Nuremberg judgment established a precedent that would be instrumental in the prosecution of crimes against cultural heritage before the International Criminal Tribunal for the former Yugoslavia (ICTY) and ultimately the ICC.

The ICTY: The Foregrounding of Heritage Destruction in International Prosecutions

In the years following the conclusion of the IMT proceedings, the momentum created by this historic advance in international law precipitated the drafting and adoption of a series of instruments that placed ever-increasing emphasis on notions of human dignity, fundamental human rights, and the pursuit of individual criminal responsibility for international crimes. Nevertheless, it was inevitable that the optimism of the law’s postwar progressive development would gradually dissipate in the context of the intractability and consequent inertia of the Cold War. For the next fifty years international criminal accountability became an occasional domestic spectacle rather than a pillar of the international legal order. However, with the Cold War shackles completely removed after the December 1991 implosion of the Soviet Union, the early 1990s represented a moment in which the legacy of Nuremberg could be revived.

The breakup of Yugoslavia, which started in 1990, sparked a protracted and brutal interethnic conflict characterized by harrowing numbers of civilian casualties, ethnic cleansing, and the wanton destruction of public and private property, including in particular the deliberate targeting of cultural sites by all parties to the conflict. The response of the international community took several forms, but central was the determination that international criminal justice could play a role in the restoration of peace.

To this end, the UN Security Council, invoking its powers under Chapter VII of the UN Charter, established the ICTY in May 1993 through resolution 827. Under its statute, the ICTY had jurisdiction with respect to war crimes, crimes against humanity, and genocide committed on the territory of the former Yugoslavia since 1 January 1991. Most importantly for present purposes, under Article 3.d of its statute the tribunal was expressly granted jurisdiction to prosecute crimes against tangible cultural heritage as a violation of the laws and customs of war. The wording of the article provides for the prosecution of conduct relating to the “seizure of, destruction

or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.”

The ICTY’s jurisdiction to prosecute crimes against cultural heritage was not limited to the terms of Article 3.d. The complex interethnic character of the various conflicts that raged on the territory of the former Yugoslavia demanded that prosecutions reflect the underlying motivations and specific intent that drove perpetrators to systematically destroy cultural heritage. Throughout the period of the conflicts, from 1991 to 1999, heritage destruction in Croatia, Bosnia and Herzegovina, Serbia, and the latter’s own breakaway territory of Kosovo was not the result of recklessness or the disproportionate use of force; it was the consequence of concerted campaigns of ethnic cleansing, persecution, and genocide. The foundation to the destruction of cultural heritage was the pursuit of ethnic homogeneity and the complete elimination of the “other.” In short, the situation encompassed both ethnic *and* cultural cleansing.²³ Article 3.d of the statute was not equipped to encapsulate this reality, rather it was for Articles 4 and 5, which addressed genocide and crimes against humanity, respectively, to account for the persecutory and at times genocidal intent that characterized the destruction of cultural heritage in the former Yugoslavia.

Over the course of almost twenty-five years, the ICTY also developed an extensive and diverse body of jurisprudence addressing individual criminal responsibility for the destruction of tangible cultural heritage. Charges addressing the destruction of cultural heritage as a war crime under Article 3.d were frequently connected with related charges of persecution as a crime against humanity. This strategy reflected the relationship between the intentional destruction of cultural heritage and associated systematic attacks against civilian populations. While a full account of the ICTY’s jurisprudential legacy can hardly be captured in this short contribution, a number of seminal cases demand attention.²⁴

The destruction of cultural heritage was not the sole focus in any one case at the ICTY, but in a number of cases heritage destruction featured more prominently. Perhaps most significant is *Strugar*, which dealt with criminal responsibility for the shelling of the Old Town of Dubrovnik, a UNESCO World Heritage Site in Croatia. Pavle Strugar, the commander of a unit of the Yugoslav People’s Army (JNA), argued that the Old Town constituted a legitimate military target and that the shelling was consistent with his understanding of the notion of military necessity since it was his belief that Croatian forces were using it as a defensive stronghold. The trial chamber was not persuaded. And in finding him guilty and sentencing him to eight years imprisonment, it interpreted the elements of the offense under Article 3.d. The court determined that the protection of cultural heritage applies equally to international and non-international in armed conflict, and that the article reflected customary international law. The judgment identified three elements to the offense under Article 3.d: “(i) ... damage or destruction to property which constitutes the cultural or

spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.”²⁵

In a series of cases the ICTY expounded not only on the elements of the offense falling within the scope of Article 3.d, but advanced much further in offering reflections on the normative values that motivate accountability for heritage destruction in international criminal law. For example, in the *Hadžihasanović and Kubura* case, dealing with the destruction of religious buildings, the tribunal emphasized that, in assessing the gravity of the alleged offense, the spiritual value of property protected under the article should be a paramount consideration over and above the material damage inflicted.²⁶ In other instances, the ICTY highlighted the intrinsic value of property protected under the article.²⁷

A significant feature of the tribunal’s jurisprudence is its recognition of the intersectionality of heritage destruction with the crime against humanity of persecution. The latter is complex and multilayered, but at the heart of it is the denial of fundamental human rights on discriminatory grounds. In the *Tadić* case, the trial chamber held that persecution under Article 5.h provided broad coverage, “including acts mentioned elsewhere in the Statute as well as acts which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken.” The tribunal emphasized that “what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual’s fundamental rights.”²⁸

The first recognition that the targeting and destruction of religious and cultural heritage could be classified as persecution came in the *Blaškić* case. The trial chamber determined that “persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind.” Included within this understanding was the “confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence.”²⁹

This opened the door for further development of the law in the *Kordić and Čerkez* case, in which the accused were charged with multiple counts relating to “the destruction and plunder of Bosnian Muslim property and the destruction of institutions dedicated to religion or education.” Reflecting on whether attacks on religious cultural property fell within the scope of persecution, the tribunal stated: “This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such it manifests a nearly pure expression of the notion of ‘crimes against humanity,’ for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and willful damage of

institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution.”³⁰

This categorically emphasizes the intersectionality of attacks on cultural heritage with campaigns of ethnic cleansing. It is also arguably the closest international criminal law has come to encapsulating within a single prosecutable offense acts contemplated by Raphael Lemkin—who first proposed the concept of genocide—to fall within the scope of the notion of “cultural genocide,” which he referred to as “vandalism.” In prosecuting heritage destruction as persecution, the ICTY was in a position to comprehensively set out the context within which attacks on cultural heritage were carried out.³¹ Such attacks are rarely isolated incidents of destruction, but rather fall within a widespread pattern of related conduct that is systematically directed at the eradication of significant markers of the religious and cultural identity of a distinct group.

The absence of cultural genocide from the 1948 Genocide Convention has been much lamented and commented upon. While international criminal law does not expressly contemplate accountability for cultural genocide, evidence of heritage destruction was used to great effect by the ICTY as a means of establishing the specific intent required of the crime of genocide; that is, the intent to destroy the protected group in whole or in part. The utility of evidence of heritage destruction in this regard was clearly endorsed in the *Tolimir* case, where the tribunal stated that: “Although an attack on cultural or religious property or symbols of a group would not constitute a genocidal act, such an attack may nevertheless be considered evidence of an intent to physically destroy the group.”³² This position has been endorsed in the jurisprudence of the International Court of Justice, which has cited ICTY jurisprudence approvingly on the matter.³³

The ICTY deserves due recognition for foregrounding the destruction of cultural property in many of its most high-profile cases. The following section considers the extent to which the ICC has embraced this legacy and whether it is well placed or not to further the law as it relates to the destruction of cultural heritage.

The ICC: *Al Mahdi* and the Trajectory of Accountability for Heritage Destruction

Since its establishment in 2002, the ICC has struggled under the weight of utopian expectations. The unfortunate reality is that in the more than twenty years since the conclusion of the 1998 Rome Statute that gave birth to the ICC, there have only been rare successes amid a plethora of failures and missed opportunities. One of the more unexpected success stories relates to the efforts of the Office of the Prosecutor to pursue charges relating to heritage destruction. Under Article 8 of the Rome Statute, the court has jurisdiction to prosecute the war crime of “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 objectives.” This provision is applicable both in national and international armed conflict under Articles 8.2.b.ix and 8.2.e.iv, respectively. Harking back to the terms of Article 27 of the regulations annexed to Hague Convention IV of 1907, the provision mixes the protection of immovable cultural property with other types of protected property. The emphasis is clearly on civilian use rather than the cultural value of the protected property,³⁴ and the scope of the provision is further limited by the exclusion of movable cultural objects.

Whereas Article 3.d of the ICTY statute referred to “damage or destruction” done to cultural property, the equivalent offense under the Rome Statute refers to “intentionally directing attacks.” An attack under international humanitarian law (also known as the laws of war) is quite particular, and refers to combat action, whether in offense or defense. This means that in the language of international humanitarian law, attacks occur during a specific phase of an armed conflict—during the conduct of hostilities. This would suggest that in order for an offense under Article 8.2.b.ix or 8.2.e.iv to be prosecutable, the cultural property must be intentionally attacked during the conduct of hostilities, and not in other phases of the armed conflict such as situations of occupation, or where territory or objects have fallen into the hands of one of the parties. If the provision is strictly construed, as is required by Article 22 of the Rome Statute, the scope of protection afforded to immovable cultural heritage is significantly reduced.

The opportunity to explore the interpretation to be given to heritage protection under Article 8 came in the *Al Mahdi* case, which arose in the context of the Office of the Prosecutor’s investigation into crimes allegedly committed in the context of the internal armed conflict that was waged in Mali in 2012 and 2013. The conflict was sparked by an Islamist uprising in the north of the country in January 2012 that culminated in large areas, including the city of Timbuktu, falling under the control of an alliance of Islamist groups. Ansar Dine, a Salafist (ultraconservative Muslim) group was a prominent member of this alliance, and, along with al-Qaeda in the Islamic Maghreb (AQIM), controlled Timbuktu between April 2012 and its liberation by French and Malian government forces in January 2013. During the short-lived occupation of the city, a fundamentalist, strictly conservative system of sharia law was enforced. From April to September 2012, Ahmad al-Faqi al-Mahdi acted as the head of the Hesbah, or morality brigade.³⁵

Famed as a historically significant center of Islamic learning and culture, Timbuktu was inscribed on the UNESCO World Heritage List in 1988. The city is renowned for its unique Islamic architecture including mosques, madrasas, and mausoleums. In June 2012, the leadership of Ansar Dine proclaimed that any construction over a tomb was contrary to sharia law and must be destroyed. As the leader of the Hesbah, al-Mahdi was instructed to destroy the mausoleums of saints located in Timbuktu’s cemeteries. Consequently, between 30 June and 11 July 2012, al-

Mahdi, alongside a number of coperpetrators, attacked and destroyed nine of the most revered mausoleums in the city, as well as the legendary door of the Sidi Yahia mosque.

In January 2013, the ICC Office of the Prosecutor formally opened an investigation into the situation in Mali, noting that there was “a reasonable basis to believe that war crimes of attacking protected objects pursuant to Article 8(2)(e)(iv) were committed at least in Timbuktu.”³⁶ In September 2015, an arrest warrant was issued under seal against al-Mahdi, who had fled and was at that time in custody in neighboring Niger. He was swiftly surrendered into the custody of the ICC, where he faced one charge of attacking protected objects under the aforementioned article. That the case focused exclusively on his role in the destruction of religious and cultural heritage was a significant statement on the part of the Office of the Prosecutor: as noted in the context of the ICTY, up to this point charges relating to crimes against cultural heritage had been laid alongside other offenses entailing the infliction of physical harm—an international criminal case had never been constructed purely around the destruction of cultural heritage. The decision was criticized by several human rights organizations, highlighting that, as head of the Hesbah, al-Mahdi could and should be held responsible for a variety of other crimes, including widespread gender-based violence.

In a statement issued shortly after he was handed into the custody of the court, Chief Prosecutor Bensouda remarked that:

The people of Mali deserve justice for the attacks against their cities, their beliefs and their communities. Let there be no mistake: the charges we have brought against Ahmad Al Faqi Al Mahdi involve the most serious crimes; they are about 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. The inhabitants of Northern Mali, the main victims of these attacks, deserve to see justice done. ... No longer should such reprehensible conduct go unpunished. 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.³⁷

There is much to unpack in this statement. Most strikingly, Bensouda emphasized the anthropocentric character of the charges, thereby implicitly rejecting suggestions that crimes against cultural heritage are not of the same gravity as offenses that involve the infliction of physical harm. The charges are presented as attacks on dignity and individual and collective identity, rather than as the infliction of material damage. This language underlines the universal cultural value of the mausoleums rather than their practical value to the local population.

It was hoped that the case would allow the ICC judges to carefully unravel the extent of the protection afforded to cultural heritage under the Rome Statute. However, such hopes were significantly dented by al-Mahdi's decision to plead guilty to the charge: instead of a lengthy set of proceedings, all that was required was a brief outline of the evidence supporting the charge, and confirmation that his guilty plea was free and fully informed. One question that needed to be addressed, however, was whether the fact that the mausoleums were destroyed outside of the conduct of the hostilities phase of the conflict had any impact on the applicability of Article 8.2.e.iv to al-Mahdi's conduct. The trial chamber chose to elide the strictures of international humanitarian law, stating that: "The element of 'direct[ing] an attack' encompasses any acts of violence against protected objects and [the chamber] will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of the armed group. ... This reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute."³⁸

This interpretation led one prominent commentator to provocatively proclaim that al-Mahdi had been convicted "of a crime he did not commit."³⁹ From a purely international humanitarian law perspective, there is much to be said for this conclusion. How the notion of "attack" is to be interpreted for the purposes of war crimes under the Rome Statute continues to be a source of some confusion: Should it be strictly construed in line with international humanitarian law, or should it be given a broader, more liberal understanding? It was hoped that the issue would be resolved by the appeals chamber in the *Ntaganda* case, but while the court appeared to disavow the *Al Mahdi* approach, significant ambiguity and uncertainty remain.⁴⁰

In determining al-Mahdi's sentence, the trial chamber embarked on an assessment of the gravity of the crime. In doing so, they rejected any notion that there was an immediate and obvious equivalence between all crimes under the statute, stating that, "even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons." Due recognition was given to the "symbolic and emotional value" attached to the destroyed mausoleums, their status as UNESCO World Heritage Sites, and the fact that they were destroyed for religious motives.⁴¹ Having taken all aggravating and mitigating factors into account (including his admission of guilt and statement of remorse), al-Mahdi was sentenced to nine years.

Under Article 75 of the Rome Statute, the ICC has the power to award reparations in the form of restitution, compensation, or rehabilitation to victims of crimes. Following al-Mahdi's conviction, the court set about determining the appropriate reparations to be awarded, permitting experts to submit their opinion on how it should conceptualize and quantify the harm that resulted from his actions and how this should be reflected in the reparations order.

In this order, of 17 August 2017, reflecting on the importance of tangible and intangible cultural heritage, the court stated that “cultural heritage is considered internationally important regardless of its location and origin” and “cultural heritage is important not only in itself, but also in relation to its human dimension.” The court also recognized that heritage destruction constitutes “an irreplaceable loss that negates humanity.”⁴² With respect to the victims of al-Mahdi’s actions, it determined that harm was inflicted on the community of Timbuktu, the people of Mali, and the international community, thus it was conceptualized as occurring on the local, national, and international levels. Al-Mahdi’s actions resulted in material damage, economic loss, moral harm in the form of “mental pain and anguish,” the “disruption of culture,” and emotional distress. Having considered multiple factors the court determined that he was liable for €2.12 million for the economic loss that resulted from his actions. Furthermore, individual and collective reparations totaling €483,000 were awarded for the moral harm inflicted.

With respect to the harm suffered by the national and international communities, the court chose to award symbolic reparations in the form of €1 to the state of Mali and UNESCO. In total, al-Mahdi was held personally liable for reparations of €2.7 million, though he is not in a position, nor is he likely to be in the future, to fulfill the reparations order. Consequently, the Court’s Trust Fund for Victims has stepped in to ensure that in time, through fund raising and voluntary contributions from states, the reparations will be appropriately fulfilled.

The *Al Mahdi* case has undoubtedly made an important contribution in terms of sharpening international criminal law’s relevance to ongoing efforts aimed at accountability for heritage destruction. Prosecuted during a period in which the world was outraged at the intentional, wanton, and ideologically-driven destruction of cultural heritage by the Islamic State of Iraq and Syria (ISIS, also known as ISIL or Da’esh), the case’s timeliness marked the possibility of international accountability, and stood as a warning to potential perpetrators that a reckoning may be at hand.

In the immediate aftermath of the case, there was a brief period in which efforts were made to build on the momentum created by the positive reception to al-Mahdi’s conviction. A memorandum of understanding was signed by the Office of the Prosecutor and UNESCO formalizing their cooperative relationship. More recently, in the final days of her term of office as chief prosecutor, Bensouda published a dedicated *Policy on Cultural Heritage*. This commits the Office of the Prosecutor, among other things, to integrate the investigation and prosecution of heritage destruction (in all of its forms) into the heart of its activities.⁴³ This is an important step in the right direction, which it is hoped will be taken up, developed, and implemented by Chief Prosecutor Karim Khan during his term of office.

Clearly, *Al Mahdi* constitutes a positive development deserving of recognition. However, it also stands as something of a missed opportunity. While on the one hand

the decision to focus the case on a single charge of heritage destruction highlighted the role of international criminal law in this area, it failed to fully account for and present the broader context in which the destruction of the mausoleums took place. The charge against al-Mahdi did not make clear that his actions were part of a broader campaign of persecution in which the fundamental rights of the people of Timbuktu were denied. In this respect, the case appeared to deviate from the important advances made in the jurisprudence of the ICTY.

The decision not to charge him with the crime against humanity of persecution, or any other offense, was necessarily a conscious one. It is entirely conceivable that limiting the charges against al-Mahdi was a purely pragmatic decision on the part of the Office of the Prosecutor, which viewed the case as a stepping-stone to prosecuting further cases arising from the situation in Mali. The commencement in 2020 of proceedings against al-Mahdi's acolyte and former chief of Ansar Dine's Islamic police, al-Hassan Ag Abdoul Aziz, tends to lend credence to this conclusion. In contrast with the former, al-Hassan is on trial for multiple counts of war crimes and crimes against humanity, including the destruction of the mausoleums. Most significantly, he is facing charges of religious and gender-based persecution as a crime against humanity under Article 7 of the Rome Statute. Central to these charges is evidence relating not only to the destruction of the mausoleums, but also evidence that addresses the wider policies of Ansar Dine that targeted the cultural heritage of the people of Timbuktu. In this respect, the Office of the Prosecutor is arguing that Ansar Dine's persecution of the city's civilian population included the denial of access to and participation in traditional forms of worship (including forms of prayer and religious festivals), singing and even listening to music, dress (including wearing amulets and talismans), and the imposition of a system of single-sex education based on the group's Salafist ideology.⁴⁴

The case has the potential to be of seminal importance in the history of international criminal law. In addition to opening up space for the prosecution of intangible cultural heritage destruction, thus broadening international criminal law's appreciation of cultural heritage's implicit diversity, it is also the first case in the history of international criminal law addressing gender-based persecution.⁴⁵ In constructing a charge of religious and gender-based persecution around evidence of the destruction of tangible and intangible cultural heritage, the Office of the Prosecutor is recognizing the inherent intersectionality of heritage destruction with different forms of discrimination. The narrative of the case presents the religious persecution as occurring against the civilian population of Timbuktu who did not subscribe to Ansar Dine's ideology. However, the inclusion of gender-based persecution represents how women and girls in Timbuktu were also persecuted on account of their gender and nonconformity with the group's brutally misogynistic

rule: they were doubly persecuted, and the destruction of tangible and intangible cultural heritage was central to both forms of persecution.

The *Al Mahdi* and *Al Hassan* cases allow for reasonable optimism that, like the ICTY, the ICC is on the road to constructing an important legacy with respect to accountability for heritage destruction. However, given the pace of proceedings, the limited capacity of the court, and increasing state ambivalence with respect to international criminal justice mechanisms, it would be naïve to expect the ICC to carry the weight of delivering global accountability for heritage destruction. It certainly has a role to play in ending impunity for heritage destruction, but this must be considered as but one element of the global response to this issue.

Conclusion

Since the concept of individual criminal responsibility for the commission of international crimes took root over a century ago, international criminal law has played an important role in documenting and holding to account those most responsible for cultural heritage destruction. The resulting jurisprudence has led to the progressive development of the law and has been a notable component in the emergence of the distinct body of international cultural heritage law. From Nuremberg to the ICC, international criminal law has recognized that the harm inflicted by heritage destruction is far from purely material, but rather exists on a spectrum of harm that has a profound impact on the spiritual and mental well-being of people on an individual and collective level. Numerous seminal cases have highlighted the link between heritage destruction and crimes against humanity, and while states have rejected the notion of cultural genocide, evidence of heritage destruction has been used as a means of proving genocidal intent. Perhaps most significantly, the prosecution of heritage destruction before international criminal courts has underlined the universal values that are eroded when heritage is targeted. Heritage destruction is an affront to the dignity and identity of those most immediately affected by it and constitutes a stain on the very notion of humanity.

With the burgeoning case law of the ICC, there is cause for optimism that international criminal justice can continue to pursue accountability for heritage destruction. However, it is imperative that it be seen as a subsidiary, rather than as a primary, means of accountability. The cases prosecuted by international criminal courts should be used as a source of guidance and inspiration to states to ensure that legislation is in place to allow for the prosecution of heritage destruction before domestic courts: the future of accountability for heritage destruction must be before domestic courts in accordance with the Second Protocol to the 1954 Hague Convention. International prosecution can show the way, but it is for states to follow if there is to be meaningful accountability for the scourge that is cultural heritage destruction.

BIOGRAPHY

Joseph Powderly is Associate Professor of Public International Law at the Grotius Centre for International Legal Studies, Leiden University. His research focuses broadly on issues relevant to international criminal law, international human rights law, and cultural heritage law. He published *Judges and the Making of International Criminal Law* in 2020.

SUGGESTED READINGS

Serge Brammertz, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich, "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY," *Journal of International Criminal Justice* 14, no. 5 (2016): 1143–74.

Micaela Frulli, "The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency," *European Journal of International Law* 22, no. 1 (2011): 203–17.

ICC, Office of the Prosecutor, *Policy on Cultural Heritage* (The Hague: ICC, June 2021), <https://www.icc-cpi.int/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>.

Ana Filipa Vrdoljak, "Cultural Heritage in Human Rights and Humanitarian Law," in *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Nephtali (Oxford: Oxford University Press, 2011), 250–302.

Karolina Wierczyńska and Andrzej Jakubowski, "Individual Criminal Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the *Al-Mahdi* Case," *Chinese Journal of International Law* 16, no. 4 (2017): 695–721.

NOTES

1. ICC, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of Trial in the Case against Mr. Ahmad Al-Faqi Al Mahdi," 22 August 2016, <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822>.*
2. Francis Lieber, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Adjutant General's Office, 24 April 1863, Arts. 35, 44.
3. Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899; and 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.
4. Its full name is the Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874.
5. Asquith made this remark in private correspondence. See Michael Brock and Eleanor Brock, eds., *Asquith: Letters to Venetia Stanley* (Oxford: Oxford University Press, 1985), quoted in Alan Kramer, *Dynamic of Destruction: Culture and Mass Killing in the First World War* (Oxford: Oxford University Press, 2007), 14.
6. See "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," *American Journal of International Law* 14, no. 1 (1920): 95, 115.

7. See Matthias Neuner, "When Justice Is Left to the Losers: The Leipzig War Crimes Trials," in *Historical Origins of International Criminal Law: Volume I*, ed. Morten Bergsmo, Cheah Wui Ling, and Yi Ping (Brussels: Tortel Opsahl Academic EPublisher, 2014), 333–77.
8. For an account of the obstacles that had to be negotiated in order to gain access to the archives of the UNWCC, see Dan Plesch, *Human Rights after Hitler: The Lost History of Prosecuting Axis War Crimes* (Washington, DC: Georgetown University Press, 2017).
9. Plesch.
10. Commission for the Protection and Restitution of Cultural Material, *Final Report*, doc. no. AME/148, 15 December 1945 (British National Archives Reference T 209/5/1), 2.
11. See Conference of Allied Ministers of Education, Commission for Protection and Restitution of Cultural Material, "Draft Minutes of the 15th Meeting of the Commission," 2 March 1945, US National Archives Microfilm Publication M1944, roll 154.
12. UNWCC, Committee I, "Looting of Art Treasures and Report of the Vaucher Committee: Report by Wing Commander Jones and Discussion in Committee I," 24 April 1945, <https://www.legal-tools.org/doc/0c6110/pdf>*.*
13. Conference of Allied Ministers of Education, Commission for Protection and Restitution of Cultural Material, "Draft Minutes of the 17th Meeting of the Commission," 8 June 1945, US National Archives Microfilm Publication M1944, roll 154, 2.
14. All fifteen volumes can be accessed through the Library of Congress: Military Legal Resources, "Law Reports of Trials of War Criminals," https://www.loc.gov/rr/frd/Military_Law/law-reports-trials-war-criminals.html.
15. See Mark Drumbl, "Germans Are the Lords and Poles Are the Servants: The Trial of Arthur Greiser in Poland, 1946" in *The Hidden Histories of War Crimes Trials*, ed. Kevin Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 411.
16. See UNWCC, "Trial of Gauleiter Artur Greiser, Supreme National Tribunal of Poland, 21st June–7th July 1946," in *Law Reports of Trials of War Criminals: Volume XIII* (London: His Majesty's Stationary Office, 1949), 71.
17. Charter of the International Military Tribunal (London Charter), 8 August 1945, Art. 6.b.
18. Rosenberg was by no means the only defendant to face charges relating to looting and destruction, indeed it was alleged that he was joined in the conspiracy by Nuremberg codefendants Hermann Göring, Wilhelm Keitel, and Hans Frank.
19. IMT, "Blue Series" Volume IV, 81 (18 December 1945), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-IV.pdf.
20. See IMT, 91. The Soviet prosecution case included extensive evidence of heritage destruction throughout Soviet territory. This was presented in various forms, including that of a documentary specifically created for the proceedings. For a general overview of the Soviet role at Nuremberg, see Francine Hirsch, *Soviet Judgment at Nuremberg* (Oxford: Oxford University Press, 2020).

21. This is most likely due to the prosecution's desire to avoid accusations of hypocrisy given the widespread evidence and notoriety of the indiscriminate Allied destruction of German towns and cities.
22. Quoted in Ana Filipa Vrdoljak, "Cultural Heritage in Human Rights and Humanitarian Law," in *International Humanitarian Law and International Human Rights Law*, ed. Orna Ben-Nephthali (Oxford: Oxford University Press, 2011), 272–273.
23. Council of Europe, Committee on Culture and Education, *War Damage to the Cultural Heritage in Croatia and Bosnia–Herzegovina*, information report, doc. no. 7431, 1995.
24. Council of Europe, para. 1157.
25. Council of Europe, paras. 229, 312. See ICTY, *Pavle Strugar*, case no. IT-01-42-T, Judgment, 31 January 2005, <https://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>.
26. ICTY, *Hadzihasanovic and Kubura*, case no. IT-01-47-T, Judgment, 15 March 2006, para. 63, https://www.icty.org/x/cases/hadzihasanovic_kubura/tjug/en/had-judg060315e.pdf.
27. ICTY, *Prlić et al.*, case no. IT-04-74-T, Judgment, Volume 2 of 6, doc. no. D2165-1567/78692 BIS, 29 May 2013, para. 1282, <https://www.icty.org/x/cases/prlic/tjug/en/130529-2.pdf>.
28. ICTY, *Tadić*, case no. IT-95-1-T, Opinion and Judgment, 7 May 1997, paras. 715, 697, <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.
29. ICTY, *Blaškić*, case no. IT-95-14-T, Judgment, 3 March 2000, para. 227, <https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.
30. ICTY, *Kordić and Čerkez*, case no. IT-95-14/2-T, Judgment, 26 February 2001, paras. 6, 207, https://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf.
31. Serge Brammertz et al., "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY," *Journal of International Criminal Justice* 14, no. 5 (2016): 1161.
32. ICTY, *Tolimir*, case no. IT-05-88/2-T, Judgment, 12 December 2012, para. 746, <https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>. See also, ICTY, *Krstić*, case no. IT-98-33-A, Appeal Judgment, 19 April 2004, para. 25, <https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>.
33. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)*, Judgment, 26 February 2007, para. 344, <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>; and ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, paras. 386–99, <https://www.icj-cij.org/public/files/case-related/118/118-20150203-JUD-01-00-EN.pdf>.
34. Micaela Frulli, "The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency," *European Journal of International Law* 22, no. 1 (2011): 211.
35. ICC, *Al Mahdi*, case no. ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, para. 33, <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-171>.
36. ICC, Office of the Prosecutor, *Situation in Mali: Article 53(1) Report*, 16 January 2013, para. 113.

37. ICC, Office of the Prosecutor, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following the Transfer of the First Suspect in the Mali Investigation,” 26 September 2015, <https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-26-09-2015>.
38. ICC, *Al Mahdi*, Judgment and Sentence, para. 15.
39. See William Schabas, “Al Mahdi Has Been Convicted of a Crime He Did Not Commit,” *Case Western Reserve Journal of International Law* 49, no. 1 (2017): 75.
40. See Ori Pomson, “Ntaganda Appeals Chamber Judgment Divided on Meaning of “Attack,”” *Articles of War*, 12 May 2021, <https://lieber.westpoint.edu/ntaganda-appeals-chamber-judgment-divided-meaning-attack/>.
41. ICC, *Al Mahdi*, Judgment and Sentence, paras. 77, 79–81.
42. ICC, *Al Mahdi*, Reparations Order, 17 August 2017, paras. 15, 16, 22, https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF.
43. ICC, Office of the Prosecutor, *Policy on Cultural Heritage* (The Hague: ICC, June 2021), para. 20, <https://www.icc-cpi.int/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf>.
44. ICC, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, case no. ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, 13 November 2019, para. 683.
45. Rosemary Grey et al., “Gender-Based Persecution as a Crime against Humanity: The Road Ahead,” *Journal of International Criminal Justice* 17, no. 5 (2019): 957.