

## Note

# Conserving Culture: The Shift Towards International Criminal Liability for the Destruction of Cultural Property

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## INTRODUCTION

The longstanding conflict in the Middle East has resulted in political turmoil, the loss of tens of thousands of lives, and the displacement of hundreds of thousands more.<sup>1</sup> These atrocities can be linked to the Assad regime in Syria, along with ISIS attacks across the region.<sup>2</sup> There has been a global response to try to curtail the violence and end the humanitarian crisis that has resulted in over one million Syrian refugees.<sup>3</sup> While the world has been rightly focused on the tragedies of death and displacement, the destruction of cultural property by individuals associated with terrorist organizations has been an overlooked aspect to the humanitarian crisis.

This Note shows that a calculated global response is needed to address the issue of mass destruction of cultural property and heritage sites across Europe and the Middle East. Part I of this Note describes the background of the destruction of cultural

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1. Greg Botelho, *What's Happening in the Middle East and Why it Matters*, CNN (Jan. 24, 2015, 9:44 AM), <https://www.cnn.com/2015/01/23/middleeast/middle-east-country-breakdown/index.html>.

2. *Id.*

3. See Nick Cumming-Bruce, *U.N. Urges Countries to Take in 480,000 Syrian Refugees*, N.Y. TIMES (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/world/middleeast/united-nations-ban-ki-moon-syria-refugees.html>.

property and the multiple sources of international law that have attempted to govern the destruction of cultural property. Part I then proceeds with a case study from the International Criminal Court (ICC) of Ahmad Al Faqi Al Mahdi. This section introduces Al Mahdi, the background of his case in the ICC, and its outcome. Part II, the analysis section, addresses the significance of Al Mahdi's case in the context of the broader global effort to combat the destruction of cultural property. Lastly, Part II argues that a strong relationship between the five permanent members (P5) on the United Nations Security Council (UNSC) and the ICC is necessary to deter the destruction of cultural property in the future. A stronger ICC would lead more states to take steps to protect their cultural property, and also deter wrongdoers from carrying out these crimes. Moreover, domestic militia in foreign territories would be more likely to protect cultural property during times of armed conflict due to customary legal norms that would emerge out of ICC jurisprudence.

## I. BACKGROUND

### A. INTERNATIONAL LAW AIMED AT PROTECTING CULTURAL PROPERTY

There are many sources of international law including numerous treaties aimed at protecting cultural property from being destroyed.<sup>4</sup> The main difficulty in such protection, however, has been acquiring state signatories to sign on, thereby binding them to protect cultural property from being destroyed.<sup>5</sup>

#### 1. History of the Protection of Cultural Property

The destruction of cultural property has been occurring for centuries. From the shelling of the Mostar Bridge in Bosnia Herzegovina and the Nazi destruction of synagogues and plundering of art during World War II, to al-Qaeda's terrorist

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4. See generally CAROLINE EHLERT, PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW 2–45 (2014) (describing the history of the prohibition of the destruction of cultural property within international treaties).

5. See, e.g., Matthew D. Thurlow, Note, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 165 (2005).

attacks on the World Trade Centers, the world has seen countless monuments be destroyed.<sup>6</sup>

The first attempts to protect cultural property came during the sixteenth and seventeenth centuries during the Renaissance.<sup>7</sup> Early international law scholars such as Hugo Grotius and Emmerich de Vattel believed that religious property like churches, memorials, temples, tombs, public buildings, and public monuments should be protected from destruction.<sup>8</sup> However, it was still acceptable to destroy buildings of this sort in order to pursue military operations that were deemed a “necessity.”<sup>9</sup> De Vattel’s discourse brought about progress during the eighteenth century, whereby, despite the lack of a formal international treaty governing the destruction of cultural property, warring parties began to show due regard for religious and educational institutions in times of war.<sup>10</sup> As this concept eventually emerged into customary international law,<sup>11</sup> coming to an agreement on binding treaties proved difficult because of the inability to harmonize internationally-accepted definitions of “destruction,” “cultural property,” and “cultural heritage.”<sup>12</sup>

Classic sources of international law have attempted to set the parameters for these terms. For example, “destruction” is known as “[d]emolishing manufactured products, installations and materials, or interrupting them or putting them out of order, for offensive or defensive purposes in the course of military operations.”<sup>13</sup> “Cultural property” has been commonly defined as “[m]ovable or immovable property that has cultural significance, whether of the nature of antiquities and monuments of classical age or important modern items of fine arts, decorative arts, and architecture.”<sup>14</sup> “Cultural heritage” has been explained as “movable property (artistic works) as well as immovable property (monuments, buildings, sites), works of expression (music, dance, theatre), intangible cultural property (folklore, talents, rituals, religious beliefs, intellectual traditions).”<sup>15</sup>

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6. See EHLERT, *supra* note 4, at 1–2.

7. *Id.* at 16.

8. *Id.* at 16–17.

9. *Id.* at 17.

10. *Id.* at 18.

11. *Id.*

12. *Id.* at 2–3.

13. PIETRO VERRI, *DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 40–41 (1992).

14. *Cultural Property*, BLACK’S LAW DICTIONARY (10th ed. 2014).

15. JIŘÍ TOMAN, *PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF*

These terms have been implemented into modern international treaties to attempt to govern the destruction of cultural property.

## 2. Sources of International Law Governing the Destruction of Cultural Property

International law, much like domestic law, has evolved and attempted to implement individual responsibility for the destruction of cultural property. Early international humanitarian law was primarily governed by the theory of *jus in bello*, which governed the conduct of war once initiated.<sup>16</sup> In 1868, the St. Petersburg Declaration was adopted by dozens of nations in response to the Russian invention of a bullet that exploded on contact and caused mass damage.<sup>17</sup> The declaration stated that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military force of the enemy.”<sup>18</sup> Hence, cultural property was off limits.

The 1949 Geneva Conventions further codified violations of the destruction of cultural property. Articles 33 and 53 protect property from being pillaged, and only allow for the destruction of real property when it is an absolute necessity during military operations.<sup>19</sup> Article 27 essentially protects cultural property by ensuring that protected persons have access to their “churches and other buildings dedicated to religion, which indirectly protects these institutions from being destroyed.”<sup>20</sup>

A major development occurred in 1954, when two agreements were concluded. The Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations of the Execution of the Convention<sup>21</sup> and the

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ARMED CONFLICT 40 (1996).

16. *Jus ad Bellum and Jus in Bello*, INT'L COMM. RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello>.

17. *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, INT'L COMM. RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/130?OpenDocument> (last visited Mar. 6, 2018).

18. *Id.*

19. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 33, 53, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287.

20. EHLERT, *supra* note 4, at 41; *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 19, art. 27.

21. Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, May 14, 1954, 249 U.N.T.S. 240 (entered into force Aug. 7, 1956).

Protocol for the Protection of Cultural Property in the Event of an Armed Conflict.<sup>22</sup> The 1954 Hague Convention was the first international convention that exclusively dealt with the protection of cultural property.<sup>23</sup> The main premise behind the Convention was the notion that there was a general, unified interest in protecting cultural property.<sup>24</sup> Today, the 1954 Hague Convention has 131 States parties, and is seen by many authors and scholars as customary international law.<sup>25</sup>

### 3. Can Individuals be Held Liable for the Destruction of Cultural Property under International Criminal Law?

Strengthening an international system that punishes individuals for destroying cultural property is essential in order to thwart the ongoing epidemic. While still a flawed institution, the ICC has the greatest potential to bring these “cultural terrorists” to justice and protect cultural property from being destroyed.

International criminal law (ICL) does not simply incorporate all of international humanitarian law (IHL) or human rights law because many states do not regard most of these violations as entailing individual responsibility.<sup>26</sup> Early forms of ICL were codified in Article 6 of the Charter of the International Military Tribunal at Nuremberg, where the court had jurisdiction to prosecute defendants for crimes against peace, war crimes, and crimes against humanity.<sup>27</sup> An offense falls under the auspices of ICL if it meets three conditions: first, the offense “must entail individual responsibility and be subject to punishment; second, the norm must be part of the body of international law; third, the offense must be punishable regardless of whether it has been incorporated into domestic law.”<sup>28</sup> The third prong is particularly important because, as

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22. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 (entered into force Aug. 7, 1956); see also EHLERT, *supra* note 4, at 43.

23. EHLERT, *supra* note 4, at 43.

24. *Id.*

25. *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, INT'L COMM. RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/400> (last visited Mar. 6, 2018); EHLERT, *supra* note 4, at 44.

26. See EHLERT, *supra* note 4, at 4.

27. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

28. EHLERT, *supra* note 4, at 7.

with some treaties discussed in the previous section, not all states have adopted them, and thus have not bound themselves to their language.<sup>29</sup> Further, because some scholars regard neither the Geneva Conventions nor Hague Conventions as customary international law,<sup>30</sup> the offense *must* be punishable regardless of whether it has been incorporated into domestic law.

The primary international institution that enforces ICL is the ICC. The Rome Statute, which entered into force on July 1, 2002,<sup>31</sup> established the ICC and deemed it a permanent institution, responsible for prosecuting heinous crimes: genocide, crimes against humanity, and war crimes.<sup>32</sup> There are currently 123 countries that are States Parties to the Rome Statute, with 33 African states comprising the majority of any regional group.<sup>33</sup>

Article 8 of the Rome Statute defines a number of war crimes that may be applied in cases related to the destruction of cultural property.<sup>34</sup> Specifically, Article 8 labels extensive destruction and appropriation of property and “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes,” among others, as war crimes.<sup>35</sup>

Even though the foundation for prosecuting individuals for the destruction of cultural property is codified in the Rome Statute, the actual investigations have seldom been completed.<sup>36</sup> There are three primary criticisms of the ICC’s lack of authority

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29. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 82 INT’L L. STUD. U.S. NAVAL WAR C. 37, 39 (2006).

30. EHLERT, *supra* note 4, at 44; see, e.g., Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶¶ 165–67 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

31. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

32. *Id.* art. 5.

33. *The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://asp.icc-cpi.int/EN\\_Menus/asp/Pages/asp\\_home.aspx](https://asp.icc-cpi.int/EN_Menus/asp/Pages/asp_home.aspx) (last visited Mar. 8, 2018) [hereinafter *States Parties to the Rome Statute*].

34. Rome Statute, *supra* note 31, art. 8.

35. *Id.*

36. See Mark Kersten, *The Al-Mahdi Case Is a Breakthrough for the International Criminal Court*, JUST. CONFLICT (Aug. 25, 2016), <https://justiceinconflict.org/2016/08/25/the-al-mahdi-case-is-a-breakthrough-for-the-international-criminal-court/>.

and inability to carry out investigations: the ICC has failed to garner universal support from powerful states, there is a complicated relationship between the ICC and the UNSC, and the ICC has been accused of systematically ignoring human rights abuses.<sup>37</sup>

*a. The ICC Does Not Have Universal Support*

Although 123 nations have signed the Rome Statute, powerful states such as the United States, Russia, and China have all been reluctant to sign on.<sup>38</sup> Former United States Secretary of Defense Donald Rumsfeld laid out numerous objections to the ICC, such as the lack of adequate checks and balances on powers of the Court's prosecutors and judges, and the lack of any effective mechanism to prevent politicized prosecutions of American service members and officials.<sup>39</sup> Another common rationale for the United States' reluctance to join the ICC comes from the "American Exceptionalist" viewpoint that Americans, not the international community, can better help suffering people.<sup>40</sup> Because of these longstanding American views, devoting resources and sacrificing some sovereignty in order to support the ICC in carrying out prosecutions against individuals accused of destroying cultural property has been difficult. With much more pressing and widespread humanitarian crises ongoing, the United States-ICC relationship remains unlikely to be changed and at the mercy of the current president's personal opinion of the Court.<sup>41</sup>

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37. See David Hoile, *ICC: The Failure that Keeps on Failing*, NEW AFR. MAG. (Mar. 23, 2015), <http://newafricanmagazine.com/icc-failure-keeps-failing/>; see also Richard Dicker, Introduction, *The ICC at 10*, 12 WASH. U. GLOBAL STUD. L. REV. 539 (2013).

38. See *States Parties to the Rome Statute*, supra note 33 (noting that 124 countries are States Parties to the Rome Statute).

39. Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC'Y INT'L L. (May 11, 2002), <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty>.

40. See Melinda Negrón-Gonzales & Michael Contarino, *Local Norms Matter: Understanding National Responses to the Responsibility to Protect*, 20 GLOB. GOVERNANCE 255, 267 (2014); Matthey Bulger, *The International Criminal Court: Why Is the United States Not a Member?*, THEHUMANIST.COM (June 19, 2013), <https://thehumanist.com/news/international/the-international-criminal-court-why-is-the-united-states-not-a-member>.

41. Caitlin Lambert, *The Evolving US Policy Towards the ICC*, INT'L JUST. PROJECT (Mar. 6, 2014), <http://www.internationaljusticeproject.com/the-evolving-us-policy-towards-the-icc/>. See also John Bellinger, *The International*

*b. The Relationship Between the ICC and UNSC is “Complicated”*

The ICC is based on the principle of complementarity, whereby the court will not investigate and prosecute cases when states are willing and able to do so themselves.<sup>42</sup> The principle of complementarity, however, is hampered by the UNSC. One way that cases fall within the ICC’s jurisdiction is by referral from the UNSC.<sup>43</sup> However, because the Council is an undemocratic and political body, the referral power to the ICC has come at a “high cost for the legitimacy and functioning of” the Court.<sup>44</sup> Moreover, because three of the five permanent members on the UNSC have not ratified the Rome Statute,<sup>45</sup> any veto effectively immunizes themselves and their allies from any potential investigation or prosecution.<sup>46</sup> Thus, complementarity and states’ willingness and ability to investigate and prosecute cases are not always the end all be all of employing the ICC.

For example, many scholars have thoroughly examined how the language of the UNSC resolutions referring the situations in Sudan and Libya “limited the ICC’s jurisdiction to the relevant state under investigation . . . suggesting a hierarchy of crimes based on the individuals that perpetrated them.”<sup>47</sup> Some actions, such as Russia’s acts in Chechnya and Israel’s occupation of Palestinian territories, have been off limits to the ICC because of the inevitable P5 vetoes.<sup>48</sup> The ICC has also been unable to investigate the destruction of cultural and religious monuments

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*Criminal Court and the Trump Administration*, LAWFARE (Mar. 27, 2018), <https://lawfareblog.com/international-criminal-court-and-trump-administration> (arguing President Trump’s appointment of John Bolton as national security advisor will likely mean that the United States will not support the ICC under the Trump Administration).

42. See Rome Statute, *supra* note 31, art. 17.

43. See *Id.* art. 13.

44. Matiangai V.S. Sirleaf, *Regionalism, Regime Complexes, and the Crisis in International Criminal Justice*, 54 COLUM. J. TRANSNAT’L L. 699, 711 (2016).

45. See *States Parties to the Rome Statute*, *supra* note 33 (showing that United States, Russia, and China have not signed the Rome Statute); *Permanent and Non-Permanent Members*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/members/> (last visited Mar. 8, 2018).

46. Sirleaf, *supra* note 44.

47. Rosa Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, in *THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE* 153 (Dawn L. Rothe et al. eds., 2013).

48. See, e.g., Mark Tran, *Background: International Criminal Court*, GUARDIAN (Jan. 26, 2009, 7:13 AM EST), <https://www.theguardian.com/world/2009/jan/26/international-criminal-court>.



in countries such as Iraq, Syria, and Yemen.<sup>49</sup> Because these countries are not members of the court, only a specific mandate from the UNSC gives the ICC jurisdiction to investigate and prosecute these war crimes.<sup>50</sup> The politics in the UNSC effectively immobilizes the ICC from investigating and prosecuting war criminals that are killing others; this is a bad sign for any agreement to prosecute individuals accused of destroying cultural property.

*c. The ICC Has Systematically Ignored Human Rights Abuses*

Some scholars have charged the ICC with ignoring blatant human rights violations perpetrated by powerful nations, such as the P5, in selecting its investigations.<sup>51</sup> Additionally, observers have noted that it is not coincidental that the only places where the ICC is investigating and prosecuting individuals are where the United States and other powerful states have few interests or resources.<sup>52</sup> In its brief history, the ICC has only prosecuted Africans, a continent with a weak global position and with few natural resources that make it an unimportant ally of the United States.<sup>53</sup> There was hope that the United States would tone down its opposition to the ICC during the Obama administration, but the United States' ratification of the Rome Treaty was still seen as highly unlikely.<sup>54</sup>

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49. See Marlise Simmons, *Prison Sentence over Smashing of Shrines in Timbuktu: 9 Years*, N.Y. TIMES (Sept. 27, 2016), [https://www.nytimes.com/2016/09/28/world/europe/ahmad-al-faqi-al-mahdi-timbuktu-mali.html?\\_r=2](https://www.nytimes.com/2016/09/28/world/europe/ahmad-al-faqi-al-mahdi-timbuktu-mali.html?_r=2).

50. *Id.*

51. See, e.g., Ifeonu Eberechi, "Rounding Up the Usual Suspects": *Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union's Emerging Resistance*, 4 AFR. J. LEGAL STUD. 51, 56 (2011).

52. Mahmood Mamdani, *Darfur, ICC and the New Humanitarian Order: How the ICC's "Responsibility to Protect" is Being Turned into an Assertion of Neocolonial Domination*, PAMBAZUKA NEWS (Sept. 17, 2008), <https://www.pambazuka.org/en/category/features/50568>.

53. Kenneth Roth, *Africa Attacks the International Criminal Court*, HUM. RTS. WATCH, (Jan. 14, 2014, 3:22PM EST), <https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court>.

54. See Tran, *supra* note 48.

B. *PROSECUTOR V. AHMAD AL FAQI AL MAHDI*

Although the ICC has been flawed in its ability to investigate and prosecute individuals for their crimes, including the destruction of cultural property, there has been a recent revelation in the prosecution of Ahmad Al Faqi Al Mahdi that gives the institution some credibility and hope. This section will lay out the facts of Al Madhi's case, including how it was brought to the ICC, and its outcome.

## 1. The Facts

A coalition of Tuareg rebels and Islamic militant factions including al-Qaeda in the Islamic Maghreb and a local group called Ansar Dine seized much of the northern part of Mali in mid-2012.<sup>55</sup> These rebels enforced a harsh version of Sharia law in areas under their control, banning music, forcing women to wear the burqa and preventing girls from attending school.<sup>56</sup> Al Mahdi traveled to Timbuktu shortly after it fell to the extremists.<sup>57</sup> He was later named their religious adviser and was given command of the Hisba, a religious police charged with stamping out "evil practices" and encouraging "correct" behavior.<sup>58</sup>

In mid-2012, Al Mahdi led a group of radicals that destroyed fourteen of Timbuktu's sixteen mausoleums.<sup>59</sup> These mausoleums contained one-room structures that housed the tombs of the city's greatest thinkers, and were also listed on the World Heritage List.<sup>60</sup> Al Mahdi and his radical-led group considered these tombs "totems of idolatry," and counter to the ideals of al-Qaeda, ISIS, and other Islamic factions.<sup>61</sup> The

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55. Jason Burke, *ICC Ruling for Timbuktu Destruction "Should Be Deterrent for Others,"* GUARDIAN (Sept. 27, 2016, 6:25 AM EDT), <https://www.theguardian.com/world/2016/sep/27/timbuktu-shrines-icc-sentences-islamic-militant-nine-years-destruction-ahmad-al-faqi-al-mahdi>.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Ahmad Al Faqi Al Mahdi Pleads Guilty at ICC to Destroying Timbuktu Tombs*, NBC NEWS (Aug. 22, 2016, 6:34 AM ET), <http://www.nbcnews.com/news/world/ahmad-al-faqi-al-mahdi-pleads-guilty-icc-destroying-timbuktu-n635716>.

60. *Id.*; *Timbuktu*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/list/119> (last visited Mar. 8, 2018).

61. *Ahmad Al Faqi Al Mahdi Pleads Guilty at ICC to Destroying Timbuktu*

shrines were “the heart of Mali’s cultural heritage and were of great importance to the people of Timbuktu;” their destruction affected not only the direct victims of crimes, but also the people throughout Mali and the international community.<sup>62</sup>

## 2. The Charge

The Government of Mali officially referred the situation to the ICC on July 13, 2012.<sup>63</sup> Al Mahdi was formally accused pursuant to Article 25(3)(a)–(d) of the Rome Statute of intentionally directing attacks against the ten religious monuments and buildings.<sup>64</sup> All but one of the structures was part of the Timbuktu World Heritage site recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>65</sup> The Office of the Prosecutor for the ICC opened an investigation on January 6, 2013.<sup>66</sup> On September 8, 2015, the Court issued a formal warrant for his arrest for war crimes of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums in Timbuktu, Mali, between June 30 and July 10, 2012.<sup>67</sup> The Niger government surrendered Al Mahdi, where he was taking shelter, to the ICC on September 26, 2015.<sup>68</sup>

Al Mahdi’s trial lasted for three days from August 22 to August 24, 2016.<sup>69</sup> In a surprise to the international community, Al Mahdi pleaded guilty of the war crime consisting of destroying cultural and religious monuments.<sup>70</sup> Finally, on September 27, 2016, the ICC found Al Mahdi guilty beyond a reasonable doubt

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*Tombs, supra* note 59.

62. Burke, *supra* note 55.

63. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Case Information Sheet (Aug. 17, 2017), <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf>.

64. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence, ¶¶ 57, 61 (Sept. 27, 2016).

65. Simmons, *supra* note 49.

66. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Case Information Sheet (Aug. 17, 2017), <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf>.

67. *Id.*

68. *Id.*

69. *Id.*

70. Mark Kersten, *Some Thoughts on the Al Mahdi Trial and Guilty Plea*, JUST. CONFLICT (Aug. 24, 2016), <https://justiceinconflict.org/2016/08/24/some-thoughts-on-the-al-mahdi-trial-and-guilty-plea/>.

of the war crimes, and he was sentenced to nine years imprisonment.<sup>71</sup>

### 3. Al Mahdi's Prosecution

The prosecution of Ahmad Al Faqi Al Mahdi represents a number of firsts for global justice.<sup>72</sup> The member of the terrorist organization Ansar Dine will now be in prison for nine years, but it is less clear how this case will resonate around the world, and whether it can deter similar crimes.<sup>73</sup> However, although subject to some skepticism, Al Mahdi's sentence still represents a significant victory for international justice and shows that there is hope that the ICC can expand its prosecutions and continue its efforts to protect cultural property.

#### *a. Criticisms of the ICC's Verdict Against Al Mahdi*

Not all international legal scholars and non-governmental organizations (NGOs) praised the ICC's prosecution of Al Mahdi. For example, Amnesty International's Senior Legal Advisor Erica Bussey commented that while the ICC's prosecution was groundbreaking, other war crimes in Mali, such as murder, rape, and torture of civilians, remain unaddressed.<sup>74</sup> The International Federation for Human Rights (FIDH), an NGO dedicated to the worldwide movement for human rights, expressed their desire that other Malians should have been charged with sexual and gender-based crimes, in addition to the charges Al Mahdi received for destroying the cultural sites in Timbuktu.<sup>75</sup> Human Rights Watch called for the Malian government to step up their efforts to ensure investigations and fair trials for all human rights abusers during the 2012 conflict

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71. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence, ¶¶ 43, 109 (Sept. 27, 2016).

72. See Kersten, *supra* note 36.

73. *Id.*

74. See Mali: ICC Trial over Destruction of Cultural Property in Timbuktu Shows Need for Broader Accountability, AMNESTY INT'L (Aug. 22, 2016), <https://www.amnesty.org/en/latest/news/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/>.

75. See Mali: Al Mahdi Trial on Destruction of Cultural Heritage Opens at the ICC, FIDH (Aug. 17, 2016), <https://www.fidh.org/en/region/Africa/mali/mali-al-mahdi-trial-on-destruction-of-cultural-heritage-opens-at-the->

in Mali.<sup>76</sup> Some scholars expressed that the ICC actually had the “wrong man” on trial<sup>77</sup> and that Al Mahdi was just a “little fish” in the grand scheme of the horrific violence in Mali.<sup>78</sup>

Other scholars have also been wary of the prosecution because it is another “attack” on African nations by the international court.<sup>79</sup> Both Burundi and South Africa have announced that they intend to withdraw from the Rome Statute, which campaigners for international justice say could lead to a “devastating exodus” from the ICC.<sup>80</sup> Scholars argue that the African Union (AU) has been a forum for anti-ICC sentiment, and other African nations may now seek to withdraw from the Court.<sup>81</sup> This “African bias” in the court can be seen in the numbers; the Office of the Prosecutor has sought to bring charges against thirty-one individuals since the court began operating in 2002, and all of them have been African.<sup>82</sup> Although ICC prosecutors have claimed to be considering alleged crimes in South America, the Middle East, and Eastern Europe, no concrete actions have occurred.<sup>83</sup> Furthermore, by some estimates, the ICC’s activities have cost at least \$1.5 billion,<sup>84</sup> a significant expense considering the very narrow geographical scope of its investigations and lack of success in bringing justice.

Despite these criticisms, however, the prosecution of Al Mahdi was very significant for the ICC and boosted their legitimacy as an international tribunal capable of bring justice.

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76. See ICC: *Clear Message on Attacking World’s Treasures*, HUM. RTS. WATCH (Sept. 27, 2016, 8:39 AM EDT), <https://www.hrw.org/news/2016/09/27/icc-clear-message-attacking-worlds-treasures>.

77. See Fatouma Harber, *Why the ICC Has the Wrong Man on Trial over Invasion of Timbuktu*, GUARDIAN (Sept. 30, 2015, 3:00 AM EDT), <https://www.theguardian.com/world/2015/sep/30/icc-mali-timbuktu-invasion-trial>.

78. See Mark Kersten, *Big Fish or Little Fish—Who Should the International Criminal Court Target*, JUST. HUB (Aug. 31, 2016, 14:08), <https://justicehub.org/article/big-fish-or-little-fish-who-should-international-criminal-court-target>.

79. See generally Sewell Chan & Marlise Simmons, *South Africa to Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html> (discussing the ICC’s allegedly disproportionate focus on Africa).

80. *Id.*

81. *Id.*

82. Thierry Cruvellier, *The ICC, Out of Africa*, N.Y. TIMES (Nov. 6, 2016), <https://www.nytimes.com/2016/11/07/opinion/the-icc-out-of-africa.html>.

83. *Id.*

84. *Id.*

Because of Al Mahdi's sentence, countries—especially African countries—should look to give more political support to the ICC. Many African nations, including Mali, do not have the political or judicial infrastructure to prosecute serious war crimes.<sup>85</sup> This was one of the primary reasons why Mali actually *referred* Al Mahdi's case to the ICC.<sup>86</sup> In the wake of the announced withdrawals by South Africa, Burundi, and Gambia, a slew of African governments have reaffirmed their backing for the ICC.<sup>87</sup> The ICC's docket has also begun to evolve, which makes the court more of an instrument of international justice, instead of African targeting.<sup>88</sup> If the ICC's imperfections are to be cured, then countries should be working *together* to garner more support for the ICC, not the opposite.<sup>89</sup> With more support from African nations, the ICC would be better suited to bring justice across the globe to those not only affected by the destruction of cultural property, but also against victims of other heinous war crimes.

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85. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Case Information Sheet (Aug. 17, 2017), <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf>.

86. *See id.*

87. Elise Keppler, *African Members Reaffirm Support at International Criminal Court Meeting*, HUM. RTS. WATCH, (Nov. 17, 2016, 6:37 PM EST), <https://www.hrw.org/news/2016/11/17/african-members-reaffirm-support-international-criminal-court-meeting>.

88. *See generally* Letter to Presidents of African States Parties to the ICC, HUM. RTS. WATCH (Nov. 15, 2016, 1:21 PM EST), <https://www.hrw.org/news/2016/11/15/letter-presidents-african-states-parties-icc> (discussing the ICC's investigations outside of Africa and the ICC acting as the sole court to offer a potential check against impunity around the world when national courts fail to hold perpetrators accountable).

89. *Id.*

## II. ANALYSIS

## A. THE SIGNIFICANCE OF AL MAHDI'S PROSECUTION

Al Mahdi's case was groundbreaking for several reasons.<sup>90</sup> This was the first case arising from the 2012 conflict in Mali.<sup>91</sup> Moreover, and perhaps more importantly, this was the first time that the destruction of religious and historical sites has been made a priority charge as a war crime.<sup>92</sup> Additionally, it was the first time ever that an ICC war crimes defendant had pleaded guilty.<sup>93</sup> Finally, this was the ICC's first prosecution of an accused jihadist.<sup>94</sup>

Although international law has safeguarded cultural property for centuries, international bodies and actors have praised the ICC's ruling for making much needed progress to protect it.<sup>95</sup> For example, Irina Bokova, the Director-General of UNESCO, applauded the ICC's efforts in the prosecution and dubbed the organization as a "key element" in the broader, global response to violent extremism.<sup>96</sup>

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90. See generally *Guilty Plea at ICC Timbuktu Artefacts Destruction Case: Ahmad Al-Faqi Al-Mahdi Pleads Guilty to Charges of Destroying Ancient Cultural Artefacts in Timbuktu*, AL JAZEERA (Aug. 22, 2016), <http://www.aljazeera.com/news/2016/08/man-trial-icc-destroying-timbuktu-artefacts-160822100834765.html> (discussing the numerous ways in which the al-Mahdi case was "groundbreaking").

91. *Id.*

92. *Id.*

93. *Id.*

94. Douglas Cantwell, *Al-Mahdi Enters ICC's First Guilty Plea, Admitting to Destruction of Cultural Property in Mali*, AM. SOC'Y INT'L L. (Sept. 15, 2016, 5:01 PM), <https://www.asil.org/blogs/al-mahdi-enters-iccs-first-guilty-plea-admitting-destruction-cultural-property-mali-august-22>.

95. *ICC Convicts Al-Mahdi of War Crime for Destroying Cultural Sites*, INT'L JUST. RES. CTR. (Oct. 5, 2016), <http://www.ijrcenter.org/2016/10/05/icc-convicts-al-mahdi-of-war-crime-for-destroying-cultural-sites/>.

96. *Timbuktu Trial: "A Major Step Towards Peace and Reconciliation in Mali"*, UNESCO (Sept. 27, 2016), [http://www.unesco.org/new/en/media-services/single-view/news/timbuktu\\_trial\\_a\\_major\\_step\\_towards\\_peace\\_and\\_reconciliation/#.V-xp0CgrKUI](http://www.unesco.org/new/en/media-services/single-view/news/timbuktu_trial_a_major_step_towards_peace_and_reconciliation/#.V-xp0CgrKUI).

### 1. Al Mahdi's Prosecution Will Help Deter Other War Criminals in the Future

In present-day Iraq and Syria, other members of terrorist organizations, such as ISIS, have sought to annihilate or loot irreplaceable cultural heritage on a massive scale.<sup>97</sup> While there are many reasons for this destruction, two common ones are important to address. First, the looting of cultural heritage is a method to fund continued engagement in a conflict or terrorist activity. Second, the destruction of cultural heritage can further the comprehensive denigration and destruction of the opposing party in conflict—for now and future generations.<sup>98</sup> Prosecuting Al Mahdi for destroying these sacred monuments sent a stark message to both the people of Timbuktu and to those looking to continue carrying out the heinous war crimes: cultural property is important, is valued by the international community, and will be protected.<sup>99</sup> Seeking accountability for war crimes of this nature also sends a strong signal to Ansar Dine, the Islamic State, Al Qaeda, and other terrorist organizations that such conduct will not be tolerated.<sup>100</sup> The ICC can use the Al Mahdi verdict as a precedent in prosecuting destruction of cultural property, which has the potential to deter would-be war criminals from carrying it out.<sup>101</sup>

While some commentators have found it unlikely that an ISIS terrorist would pause the next time they are about to destroy a holy temple or mosque,<sup>102</sup> the Al Mahdi verdict still has a deterrent effect towards future perpetrators. This is partly because the ICC has custody over a known terrorist who is likely to give investigators evidence of violent crimes committed against human victims.<sup>103</sup> This is especially important given that the ICC has yet to indict anyone for murder or sexual violence in Mali, and shows the importance of the verdict.<sup>104</sup>

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97. Paul Williams & C. Danae Paterson, *Tear It All Down: The Significance of the Al-Mahdi Case and the War Crime of Destruction of Cultural Heritage*, WORLDPOST (Sept. 26, 2016, 11:23 AM EST), [http://www.huffingtonpost.com/entry/tear-it-all-down-the-significance-of-the-al-mahdi\\_us\\_57e93786e4b09f67131e4b52](http://www.huffingtonpost.com/entry/tear-it-all-down-the-significance-of-the-al-mahdi_us_57e93786e4b09f67131e4b52).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. See Kersten, *supra* note 36.

103. *Id.*

104. *Id.*



Scholars have also noted the impact of the “Lubanga Syndrome,” in which anecdotal evidence shows how the impact of the Lubanga case has generated a fear of arrest among Congolese militia leaders.<sup>105</sup> Reportedly, the Lubanga Syndrome has induced Congolese militia leaders to release child soldiers from their ranks and into Disarmament Demobilization and Reintegration (DDR) programs.<sup>106</sup> Other early studies on prosecutorial deterrence show very promising results in terms of halting hostilities in civil wars and violence against civilians, as well as increasing domestic prosecutions of lower-level officials in accordance with ICC prosecutions.<sup>107</sup> Similar phenomena could hopefully lead to analogous deterrence effects related to the crime of destruction of cultural property.

## 2. Selectivity in Al Mahdi’s Prosecution is Inevitable and Still Possesses a Deterrent Effect

The argument that Al Mahdi was too small of a player in the Timbuktu travesty to make the ICC prosecution meaningful does not hold merit. Since the complementarity principle ensures that the ICC functions in a selective manner, the court has to manage expectations and selectively pick and choose which cases to investigate and prosecute.<sup>108</sup> Fatou Bensouda, the Prosecutor of the Court, has exercised her prosecutorial discretion in themes, whereby nationally under-prosecuted crimes are prioritized to help shatter domestic cultures of impunity.<sup>109</sup> Ms. Bensouda had, until the Al Mahdi case, chosen the prosecutorial themes of gender-based crimes and crimes against children.<sup>110</sup> Although not as severe as violence targeted

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105. See generally Mark Kersten, *The International Criminal Court and Deterrence—The “Lubanga Syndrome,”* JUST. CONFLICT (Apr. 6, 2012), <https://justiceinconflict.org/2012/04/06/the-international-criminal-court-and-deterrence-the-lubanga-syndrome/> (discussing how guilty verdicts for Congolese leaders that employed child soldiers has deterred them from continuing the practice).

106. *Id.*

107. See Kevin Burke, *The Deterrent Effect of the International Criminal Court*, CITIZENS FOR GLOBAL SOLUTIONS (Mar. 2, 2015), <https://globalsolutions.org/blog/2015/03/Deterrent-Effect-International-Criminal-Court#.WpByUudME2w>.

108. See Mohammad Hadi Zakerhossein, *The Al-Mahdi Case and Thematic Prosecution*, JUST. HUB (Sept. 8, 2016, 13:40), <https://justicehub.org/article/al-mahdi-case-and-thematic-prosecution>.

109. *Id.*

110. *Id.*

towards children or based on a person's gender, Ms. Bensouda, by selecting Al Mahdi's case to be prosecuted, has added a vision to the attacks on the cultural properties and has projected the idea of "cultural genocide."<sup>111</sup>

Other factors aside from prosecutorial discretion also played a role in opening a case against Al Mahdi. Operational and practical factors, such as being able to collect relevant and necessary evidence, are key when the ICC determines where to invest their scarce resources.<sup>112</sup> The Al Mahdi case took these factors into consideration when they chose to prosecute Al Mahdi under the war crimes provision of the Rome Statute.<sup>113</sup> Therefore, the absence of Ms. Bensouda tacking on sexual crimes in Al Mahdi's case should not lament this case as a failure or exclusion; rather, observers should focus on the success that the ICC had in getting a guilty verdict, which strengthened a new criminal theme that can lead to future deterrence.<sup>114</sup> Moreover, the fact that the ICC prosecuted this case without expending many resources gives hope that cultural property cases can be more efficient and "easier" cases to prosecute.<sup>115</sup>

### 3. Al Mahdi's Prosecution Can Help Protect Africa from International Crimes; It Does Not Target Them

While the ICC has tended to focus its resources towards African nations, the prosecution of Al Mahdi in particular can actually have a positive effect on the continent. Mali referred Al Mahdi's case to the ICC to get assistance in the investigation.<sup>116</sup> Because the ICC does not have a police or military force and operates without an enforcement body, it is highly dependent on state cooperation to execute arrest warrants, provide access to evidence, enable the relocation of witnesses, and ensure the enforcement of sentences.<sup>117</sup> The case showed that two African nations—Mali and Niger—cooperated together to work with the ICC, and combated the perception that the continent is somehow

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See Kersten, *supra* note 36.

116. Press Release, Int'l Fed'n for Human Rights, Q&A: The Al Mahdi Case at the ICC (Aug. 17, 2016), <https://www.fidh.org/en/region/Africa/mali/q-a-the-al-mahdi-case-at-the-icc>.

117. Kersten, *supra* note 105.

“against” the court.<sup>118</sup> Because prosecutions for the gender-based and sexual crimes in Mali have been out of the ICC’s grasp, the court showed that it could help bring justice to war-torn African nations that are incapable of carrying out investigations.<sup>119</sup>

A unique provision in the Rome Statute also allows victims to participate in Al Mahdi’s trial. Article 68.3 guarantees victims a right to participate in trial proceedings.<sup>120</sup> Nine applications were filed for participation in Al Mahdi’s trial.<sup>121</sup> The Trial Chamber found that each of the victims suffered “personal and economic moral harm” as a result of Al Mahdi’s actions.<sup>122</sup> The African victims who participated in this trial demonstrate how the destruction of cultural property damages more than buildings and monuments; it also harms the social, cultural, and historic fabric of communities.<sup>123</sup> This participation in proceedings shows the transparency of the ICC and its willingness to bring justice to those harmed by war crimes, which is something that African nations themselves cannot always do.

#### B. A SOLUTION TO THE ICC’S LEGITIMACY PROBLEM: U.N. SECURITY COUNCIL SUPPORT FOR PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY

The objectives of the United Nations (“U.N.”) are laid out in the U.N. Charter’s Preamble, whereby human rights and the respect for obligations arising from treaties and other sources of international law are paramount.<sup>124</sup> Today, the U.N. faces a plethora of issues<sup>125</sup> that have to be dealt with in a systematic manner. However, with 193 member nations<sup>126</sup> and the potential of a veto on any proposed course of action from members of the P5, the U.N. has struggled with maintaining international peace

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118. Kersten, *supra* note 36.

119. *See id.*

120. Rome Statute, *supra* note 31, art. 68(3).

121. Int’l Fed’n for Human Rights, *supra* note 116.

122. *Id.*

123. *Id.*

124. *See* U.N. Charter pmbl.

125. *See generally What We Do*, UNITED NATIONS PEACEKEEPING, <https://peacekeeping.un.org/en/what-we-do> (discussing the various issues that the U.N. faces in its efforts to bring peace to the world).

126. *Functions and Powers of the General Assembly*, UNITED NATIONS, <http://www.un.org/en/ga/about/background.shtml> (last visited Mar. 9, 2018).

in recent years.<sup>127</sup> Decisive action from the UNSC is needed to start saving cultural property from being destroyed and thwarting the rogue terrorists who are undertaking these heinous acts. A concentrated global response to the destruction of cultural property led by the P5 would help prevent this issue and also bring more legitimacy and opportunity to the ICC to expand their prosecutions towards other war crimes in the future.

1. Increased Cooperation Between the P5 and ICC is Paramount to Streamlining Investigations and Ultimately Preventing War Crimes and Crimes Against Humanity

The Rome Statute reserved a role for the UNSC in regards to the ICC, “whereby the Council can refer situations in which one or more crimes appears to have been committed in any State, regardless of whether it has ratified the Statute of the Court, under Chapter VII of the UN Charter.”<sup>128</sup> The ICC, however, is an independent “branch” that does not rely on UNSC referrals, and can operate without UNSC consent.<sup>129</sup> When the UNSC has chosen to intervene and refer cases to the ICC, the results were mixed. Twice in its history the UNSC has made use of its powers to refer situations in non-Party States to the ICC: in Sudan (Darfur) in 2005, and in Libya in 2011.<sup>130</sup> Scholars have applauded these referrals by the UNSC as part of a broader effort to “maintain international peace and security.”<sup>131</sup> Others, however, have been critical of the P5’s role in bringing visible success to these conflicts.<sup>132</sup> In order to bring individual

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127. See Somini Sengupta, *The United Nations Explained: Its Purpose, Power and Problems*, N.Y. TIMES (Sept. 18, 2016), [https://www.nytimes.com/2016/09/19/world/what-is-united-nations-un-explained.html?\\_r=0](https://www.nytimes.com/2016/09/19/world/what-is-united-nations-un-explained.html?_r=0).

128. Tiina Intelmann, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, WORLDPOST, [http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council\\_b\\_3334006.html](http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html) (last visited Mar. 9, 2018).

129. See *id.*

130. *Id.*

131. See, e.g., Honorable Navanethem Pillay, *Encouraging UN Security Council Support of ICC Cases Starts with Practical Steps*, INT’L CRIM. JUST. TODAY, Dec. 10, 2015, <https://www.international-criminal-justice-today.org/arguendo/encouraging-un-security-council-support-of-icc-cases-starts-with-practical-steps/>.

132. See Press Release, Security Council, Amid Growing Brutality in Darfur, International Criminal Court Prosecutor Urges Security Council to Rethink

accountability to those responsible for destroying cultural property, the P5 and the ICC need to take practical steps that can encourage better coordination for current and future investigations.

First, the ICC Assembly of States Parties needs to create a formal mechanism whereby both UNSC members that are also members of the ICC and the P5 meet regularly to discuss relevant issues.<sup>133</sup> With an improved relationship centered on communication in regards to the destruction of cultural property, local conditions where it is taking place, and the domestic judicial environment, it is more likely that the UNSC as a whole will be better suited to understand these pressing issues. The United Kingdom and France should lead the way within this new commission, since they are both P5 members and parties to the Rome Statute.<sup>134</sup> Their leadership would ensure the mechanism's stability and continuity.<sup>135</sup> France has already taken leadership in terms of attempting to curtail the use of the P5 veto power in cases where a mass atrocity has been ascertained.<sup>136</sup>

This kind of agenda, while ambitious, is necessary to mend the contentious relationship between the P5 and the ICC, and to eventually make it unimaginable for a P5 member to veto resolutions that refer genocide, crimes against humanity, and larger-scale war crimes to the ICC.<sup>137</sup> A "Responsibility Not to Veto" is perhaps the most suitable way to improve UNSC-ICC relationship, given that customs and norms are pillars of the international legal order.<sup>138</sup> It is worth noting that the UNSC has been critical of ISIS's destruction of religious and cultural artifacts in Mosul, Iraq.<sup>139</sup> This kind of "peer pressure" from the world's most powerful countries is an important first step to recognizing and dealing with this humanitarian crisis. While it

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Tactics for Arresting War Crimes Suspects, U.N. Press Release SC/11696 (Dec. 12, 2014).

133. Pillay, *supra* note 131.

134. *See id.*

135. *Id.*

136. *See Why France Wishes to Regulate Use of the Veto in the United Nations Security Council*, FR. DIPLOMATIE, <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/france-and-the-united-nations/article/why-france-wishes-to-regulate-use>.

137. Pillay, *supra* note 131.

138. *Id.*

139. *See, e.g.*, Press Release, Security Council, Security Council Press Statement on ISIL's Destruction of Religious and Cultural Artefacts in Mosul, U.N. Press Release SC/11804-IK/700 (Feb. 27, 2015).

is extremely unlikely that a simple press release will deter ISIS fighters from destroying cultural and religious artifacts, it is nonetheless a vital first step to combating the problem. UNSC leadership in this arena is critical to preventing these mass atrocities in the future.

Second, an improved relationship between the P5 and ICC will have a deterrent effect towards those committing crimes against humanity and war crimes; other war crimes in addition to the destruction of cultural property will decrease as a result of this working relationship. Although less important than shocking acts of murder, torture, beating, or rape,<sup>140</sup> prosecuting the destruction of cultural property is attractive for a few reasons. For one, it will aid the ICC in improving their investigative and prosecutorial techniques. As the ICC improves its methods to gather evidence and witnesses, and works in harmony with member-states to bring more prosecutions, it may be able to shift its resources towards prosecuting the serious war criminals that are suspected of murder, rape, and torture. This is a goal that both the P5 and ICC should share.

Third, investigating the destruction of cultural property does not have to be done in times of war. Gathering evidence and putting together a successful case in a war-torn region under the rule of a despot may prove extremely difficult for ICC prosecutors, and is perhaps one of the primary reasons why they choose to stay away from more serious war crimes.<sup>141</sup> A prosecutor's ability to interview witnesses and collect evidence in response to cultural terrorists destroying cultural property is likely to be difficult to achieve when people in a village are being raped or pillaged. Thus, the conditions are oftentimes ideal for an international body to conduct a successful investigation. Lastly, if the P5 and the ICC choose to team up and combat the destruction of cultural property, they can preserve items and artifacts which hold economic, political, and social value for their nations and their peoples.<sup>142</sup> As a normative manner, cultural

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140. Sarah J. Thomas, *Prosecuting the Crime of Destruction of Cultural Property*, GENOCIDE WATCH, [http://www.genocidewatch.org/images/Cambodia\\_Prosecuting\\_the\\_Crime\\_of\\_Destruction\\_of\\_Cultural\\_Property.pdf](http://www.genocidewatch.org/images/Cambodia_Prosecuting_the_Crime_of_Destruction_of_Cultural_Property.pdf) (last visited Mar. 9, 2018).

141. See H.E. Judge, Second Vice-President of the International Criminal Court, Keynote Address at Salzburg Law School on International Criminal Law: The International Criminal Court – Current Challenges and Perspectives (Aug. 8, 2011).

142. See David W. Bowker et al., *Confronting ISIS's War on Cultural Property*, AM. SOC'Y INT'L L. (July 14, 2016), <https://www.asil.org/insights/>

property is important because it encompasses a nation's identity and past; it is not readily replaceable; once looted, defaced, or destroyed, it may be lost forever.<sup>143</sup> Instead of being a symbol of national heritage and pride, cultural property is being plundered and sold off to finance terrorist operations.<sup>144</sup> Because terrorist-laded countries such as Iraq and Syria are not members to the Rome Statute, the ICC does not have personal or territorial jurisdiction over them.<sup>145</sup> Thus, the UNSC needs to be willing and able to recommend prosecutions to the ICC in order to preserve cultural heritage when it is under siege. Scholars have proposed a number of other measures in the hopes of preventing, deterring, and punishing ISIS for its devastation of cultural property.<sup>146</sup> However, prosecutorial efforts are the most effective way to deter the destruction of cultural property now and into the future.

2. A P5-ICC Coalition Can Help Guide Domestic Militaries and Create International Legal Norms to Protect Cultural Property during Times of Armed Conflict

The Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law . . . .”<sup>147</sup> However, treaty law often leaves large gaps that need to be filled.<sup>148</sup> Those gaps are filled by customary international law, whereby the international community has developed a set of definable rules through custom that nations must accept as law.<sup>149</sup> Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) asserts that custom is “evidence of a general practice accepted as law” that forms a fundamental part of

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volume/20/issue/12/confronting-isis-war-cultural-property.

143. *Id.*

144. *Id.*

145. *Id.*

146. *See, e.g., Id.* (discussing robust international measures to prevent the destruction of cultural property).

147. Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1115 U.N.T.S. 331.

148. *See* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 116 n.2 (2005).

149. *See* Gerald Postema, *Custom in International Law: A Normative Practice Account*, in THE NATURE OF CUSTOMARY LAW 279, 279–82 (Amanda Perreau-Saussine & James B. Murphy eds., 2007) (discussing traditional and modern approaches to establishing customary law).

international law.<sup>150</sup> While the United States has signed the Vienna Convention Treaty, the United States Senate has not given its advice and consent, and therefore has not ratified it.<sup>151</sup> However, the United States considers many of the provisions of the Vienna Convention to constitute customary international law on the law of treaties.<sup>152</sup> Because the United States is arguably the most powerful member of the P5 that has not ratified the Rome Statute, customary international law protecting cultural property should govern their armed forces in times of armed conflict.<sup>153</sup> A strong P5-ICC alliance could therefore create effective mechanisms and customary international legal norms to protect cultural property in times of armed conflict.

Furthermore, it is imperative for armed forces to protect cultural property in times of armed conflict. Avoidable destruction of cultural property by military forces, especially foreign military forces, endangers mission success.<sup>154</sup> The destruction of cultural property arouses the hostility of local populations, offers the adversary a potent propaganda weapon, undermines support on the home front among allies for the continued pursuit of victory, and provides a source of income for hostile non-state armed groups and terrorist organizations;<sup>155</sup> similar to the one Al Mahdi led.

On the other hand, if a strong alliance is formed between the P5 and the ICC that lays out rules protecting cultural property in times of war, foreign militia can win the hearts and minds of those affected by the destruction. While this Note has addressed numerous sources of international law that have attempted to govern the destruction of cultural property, there is still a gap in the literature. The literature has failed to address how a strong relationship between the P5 and the ICC can create international legal norms for armed forces to follow in their

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150. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

151. See *Vienna Convention on the Law of Treaties*, U.S. DEP'T STATE, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Mar. 9, 2018).

152. *Id.*

153. See Int'l Comm. of the Red Cross, *Rule 38: Attacks Against Cultural Property*, INT'L HUMANITARIAN L. DATABASE, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (last visited Mar. 9, 2018).

154. See ROGER O'KEEFE ET AL., PROTECTION OF CULTURAL PROPERTY: MILITARY MANUAL ¶ 5 (United Nations Educ. Sci. & Cultural Org. ed. 2016) <http://unesdoc.unesco.org/images/0024/002466/246633e.pdf>.

155. *Id.* ¶ 5.



efforts to prevent destruction—especially in the aftermath of Al Mahdi’s trial. Both the P5 and ICC should look to build on the momentum of Al Mahdi’s guilty verdict to streamline communication between member state’s militias and the ICC in regards to the conditions surrounding cultural property in times of armed conflict.

The reason for the P5 and ICC to govern the protection of cultural property in times of war is twofold. First, a unifying role in articulating resources, procedures, and norms would be advantageous to operations as sovereign militaries assess, plan, and implement the international customary rules to protect cultural property. This would increase cooperation among states, and militaries could share technology and information with each other in their joint efforts to protect cultural property. For example, best practice dictates that particularly significant cultural property should be placed on a no-strike list to be utilized by military planners during target selection.<sup>156</sup> This has proved successful in Iraq, Libya, Syria, and Mali, all of whom are rich in cultural heritage sites.<sup>157</sup> Because the “boots on the ground” will be more informed on the country conditions where they are stationed, they can also employ the help of civilian experts in their efforts to protect the cultural heritage sites. As mentioned earlier, this will help win the “hearts and minds” of the civilian populations.<sup>158</sup> The United States and other international organizations already have developed a range of training materials for military and associated personnel on the protection of cultural property in both armed conflict and stabilization missions.<sup>159</sup>

Consolidating these methods and sharing resources with the rest of the P5 and ICC would only strengthen domestic militaries’ efforts in protecting cultural property. Second, because the P5 countries are often the ones who occupy other nations in times of armed conflict, international law imposes temporary duties on them to act as a “custodian” until the sovereign’s governing authority is restored.<sup>160</sup> Thus, if the goal is for the occupying hosts to protect the country they are occupying, it is best if they write the rules to protect cultural property. These countries are the ones who are familiar with the

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156. *Id.* ¶ 99.

157. *Id.*

158. *See infra* Section II(B)(2).

159. *See Id.* ¶¶ 62–63.

160. *Id.* ¶ 163.

conditions on the ground in some of these war-torn countries, so working together with other P5 nations, while aiding the ICC in their prosecutorial efforts, is the most effective and efficient way to protect cultural property now and into the future.

### III. CONCLUSION

The prosecution of Ahmad Al Faqi Al Mahdi represents a significant shift in the international community's attitude towards protecting cultural property. Never before has the destruction of cultural property been prosecuted as a standalone war crime. The fact that Al Mahdi was a member of a known terrorist organization makes the prosecution all the sweeter for those committed to protecting their cultural heritage from being plundered by these rebels.

Although ISIS and other non-state actors are not parties to the many declarations and treaties that protect cultural property, they are still bound by IHL and customary international law.<sup>161</sup> The ICC Prosecutor, despite the many hurdles, needs to attempt to build a relationship with the UNSC and other nation states—especially African states—to form a strong coalition to combat the destruction of cultural property. However, this relationship needs to be coequal, and nation states need to be more receptive of the Prosecutor's role, and the challenges that she faces when states continuously try to undermine the ICC's legitimacy. The hope is that Al Mahdi's prosecution spurs even more action from both domestic governments and the ICC, and that region-by-region, country-by-country, cultural property can be protected for generations to come.

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161. Bowker et al., *supra* note 142.