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Looking Humanity in the Eye and Seeing its Loss in the Eyes of the ICC: An Evaluation of Daesh's Destruction of Palmyra using the Gravity Assessment Made by the ICC Prosecutor in the *Al Mahdi* Case

Abstract: Under international law, cultural property is protected by a broad range of legal instruments prohibiting its destruction during armed conflicts. At the same time, the premise that international crimes must be of a sufficient gravity plays a crucial role in international criminal law. In this sense, the enforcement of the legislative framework aimed at the protection of cultural property before an international court is only possible if the crime concerned is sufficiently grave in the context of international criminal law. While the latest gravity assessment regarding such a crime was made by the International Criminal Court (ICC) Prosecutor in *Al Mahdi* case, previous examples include similar assessments made by the International Criminal Tribunal for the former Yugoslavia for the shelling

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of Dubrovnik in the *Jokić* and *Strugar* cases. Recently, in addition to its humanitarian plight on a horrible scale, the Syrian Civil War has also seriously affected all six World Heritage Sites within its territory, including the Site of Palmyra. As a result of this ongoing armed conflict, the monuments in the Site of Palmyra experienced widespread damage inflicted by Daesh. Having reference to the ICC Prosecutor's assessment of the gravity of the crime in the *Al Mahdi* case, this article analyses the legal arguments which support the thesis that its destruction is clearly grave enough to take further action by the international community, even if not yet by the ICC due to its lack of jurisdiction.

Keywords: protection of cultural property, gravity assessment, the Site of Palmyra, ICC Prosecutor, *Al Mahdi* case

Introduction

In a remote past Hugo Grotius, the father of the modern discipline of international law,¹ believed that sovereignty was not absolute with regard to injuries that “excessively” violate the laws of nature or of nations.² For ages, this approach has been embodied in the concept that international crimes must be of a sufficient gravity to play a pivotal role in justifying the creation of institutions to adjudicate them and in focusing on the most serious crimes that concern the entire international community.³ It is noteworthy that this is also the case for the war crime of destruction of cultural property, which is often considered as being auxiliary to more “serious” crimes such as crimes against humanity and genocide in the realm of international criminal law.⁴ Indeed, armed conflicts continue to represent a serious threat to the integrity of cultural property, which often materializes as a war crime in the form of the destruction of monuments, religious sites, museums, libraries, etc.⁵ Some examples in recent times include the shelling of the Old Town of Dubrovnik during

¹ In using this epithet, the author was inspired by Hamilton Vreeland's book. See: H. Vreeland, *Hugo Grotius, the Father of the Modern Science of International Law*, Oxford University Press, New York 1917, p. 258.

² H. Grotius, F.W. Kelsey, *De Jure Belli Ac Pads Libri Tres*, Clarendon Press, Oxford 1925.

³ M. El Zeidy, *The Gravity Threshold under the Statute of the International Criminal Court*, “Criminal Law Forum” 2008, Vol. 19, p. 36.

⁴ See e.g. M. Kersten, *Big Fish or Little Fish - Who Should the International Criminal Court Target?*, “Justicehub”, 31 August 2016, <https://justicehub.org/article/big-fish-or-little-fish-who-should-international-criminal-court-target> [accessed: 6.01.2019].

⁵ J. Hladik, *Protect Cultural Property in the Event of Armed Conflict*, Program and Meeting Document, 2005, <https://unesdoc.unesco.org/ark:/48223/pf0000138645> [accessed: 25.11.2018].

the war in the former Yugoslavia and the destruction of ten of the most important and well-known sites in Timbuktu during the Malian Civil War. In the latter incident, the war crime of directing attacks against cultural property was considered to be sufficiently grave for the prosecutor to crack open the door to the crime as an admissibility criteria before the International Criminal Court (ICC). Thus, the *Al Mahdi* case has come to signify the latest gravity assessment made by an international tribunal regarding such a crime.

The Syrian Civil War, which broke out in March 2011,⁶ is another prominent example of the disastrous effects of armed conflicts on cultural heritage. As a recent example, some of the monuments in the Site of Palmyra were destroyed by the Islamic State of Iraq and Syria ("Daesh"). Each monument in the Site is of incredible cultural and historical significance for the international community; hence their destruction constitutes a great loss to humanity.⁷ This article will draw attention to the gravity of this loss in the eyes of the ICC Prosecutor by first putting a spotlight on the gravity assessment made by the prosecutor in the *Al Mahdi* case, and secondly exploring the destruction in Palmyra in the context of this assessment, while putting aside the discussion as to jurisdiction of the Court over the matter. In doing so, it will also illustrate a comparative analysis of the gravity assessment made by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Jokić* and *Strugar* cases with that of the ICC in the *Al Mahdi* case. This is because the experiences and jurisprudence of international criminal tribunals, including that of the ICTY, had a strong impact on the practice of the ICC in the *Al Mahdi* case⁸ and the same reasoning could also be made in terms of the gravity of the crimes against cultural property.

A normative research method is employed to elaborate on this research topic. Section 2 specifies the international legal framework protecting cultural property. In Section 3, the "sufficient gravity" requirement with reference to the protection of cultural property will be analysed by considering the gravity assessment made by the ICTY in the *Strugar* and *Jokić* cases. Next, Section 4 is devoted to the development of the gravity assessment within the ICC Statute and the assessment made by the Court in the *Al Mahdi* case is analysed. Moreover, a comparative analysis is made of that assessment with the assessment made by the ICTY. Following this, Section 5 delineates Daesh's destruction of the Site of Palmyra in the context of the assessment made in the *Al Mahdi* case. Finally, Section 6 draws conclusions.

⁶ A.W. Agha, *Issue 2: Syrian Armed Conflict*, "Journal of East Asia and International Law" 2013, Vol. 6, p. 308.

⁷ V.H. Caitlin, *Killing a Culture: The Intentional Destruction of Cultural Heritage in Iraq and Syria under International Law*, "Georgia Journal of International & Comparative Law" 2016, Vol. 45, p. 196.

⁸ K. Wierczyńska, A. Jakubowski, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, "Chinese Journal of International Law" 2017, Vol. 16, p. 709.

The Criminalization of Destruction of Cultural Property in International Law

The legal framework for the protection of cultural property until the 1990s

On the international normative level, the first legal instrument that prohibited the destruction of cultural property was the Lieber Code, created in the second half of the 19th century during the American Civil War.⁹ It was only in 1899 that States formally adopted the first treaties on the law of war, in which some norms prescribe binding obligations with regard to cultural heritage in particular.¹⁰ These norms existed in the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land,¹¹ which was later amended as the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.¹² Article 27 of the 1907 Hague Convention (IV) provides that “all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments [...] provided they are not being used for military purposes”.

In the aftermath of the Second World War, the law of armed conflicts underwent a major development, in particular through the adoption of the four Geneva Conventions of 1949, supplemented in 1977 by two Additional Protocols. Article 53 of the Additional Protocol I (“AP I”) states that it is prohibited to commit any acts of hostility directed against historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of people; to use such objects in support of the military effort; or to make such objects the object of reprisals.¹³ Moreover, Article 16 of the Additional Protocol II (“AP II”) extends Article 53 of the AP I to non-international armed conflicts.¹⁴ Above all, the desire to prevent future attempts at destruction of cultural property such as those which occurred during the Holocaust resulted in the acknowledgement by the international community of the need for a separate instrument with the sole purpose of

⁹ Article 35 of the Lieber Code states that “classical works of art, libraries, scientific collections, or precise instruments must be secured against all available injury”. See D. Keane, *The Failure to Protect Cultural Property in Wartime*, “DePaul Journal of Art, Technology and Intellectual Property Law” 2004, Vol. 14, p. 3.

¹⁰ P. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO Publishing, London 1993, p. 248.

¹¹ 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, 29 July 1899, 32 Stat. 1803.

¹² Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277.

¹³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 7 December 1979, 1125 UNTS 3, art. 53.

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 7 December 1979, 1125 UNTS 609, art. 16. See E. Cunliffe, N. Muhesen, M. Lostal, *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, “International Journal of Cultural Property” 2016, Vol. 23, p. 6.

protecting cultural property during armed conflicts.¹⁵ Eventually this led to the adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.¹⁶ This Convention applies to immovable property of great importance to the cultural heritage of every people¹⁷ and it sets forth special legal measures at the international level for its safeguarding, with an exception for imperative military necessity.¹⁸

However, the protection of cultural property remained ineffective during the conflicts that took place at the end of the 1980s and beginning of the 1990s.¹⁹ During that period, non-international armed conflicts, particularly those relating to national, regional, ethnic, or religious motives, became the foremost cause of losses of cultural properties.²⁰ Hence, the 1999 Second Protocol to the 1954 Hague Convention was adopted to impose a higher threshold of protection for cultural property, especially for cultural property of the greatest importance for humanity.²¹ It essentially attempted to provide clarity as to when exactly the military necessity exception could be triggered.²² This was because the vagueness of the exception in the Convention was described as a serious weakness with respect to the basic principle of protection of cultural property.²³

The statutes of the ICTY and the ICC

Notwithstanding such contributions to the legal framework, the destruction of cultural property continued. In the 1990s the Balkan Wars witnessed attacks on many historical sites and cities, including the shelling of the Old Town of Dubrovnik, protected under the regime of the World Heritage Convention.²⁴ This cultural catastrophe, which resulted in irreparable historic and cultural losses, was certainly a compelling factor for the drafters of the ICTY Statute to produce a provision with

¹⁵ M. Ellis, *The ICC's Role in Combatting the Destruction of Cultural Heritage*, "Case Western Reserve Journal of International Law" 2017, Vol. 49, p. 35.

¹⁶ Y. Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC*, "Penn State International Law Review" 2005, Vol. 23, p. 860.

¹⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 7 August 1956, 249 UNTS 215, art. 1(a).

¹⁸ *Ibidem*, art. 4(1) and (2).

¹⁹ J. Hladik, *op. cit.*, p. 2.

²⁰ P. Boylan, *op. cit.*

²¹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 9 March 2004, 2253 UNTS 172, art. 10(a).

²² *Ibidem*, art. 6.

²³ J.M. Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, "International Review of the Red Cross" 1999, Vol. 81, p. 597.

²⁴ Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

regard to the destruction of cultural heritage.²⁵ Consequently, the ICTY was granted the power to prosecute persons violating the laws or customs of war, including but not limited to, “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” in accordance with Article 3(d) of the Statute.²⁶

Moreover, having the destruction of the Balkan Wars in mind the ICC Statute was created in a way that is unequivocal in declaring its intention to prosecute war crimes against cultural property.²⁷ Thus the Preamble of the ICC Statute states that all peoples are united by common bonds, their cultures pieced together in a shared heritage.²⁸ The destruction of cultural heritage falls within the ICC’s jurisdiction through Article 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute, which gives the Court jurisdiction in, respectively, international and non-international armed conflicts, over the war crime of “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, and historic monuments”. These statutes were instrumental in finding international criminal responsibility for the crime of destruction of cultural property in several trials, including those of Jokić, Strugar, and Al Mahdi.

Sufficient Gravity Requirement for the Protection of Cultural Property

Origin and purpose of the requirement

Addressing the Nazi atrocities in the aftermath of the Second World War before the International Military Tribunal at Nuremberg was a truly revolutionary step in light of the fact that the international community had failed to establish a court to prosecute the crimes committed during the First World War, notwithstanding the grave violations of international law which took place. Indeed, the gravity of the crimes provided the primary justification for the creation of the International Military Tribunal at Nuremberg, and no one felt a need to explain what made the crimes of the Holocaust grave.

Another turning point in this regard was the establishment of the ICTY in order to address the atrocities committed during the Yugoslav Wars in 1993.²⁹

²⁵ H. Walasek, *The ICTY and the Prosecution of Crimes Against Cultural and Religious Property*, “Ashgate”, 2015, <https://perma.cc/PAC2-3L63> [accessed: 5.01.2019].

²⁶ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993, 32 ILM 1159.

²⁷ M. Ellis, op. cit, p. 39.

²⁸ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 (“ICC Statute”).

²⁹ M. deGuzman, *How Serious are International Crimes? The Gravity Problem in International Criminal Law*, “Columbia Journal of Transnational Law” 2012, Vol. 51, p. 30.

The following year, the International Criminal Tribunal for Rwanda was created in response to the Rwandan genocide, which led to the brutal killings of an estimated one million men, women, and children in a mere three months.³⁰ In the creation of these tribunals, the rhetoric of gravity was again employed in order to justify international jurisdiction.³¹ That being said, during the time of their creation it was precisely the gravity of the crimes that seemed to be reflected in the purpose and the scope of the international courts created to prosecute the most serious crimes that concerned the entire international community.³²

Gravity assessment with regard to cultural property before the ICTY

The assessment standard in the case law of the Court

As stated above, Article 3(d) of the ICTY Statute ensures protection for cultural property. In addition, the case law of the Court constitutes an important source signalling the consideration of the gravity of breaches in the context of Article 3. In the *Prosecutor v. Tadić* case, the court found that Article 3 functions as a “residual clause” designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the Tribunal.³³ Accordingly, Article 3 confers on the Tribunal jurisdiction over any serious offence against international humanitarian law not covered by other articles of the Statute, provided that, *inter alia*, the violation is serious, namely that it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim(s).³⁴ Thus the applicability of Article 3(d) of the ICTY Statute is subject to the fulfilment of this requirement, which specifically draws attention to the grave nature of the crime. In short, an ex-post gravity assessment was needed in order to establish the jurisdiction of the ICTY over a crime within the scope of Article 3 of the Statute.

The gravity assessment made in the *Jokić* and *Strugar* cases before the ICTY

Pavle Strugar and Miodrag Jokić, members of the Yugoslav People's Army, were both charged under Article 3(d) of the ICTY Statute for the shelling of the Old Town

³⁰ M. Guy, *Readings of the Rwandan Genocide*, “African Studies Review” 2002, Vol. 45, p. 17.

³¹ See UN Security Council, *Security Council Resolution 808*, No. S/RES/808, 22 February 1993 (establishing the ICTY in response to “widespread violations of humanitarian law [...] including reports of mass killings and the continuance of [...] ethnic cleansing”).

³² M. Ochi, *Gravity Threshold Before the ICC*, “International Crime Database Brief”, January 2016, p. 2, <http://www.internationalcrimesdatabase.org/upload/documents/20160111T115040-Ochi%20ICD%20Format.pdf> [accessed: 5.11.2018].

³³ Appeals Chamber, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 91.

³⁴ *Ibidem*, para. 94.

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of Dubrovnik during the Yugoslav Wars.³⁵ In *Prosecutor v. Pavle Strugar*, the Court held that the consequences of attacks on cultural property could be grave. In its rather brief assessment with regard to the seriousness of the offence of damage to cultural property, the Court determined that cultural property is, by definition, of great importance to the cultural heritage of every people.³⁶ In doing so, the Court specifically relied on Article 1 of the 1954 Hague Convention. To this end, the Court held that the fact that the victim of the offence was understood as people rather than any particular individual was not an obstacle to finding that the offence itself involved grave consequences for the victim(s).³⁷ In other words, the emphasis was shifted away from individual victims and towards the region's shared heritage.³⁸ Consequently, the Court found that the offences under Article 3(d) of the Statute were serious violations of international humanitarian law, namely that the above-mentioned requirement was satisfied in the case.

In *Prosecutor v. Miodrag Jokić*, the Court stressed the fact that a crime falling within the meaning of Article 3(d) of the Statute represents a violation of values especially protected by the international community.³⁹ To support this argument, it referred to the preamble of the UNESCO World Heritage Convention.⁴⁰ It is significant to note here that the Old Town was put on the World Heritage List in 1979.⁴¹ Thus the Court came to the conclusion that the shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.⁴² Moreover, the Court also pointed out the irreversibility of the crime in the sense that the restoration of the cultural property in question, even if possible, can never return the buildings to their original state prior to the shelling attacks.⁴³ Furthermore, the Court stated that in addition to the protection attached to the civilian objects, it is prohibited to direct attacks against

³⁵ Trial Chamber II, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005 ("Strugar Judgment"); Trial Chamber I, *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Judgment of 18 March 2004 ("Jokić Judgment").

³⁶ Article 1 of the 1954 Hague Convention provides that: "For the purposes of the present Convention, the term cultural property shall cover: (a) movable or immovable property of great importance to the cultural heritage of every people". See *Strugar Judgment*, para. 231.

³⁷ *Strugar Judgment*, para. 232.

³⁸ R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, Cambridge 2006, p. 839.

³⁹ *Jokić Judgment*, para. 46.

⁴⁰ The Preamble of the UNESCO World Heritage Convention provides that "deterioration or disappearance of any item of cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world".

⁴¹ UNESCO, *World Cultural Heritage List: Old City of Dubrovnik*, <https://whc.unesco.org/en/list/95> [accessed: 29.11.2018].

⁴² *Jokić Judgment*, para. 51.

⁴³ *Ibidem*, para. 52.

this kind of property, regardless of the amount of actual damage that results.⁴⁴ Thus the Court held that since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on a cultural property such as the Old Town of Dubrovnik.⁴⁵ Therefore it could be argued that the Court made a comparison according to which the interest in protecting cultural property is greater than in the case of protection of civilian buildings, signifying the gravity of the destruction of cultural property.

Development of the Gravity Assessment in the ICC

The assessment standard in the ICC Statute

The ICC Statute, which established the world's first permanent international criminal tribunal, leaves no doubt in its Article 1 that the Court is intended to prosecute only the most serious crimes of international concern.⁴⁶ Moreover, Article 5 points out that the jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. Thus, the Statute sets forth a gravity threshold requirement for the admissibility of cases brought before the Court. Article 17(1)(d) provides that the Court shall determine that a case is inadmissible if it is not of sufficient gravity to justify further action by the Court. This provision is complemented by Article 53(1), which states that when determining whether there is a reasonable basis to proceed with an investigation into a situation, the prosecutor shall consider, *inter alia*, the gravity of the crime as an admissibility criterion within the meaning of Article 17. The gravity assessment thus plays a distinct role in guiding the Office of the Prosecutor's (OTP) discretionary selection of situations, as well as in its choice of cases to prosecute with respect to such situations.⁴⁷

The ICC Statute does not contain any definition with respect to when a case is of sufficient gravity, which constitutes one of the most contentious issues confronting the ICC Prosecutor.⁴⁸ Yet some documents regulating the operation of the OTP are of crucial importance in this regard. Firstly, the Office's *Policy Paper on Preliminary Examinations* addresses the process for the opening of an investigation into a situation as a whole within the meaning of Article 53(1). The Office's assessment of gravity includes both quantitative and qualitative considerations, and as stipulated in Regulation 29(2) of the Regulations of the Office, the factors that guide the Office's assessment include the scale, nature, manner of commission, and impact

⁴⁴ Ibidem, para. 50.

⁴⁵ Ibidem, para. 53.

⁴⁶ ICC Statute, art. 1. See S. SáCouto, K. Cleary, *The Gravity Threshold of the International Criminal Court*, "American Journal of International Law" 2008, Vol. 23, p. 816.

⁴⁷ M. Longobardo, *Factors Relevant for the Assessment of Sufficient Gravity in the ICC. Proceedings and the Elements of International Crimes*, "Zoom-In Questions of International Law" 2016, Vol. 36, p. 2.

⁴⁸ R. Murphy, *Gravity Issues and the International Criminal Court*, "Criminal Law Forum" 2006, Vol. 17, p. 282.

of the alleged crimes.⁴⁹ Secondly, the *Policy Paper on Case Selection and Prioritisation* sets out the considerations which guide the exercise of prosecutorial discretion in the selection of case(s) (resulting from a situation) for investigation and prosecution. Accordingly, the Office selects cases for investigation and prosecution in light of the gravity of the crimes, the degree of responsibility of the alleged perpetrators, and the potential charges.⁵⁰ At this stage, the gravity of crime(s) is assessed similarly to gravity as a requirement for admissibility under Article 17(1)(d), and its assessment includes the same aspects of the crime(s) specified above.⁵¹ Indeed, in the *Mavi Marmara* affair the OTP considered – taking into account the scale, impact, and manner of the alleged crimes committed – that the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court, and would therefore be inadmissible pursuant to Articles 17(1)(d) and 53(1)(b) of the Statute.⁵² That being said, the next sub-section examines the Article 53(1) Report concerning the situation in Mali in order to determine the gravity assessment applied by the OTP with regard to the war crime of directing attacks against cultural property.

Gravity assessment made by the OTP on the situation in Mali

On 27 September 2016, Al Mahdi was found guilty, according to Article 8(2)(e)(iv) of the ICC Statute, as a co-perpetrator of the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments, with reference to the destruction of ten of the most well-known cultural sites in Timbuktu.⁵³ Notably, in contrast to the cases discussed above, the *Al Mahdi* case delineated for the first time that attacks against cultural heritage could constitute the main charge in an international criminal case.⁵⁴

In its decision to investigate the situation in Mali, when addressing the gravity of the war crime of directing attacks against cultural property as a criterion for admissibility the OTP started by specifying the impact of the destruction of religious

⁴⁹ ICC-OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 61, https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [accessed: 13.11.2019].

⁵⁰ ICC-OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 34, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [accessed: 12.12.2018].

⁵¹ *Ibidem*, paras. 36 and 37.

⁵² ICC-OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia - Article 53(1) Report*, 6 November 2014, para. 150, [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov-2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov-2014Eng.pdf) [accessed: 13.11.2019].

⁵³ ICC, *Case Information Sheet: The Prosecutor v. Ahmad Al Faqi Al Mahdi*, No. ICC-PIDS-CIS-MAL-01-08/16, 20 March 2018, <https://www.icc-cpi.int/CaseInformationSheets/Al-MahdiEng.pdf> [accessed: 1.12.2018].

⁵⁴ M. Lostal, *The First of Its Kind: The ICC Opens a Case Against Ahmad Al Faqi Al Mahdi for the Destruction of Cultural Heritage in Mali*, "Global Policy Forum", 2 October 2015, <https://www.globalpolicy.org/home/163-general/52814-icc-opens-a-case-for-the-destruction-of-cultural-heritage-in-mali.html> [accessed: 10.12.2018].

and historical sites in Timbuktu.⁵⁵ It emphasized that during the period from 4 May through 10 July 2012 there was a series of intentional attacks perpetrated by the members of Ansar Dine and of Al-Qaeda in the Islamic Maghreb against at least nine out of 16 mausoleums, two out of the three great mosques listed in the UNESCO's World Heritage List, as well as against two historical monuments in Timbuktu, Mali.⁵⁶

As regards the nature of the crime, the OTP specified that the special nature of these objects made the intentional acts of destruction against them the commission of a war crime under Article 8(2)(e)(iv). To underline the special nature of the buildings in Timbuktu, the prosecutor relied on the International Committee of the Red Cross (ICRC) commentary, which reads as follows: "The cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people". The OTP stated that this was the case for the religious and historical buildings in Timbuktu, which belonged to the World's Heritage since 23 December 1988.⁵⁷

When it came to the manner of commission of the crime, the prosecutor pointed out that the buildings were destroyed intentionally and pursuant to the ideology of the alleged perpetrators.⁵⁸ Moreover, she also felt the need to specify the manner in which those buildings were damaged or destroyed, noting that the religious and historical sites were demolished with axes, hatchets, and picks, while the wooden parts thereof were burned.

Finally, the OTP evaluated the impact of the crime by emphasizing the effects of the destruction of religious and historical World Heritage sites in Timbuktu on the conscience of humanity.⁵⁹ In doing so, it referred to the solemn declaration of the African Union on the situation in Mali, wherein it condemned the destruction of the cultural, spiritual, and historical heritage of the region in Timbuktu.⁶⁰ Furthermore, the prosecutor also relied on the statement of the UN Secretary-General recognizing the attacked sites as part of the indivisible heritage of humanity.⁶¹ Consequently, considering all these factors together the prosecutor found that the destruction of religious and historical sites in Timbuktu was grave enough to justify further action by the Court within the meaning of Article 17(1)(d).⁶²

⁵⁵ ICC-OTP, *Situation in Mali – Article 53(1) Report*, 16 January 2013, para. 154, https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf [accessed: 6.01.2019].

⁵⁶ UNESCO, *World Cultural Heritage List: Timbuktu*, <https://whc.unesco.org/en/list/119> [accessed: 5.01.2019].

⁵⁷ ICC-OTP, *Situation in Mali...*, para. 155. See also: K. Wierczyńska, A. Jakubowski, *op. cit.*, p. 710.

⁵⁸ ICC-OTP, *Situation in Mali...*, para. 156.

⁵⁹ *Ibidem*, para. 157.

⁶⁰ *Ibidem*, para. 158.

⁶¹ *Ibidem*, para. 159.

⁶² *Ibidem*, para. 160.

Analysis of the OTP's assessment and its comparison with the ICTY

To start with, the ICC explicitly stated in the *Al Mahdi* case that the jurisprudence of the ICTY was of limited guidance for the case at hand, since the ICTY Statute did not govern “attacks” against cultural objects but covered their “destruction or willful damage”, hence the legal contexts were different.⁶³ Nevertheless, a comparison of the assessments made by these two courts regarding the gravity of these crimes is instructive as the assessments possess striking similarities with one another. Similar to the assessment made by the prosecutor in the *Al Mahdi* case, the ICTY had also considered the impact of the crime by referring to the fact that the City of Dubrovnik is a UNESCO World Heritage Site. Furthermore, it could also be said that the nature of crime was touched upon by the ICTY in the *Strugar* and *Jokić* cases to a certain degree, as both referred to the irreversible nature of the crime. Finally, the impact of crime was also reflected in the Court's holding that the attack on the Old Town of Dubrovnik was also directed against the cultural heritage of humankind. Yet, unlike the assessment made by the prosecutor in the *Al Mahdi* case, the ICTY did not make any reference to the intention, motive, or the means used by the perpetrators and did not explain the manner of the crime committed in those cases.

An Analysis of the Destruction of Cultural Property by Daesh in the Site of Palmyra

The armed conflict in Syria started in March 2011 and constantly escalated, leading to significant violence and the degradation of humanitarian conditions.⁶⁴ Moreover, cultural property has seriously been affected at the front lines of the war in the country.⁶⁵ For this reason all six of Syria's Cultural Heritage sites have, since 2013, been placed on UNESCO's List of World Heritage in Danger, as their integrity was to varied degrees compromised after the outbreak of the conflict.⁶⁶ Yet it is not possible to recount the full extent of the damage and destruction in Syria in this article due to the fact that the war is still ongoing and that this conflict is particularly complex due to the large number of non-state actors involved.⁶⁷ It will therefore be

⁶³ *Prosecutor v. Al Mahdi* (Case No. ICC-01/12-01/15-171), Judgment of 27 September 2016, para. 16.

⁶⁴ UNESCO, *State of Conservation of the Properties Inscribed on the List of World Heritage in Danger*, No. WHC/18/42.COM/7A.Add, 28 May 2018, <https://whc.unesco.org/archive/2018/whc18-42com-7AAdd-en.pdf> [accessed: 13.07.2019].

⁶⁵ P.L. Mahnad, *Protecting Cultural Property in Syria: New Opportunities for States to Enhance Compliance with International Law*, “International Review of the Red Cross” 2019, Vol. 99, p. 1055.

⁶⁶ The “danger listing” is intended to mobilize all possible support for the safeguarding of the listed property. See: UNESCO, *World Heritage Committee Report - 37th Session*, No. WCH13/37.COM/7B.Add, 17 May 2013, <http://whc.unesco.org/archive/2013/wh13-37com-7B-Add-en.pdf> [accessed: 10.07.2019].

⁶⁷ E. Cunliffe, N. Muhsen, M. Lostal, op. cit., p. 19.

more instructive to consider the disastrous effect caused by the most prominent of those actors, namely the attacks of Daesh against the Site of Palmyra.

As was indicated above, in its Article 53(1) Report regarding the situation in Mali the OTP assessed the gravity of the destruction of religious and historical sites in Timbuktu with reference to its scale, nature, manner of commission, and impact in line with Regulation 29(2) of the Regulations of the Office. Thus the analysis of the destruction of the Site of Palmyra by the OTP will necessarily require a consideration of these same aspects for the situation in Palmyra.

Scale of the crime

During its occupation of the city, Daesh intentionally destroyed some of the standing structures in the Site of Palmyra which were inscribed on UNESCO's World Heritage List in 1980, and also designated as national monuments by the Syrian government pursuant to its domestic Antiquities Law.⁶⁸ On 27 June 2015, the Lion of Al-lāt was severely damaged by Daesh.⁶⁹ During the period between 23 and 30 August 2015, Daesh detonated a large quantity of explosives inside the Temple of Baalshamin, completely destroying the building.⁷⁰ Furthermore, it partially demolished the Temple of Bel by explosives.⁷¹ On 4 October 2015, the Monumental Arch was destroyed using dynamite.⁷² Syrian government forces, supported by Russian airstrikes, recaptured Palmyra on 27 March 2016.⁷³ Even though Daesh briefly reoccupied the city on 11 December 2016,⁷⁴ the Syrian Army retook Palmyra on 2 March 2017.⁷⁵ During its second occupation of the city, Daesh intentionally

⁶⁸ UNESCO, *World Cultural Heritage List: Site of Palmyra*, <http://whc.unesco.org/en/list/23> [accessed: 1.07.2019].

⁶⁹ *Isis Militants Destroy 2,000-year-old Statue of Lion at Palmyra*, "The Guardian", 2 July 2015, <https://www.theguardian.com/world/2015/jul/02/isis-militants-destroy-palmyra-stone-lion-al-lat> [accessed: 13.07.2019].

⁷⁰ The temple's destruction was also announced by the head of the Syrian Director-General of Antiquities and Museums Maamoun Abdulkarim. See *Palmyra's Baalshamin Temple Blown up by IS*, "BBC News", 9 September 2015, <https://www.bbc.com/news/world-middle-east-34036644> [accessed: 12.07.2019].

⁷¹ S. Westall, *Islamic State Destroys Part of Syria's Temple of Bel*, "Reuters UK", 30 August 2015, <https://uk.reuters.com/article/uk-mideast-crisis-syria-bel/islamic-state-destroys-part-of-syrias-temple-of-bel-monitors-idUKKCN0QZ0XO20150830> [accessed: 3.07.2019].

⁷² *ISIL Blows up Arch of Triumph in Syria's Palmyra*, "Al Jazeera", 5 October 2015, <https://www.aljazeera.com/news/2015/10/isis-blows-arch-triumph-syria-palmyra-151005033238445.html> [accessed: 1.07.2019].

⁷³ D. Evans, *Syrian Army, with Russian Air Support, Advances Inside Palmyra*, "Reuters UK", 25 March 2016, <https://uk.reuters.com/article/uk-mideast-crisis-syria-idUKKCN0WR0R8> [accessed: 3.07.2019].

⁷⁴ S.E. Williams, *Isil Retakes Historic City of Palmyra*, "The Telegraph", 11 December 2016, <https://www.telegraph.co.uk/news/2016/12/10/islamic-state-back-unesco-world-heritage-city-palmyra-surprise/> [accessed: 4.07.2019].

⁷⁵ L. Dearden, *Isis Driven Out of Ancient Syrian City of Palmyra for Second Time*, "The Guardian", 2 March 2017, <https://www.independent.co.uk/news/world/middle-east/isis-palmyra-syria-driven-out-second-time-islamic-state-ancient-roman-ruins-assad-executions-a7607351.html> [accessed: 3.07.2019].

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attacked the ancient Roman Tetraplion and part of the Roman Theater during the period between December 2016 and February 2017.⁷⁶

Nature of the crime

According to the wording of the ICC Statute, the objects of an offence under Article 8(2)(e)(iv) have a special protection. The buildings listed in the ICC Statute can be classified into four main categories: cultural objects; places for the collection of those in need; institutions dedicated to religion; and others dedicated to education.⁷⁷ Cultural objects can be defined by referring to the definition of cultural property in treaty law, including the 1954 Hague Convention.⁷⁸ Moreover, it was stated in the *Martić* case before the ICTY that institutions dedicated to religion or education are protected as long as they meet the special requirement of cultural heritage of people, meaning objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.⁷⁹ As described above, these criteria were used by the ICC Prosecutor for the mausoleums and mosques in the *Al Mahdi* case, and Article 53 of the AP I as well as the ICRC commentary were deemed to confirm the special protection enjoyed by institutions dedicated to religion.⁸⁰ Yet, unlike in the *Al Mahdi* case, the monuments in the Site of Palmyra are cultural objects within the meaning of Article 1(a) of the 1954 Hague Convention, hence fall under the prohibition provided in Article 8(2)(e)(iv).⁸¹ Indeed, this could also be reinforced by the fact that the Site of Palmyra has been on the World Heritage List since 1980, since the fact that destroyed objects in Timbuktu were World Heritage Sites was also used by the prosecutor in order to justify their destruction falling under Article 8(2)(e)(iv).

Furthermore, as explicitly stated in Article 8(2)(e)(iv), military objectives may constitute an exception to the ambit of protection provided in this Article. For international armed conflicts, military objectives are defined by Article 52(2) of the AP I as “objects which by their nature, location, purpose or use make an effective

⁷⁶ *ISIS Destroys Part of Roman Theater in Palmyra*, “Reuters”, 20 January 2017, <https://www.rt.com/news/374315-syria-palmyra-roman-theatre/> [accessed: 5.07.2019].

⁷⁷ M. Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels 2017, p. 172.

⁷⁸ *Strugar* Judgment, para. 230.

⁷⁹ Trial Chamber I, *Prosecutor v. Milan Martić*, Case No. IT-95-11, Judgment of 12 June 2007, para. 97.

⁸⁰ It was stated in the commentary that the cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people. See: Y. Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Geneva 1987.

⁸¹ The article states that “the term ‘cultural property’ shall cover movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites”. See Article 1(a) of the 1954 Hague Convention.

contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Although this definition was not specified in AP II – which relates to non-international armed conflicts – the ICRC stated in its study on customary international humanitarian law that it is subsequently incorporated into treaty law applicable in non-international armed conflicts, such as the Second Protocol to the 1954 Hague Convention and that it is considered customary international law in both international and non-international armed conflicts.⁸² Hence, even though Syria is not a State Party to the Second Protocol, it could be argued that it is bound by this definition through its customary international law status. Therefore, unlike the *Al Mahdi* case, this criterion should be briefly discussed with respect to the destruction carried out at the Site of Palmyra. Overall, it could be clearly said that within Syria there is one general conflict of a non-international character between the Syrian Army and a number of different parties, including Daesh.⁸³ Against this backdrop, despite Palmyra having witnessed intense confrontations over the capture of the city, at the time of the destruction of the objects in the Site of Palmyra, the city was under the complete control of Daesh. Thus, it could be argued that none of the monuments in the Site constituted a military objective making an effective contribution to military action when Daesh attacked them hence they do not fall under the exception provided in Article 8(2)(e)(iv).

Manner of commission

First of all, Daesh intentionally destroyed some of the most important objects in the Site of Palmyra. The 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage states that intentional destruction is an act intended to destroy cultural heritage, in whole or in part and thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law.⁸⁴ In this sense, the sole fact of Daesh releasing several videos of their systematic destruction of cultural heritage makes it clear that the destruction was intentional as defined by the 2003 Declaration.⁸⁵

⁸² Article 1(f) of the 1954 Hague Convention. See J.M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge 2005, Rule 8.

⁸³ T.D. Gill, *Classifying the Conflict in Syria*, "International Law Studies (Naval War College)" 2016, Vol. 92, p. 375.

⁸⁴ UNESCO, *Records of the General Conference*, UNESCO Doc. 32 C/Resolutions, 29 September – 17 October 2003, Vol. 1.

⁸⁵ V.H. Caitlin, op. cit., p. 197. See also B. Wederman, D. Ford, *Video Shows ISIS Militants Destroying Antiquities in Iraq*, "CNN", 27 February 2015, <http://cnn.com/2015/02/26/middleeast/isis-antiquities-vandalism/> [accessed: 14.07.2019].

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Moreover, the destruction of the Site of Palmyra was a result of both the ideology as well as the long-term motives of Daesh. While the official motivation for the destruction of cultural property by Daesh is their wrong interpretation of Islamic aniconism and laws against idolatry,⁸⁶ it would be too easy and monocausal to solely blame religious motivations for these crimes.⁸⁷ Known for their video footage documenting the destruction of the cultural heritage of its enemies, Daesh used this practice as means of propaganda to shock and demoralize its enemies and to distract from their own failures (for example the destructions of the monuments in Palmyra followed Daesh's great military losses).⁸⁸

Additionally, in terms of its long term consequences the destruction of cultural property by Daesh can be regarded as the attempted obliteration of the Syrian identity and part of a sustained campaign against the cultural heritage of all humankind.⁸⁹ As regards the former aspect, Syria is a heterogeneous country with many different ethnic and religious communities.⁹⁰ The cultural heritage of a country constitutes a collective memory and identity which creates a feeling of unity, national pride, and a sense of belonging to a nation.⁹¹ In this sense, this collective memory and identity is a significant way to ensure stability for people who lost their sense of social and geographical security, and it can help hold otherwise disparate groups of people together.⁹² By destroying the monuments in Palmyra, Daesh attempted to rob the Syrian population, as well as the international community, of its identity and memory and to further intensify conflict in the region.

⁸⁶ Their stated reason for destroying sites of the pre-Islamic period, non-Islamic sites and structures, and Islamic structures that do not meet their orthodox beliefs is that these structures do not conform to and therefore pollute "their version of Islam". See P. Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, "The John Marshall Review of Intellectual Property Law" 2016, Vol. 15, p. 360.

⁸⁷ J. Noyes, *The Politics of Iconoclasm: Religion, Violence and the Culture of Image Breaking in Christianity and Islam*, I.B. Tauris, London 2013, p. 1.

⁸⁸ K. Romey, *Why ISIS Hates Archaeology and Blew up Ancient Iraqi Palace*, "National Geographic", 14 April 2015, <http://news.nationalgeographic.com/2015/04/150414-why-islamic-statedestroyed-as-syrian-palace-nimrud-iraq-video-isis-isil-archaeology/> [accessed: 10.07.2019]. See also M. Kaplan, *Palmyra Temple Destroyed: Islamic State Militants Blow up 2,000-year-old Baalshamin Temple in Ancient City*, "IB Times", 23 August 2015, <http://www.ibtimes.com/palmyra-temple-destroyed-islamic-state-militants-blow-2000-year-old-baalshamintemple-2064786> [accessed: 10.07.2019].

⁸⁹ C. Doppelhofer, *Will Palmyra Rise Again? - War Crimes against Cultural Heritage and Post-War Reconstruction*, "UN Office of the High Commissioner", 2016, <https://www.ohchr.org/Documents/Issues/Cultural-Rights/DestructionHeritage/NGOS/Ch.Doppelhofer.pdf> [accessed: 5.07.2019].

⁹⁰ J. Holliday, *The Struggle for Syria in 2011: An Operational and Regional Analysis*, Institute for the Study of War, Washington 2011, p. 6.

⁹¹ D. Massey, *A Place in the World? Places, Cultures and Globalization*, Oxford University Press, New York 1995, p. 185.

⁹² L. Smith, *Archaeological Theory and the Politics of Cultural Heritage*, Routledge, London - New York 2004, p. 14.

Impact of the crime

The destruction of the monuments in the Site of Palmyra have shocked the conscience of humanity and caused an international outcry. In fact, considering the serious crimes previously committed by Daesh, when Daesh occupied the city of Palmyra archaeologists and the international community immediately feared that the militant group would destroy the site.⁹³

After the destruction of the ancient temple of Baalshamin by Daesh, the Director-General of UNESCO, Irina Bokova, released a statement that:

The systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of such attacks, which is to deprive the Syrian people of its knowledge, its identity and history. [...] Such acts are war crimes and their perpetrators must be accountable for their actions. UNESCO stands by all Syrian people in their efforts to safeguard their heritage, a heritage for all humanity.⁹⁴

Furthermore, in the UN Security Council press statement issued on 20 January 2017, the members of the Security Council reaffirmed their grave concern for the protection of the World Heritage Site of Palmyra and the systematic campaign of destruction of cultural heritage in Syria by Daesh. They also underscored the need to defeat Daesh and stressed that the intolerance, violence, and hatred it espouses must be stamped out.⁹⁵

Conclusions

This article has demonstrated that cultural property benefits from a comprehensive international legal framework that prohibits its destruction during armed conflicts. Moreover, the enforcement of this legal framework is inseparably linked to the sufficient gravity requirement for this war crime in the context of international criminal law. Thus, this article has provided the standards for a gravity assessment, as well as their application in reference to the ICTY case law and to the assessment made by the ICC Prosecutor in the *Al Mahdi* case. The latter could clearly be considered as an important development since it will surely shed a light on future cases in shaping the Court's jurisprudence with respect to the gravity assessment of the war crime of directing attacks against cultural property. In this sense it is posited that, taking into consideration that the destruction of cultural property has

⁹³ V.H. Caitlin, op. cit., p. 197.

⁹⁴ UNESCO, *Director-General Irina Bokova Firmly Condemns the Destruction of Palmyra's Ancient Temple of Baalshamin, Syria*, 1 September 2015, <http://en.unesco.org/news/director-general-irina-bokova-firmly-condemns-destruction-palmyra-s-ancient-temple-baalshamin> [accessed: 11.07.2019].

⁹⁵ UN Department of Public Information, *Security Council Press Statement on Destruction of Cultural Heritage, Executions in Palmyra*, 20 January 2017, UN Doc. SC/12690, <https://www.un.org/press/en/2017/sc12690.doc.htm> [accessed: 27.06.2019].

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radically increased in recent years, the conveyance of a message to the international community that this war crime will not be disregarded by the ICC and that the Court is willing to dedicate its focus and energy into this issue was a matter more crucial than ever.

Attacks against cultural property during armed conflicts, such as those which took place in the former Yugoslavia and Mali and which were prosecuted by the ICTY and the ICC, respectively, clearly constitute a precedent for the future prosecutions of the destruction of cultural property. During the Syrian Civil War, Daesh has committed the war crime, among many others, of directing attacks against cultural property, including the destruction of the monuments in the Site of Palmyra. As has been demonstrated above, as a result of their ideology and long-term motives the perpetrators destroyed several historic structures located at the Site of Palmyra, and worse still they openly displayed their attacks and the destruction of a World Heritage Site to a global audience. At this point, it is posited that in light of the gravity assessment made by the ICC Prosecutor concerning the situation in Mali, these horrible acts committed by Daesh are grave enough to justify further action by the international community, if not yet by the ICC within the meaning of Article 17(1)(d) of the ICC Statute. In this sense, it is posited that seeing the destruction of the Site of Palmyra through the eyes of the ICC Prosecutor is a valuable legal consideration with the aim to provide a better insight for the international community of this loss of humanity which is not yet able to crack open the door of the ICC jurisdiction. Indeed, the cultural heritage of Syria cannot be considered a matter of Syrian concern only, since from a global perspective the issue should be regarded as a concrete threat to all societies with their diverse backgrounds. By safeguarding the cultural heritage in Syria and bringing the perpetrators to justice, it must be the duty of the international community as a whole to look humanity in the eye and show once again that its loss will never be tolerated.

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