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# “SO FAR AS WAR ALLOWS”: WHY THE AL MAHDI CONVICTION IS UNLIKELY TO STEM THE PACE OF CULTURAL DESTRUCTION PERPETRATED BY NON-STATE ACTORS

Jessica E. Burrus<sup>†</sup>

*Abstract:* In September of 2016, Ahmad Al Faqi Al Mahdi was convicted in the International Criminal Court (“ICC”) for the intentional destruction of several World Heritage sites during the 2012 conflict in Timbuktu, Mali. This conviction was hailed as a breakthrough after years of frustration with the lack of enforcement of international laws prohibiting the destruction of cultural property. It was also the first conviction of its kind, and advocates of cultural preservation have celebrated it as a much-needed general deterrent in North Africa and the Middle East, where iconoclasm has become a favorite tactic of various state and non-state actors in armed conflict. However, the Al Mahdi trial may in fact be the exception that proves the untenability of the legal regime protecting cultural heritage sites. Current treaty law protecting immovable cultural property reflects an increasingly outdated philosophical and historical narrative that is directly contradicted by the ideologies of the groups that most often threaten World Heritage sites. As long as the protection of cultural property remains more closely associated with a state’s sovereign responsibility to protect physical buildings, as opposed to the international community’s willingness to protect the people who hold those buildings dear, the effective prevention of the destruction of cultural heritage will remain out of reach.

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## I. INTRODUCTION

Today we are fighting in a country which has contributed a great deal to *our* cultural inheritance, a country rich in monuments which by their creation helped and now in their old age illustrate the growth of the civilization which is *ours*. *We* are bound to respect those monuments so far as war allows.<sup>1</sup>

General Dwight D. Eisenhower’s instructions to the Allied troops fighting in Italy during World War II demonstrate the nascent foundational presumptions of his generation that influenced twentieth-century international lawmaking on the preservation of cultural property. In the excerpt above,

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<sup>1</sup> Letter from Dwight D. Eisenhower, Commander-in-Chief, Allied Force Headquarters, to All Commanders (Dec. 29, 1943) (emphasis added), <https://text-message.blogs.archives.gov/2014/02/10/general-dwight-d-eisenhower-and-the-protection-of-cultural-property/>.

which is the opening paragraph of his letter, Eisenhower firmly established that the military in wartime had a duty of stewardship—if not co-ownership—of the cultural property surrounding them in Italy. His statements rely on a notion of collective responsibility: Italy’s monuments are emblematic of “our” civilization, and “we” are their cultural heirs. That said, the same letter takes an equally firm stance on the necessity to protect bodies before buildings, stating that however valuable that cultural property may be, “our men’s lives count infinitely more.”<sup>2</sup>

The nature, extent, and even the existence of this “sacred duty”<sup>3</sup> to protect cultural property face unique challenges in the twenty-first century. A pattern of iconoclasm<sup>4</sup> has accompanied the rise of militant religious state- and non-state actors in Africa and the Middle East, often committed in defiance of the international community.<sup>5</sup> The current legal regime protecting cultural property remains particularly ill-suited for conflicts with and among non-state actors<sup>6</sup> who define themselves in religious, racial, and ideological terms. This same structure has hindered the recognition of the rights of indigenous peoples and minority groups, and many monuments and sites

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<sup>2</sup> *Id.*

<sup>3</sup> Constitution of the United Nations Educational, Scientific and Cultural Organisation pmb., Nov. 16, 1945, 4 U.N.T.S. 275 [hereinafter UNESCO Constitution], <https://treaties.un.org/doc/Publication/UNTS/Volume%204/volume-4-I-52-English.pdf> (“[T]he wide diffusion of culture, . . . education . . . and peace are indispensable . . . and constitute a sacred duty which all the nations must fulfill . . .”).

<sup>4</sup> “Iconoclasm” will be used in this Comment to identify “the rejection or destruction of religious images as heretical.” *Iconoclasm*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2015).

<sup>5</sup> See, e.g., Kevin D. Kornegay, *Destroying the Shrines of Unbelievers: The Challenge of Iconoclasm to the International Framework for the Protection of Cultural Property*, 221 MIL. L. REV. 153, 154 (2014) (“[T]he destruction of the Bamiyan Buddhas was also a statement of defiance of the international community, which had lobbied strenuously for their preservation”); Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L L. 619, 620 (2003) (“[T]o the knowledge of the authors, this episode [the destruction of the Bamiyan Buddhas] is the first planned and deliberate destruction of cultural heritage of great importance as act of defiance of the United Nations and of the international community.”).

<sup>6</sup> This Comment will rely on Andrew Clapham’s expansive definition of “non-state actor” as “including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious groups, or corporations,” recognizing that the international community itself and the United Nations, as an intergovernmental organization, may also be described as “non-state actors.” Andrew Clapham, *Non-State Actors*, in POSTCONFLICT PEACE-BUILDING: A LEXICON 200–02 (Vincent Chetail ed., 2009), <https://ssrn.com/abstract=1339810>.

designated for international protection face an unprecedented threat of destruction as groups vie for cultural dominance.<sup>7</sup>

The International Criminal Court’s (“ICC”) ability to prosecute cultural destruction as a war crime is considered an important deterrent against iconoclastic tactics,<sup>8</sup> but until recently it had never been wielded.<sup>9</sup> That all changed on September 27, 2016, when the ICC sentenced Ahmad Al Faqi Al Mahdi to nine years of imprisonment for his role in the destruction of nine mausoleums<sup>10</sup> and the door of a mosque in Timbuktu, Mali, in 2012,<sup>11</sup> all of which were United Nations Educational, Scientific and Cultural Organization (“UNESCO”) World Heritage sites.<sup>12</sup> Al Mahdi was a member of Ansar Dine,

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<sup>7</sup> See May Yaacoub & Karim Hendili, *Cultural Sites in the Middle East Face “Unprecedented” Destruction*, UNITED NATIONS RADIO (Dec. 15, 2016), <http://www.unmultimedia.org/radio/english/2016/12/cultural-sites-in-the-middle-east-face-unprecedented-destruction/>. It should be noted that recent progress has been made in the form of, for example, new protections for intangible cultural property. See, e.g., Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT’L L. 9, 14 (2011) (“States remain the contracting parties to the [Convention for the Safeguarding of Intangible Cultural Heritage] but the substantive addressees are the cultural communities and human groups, including minorities, whose cultural traditions are the real object of the safeguarding under international law.”).

<sup>8</sup> Jason Burke, *ICC Ruling for Timbuktu Destruction ‘Should Be Deterrent for Others’*, GUARDIAN, Sept. 27, 2016, 6:25 AM, <https://www.theguardian.com/world/2016/sep/27/timbuktu-shrines-icc-sentences-islamic-militant-nine-years-destruction-ahmad-al-faqi-al-mahdi>.

<sup>9</sup> Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 387 (2016).

<sup>10</sup> These were: “1) the mausoleum Sidi Mahamoud Ben Omar Mohamed Aquit, 2) the mausoleum Sheikh Mohamed Mahmoud Al Arawani, 3) the mausoleum Sheikh Sidi Mokhtar Ben Sidi Muhammad Ben Sheikh Alkabir, 4) the mausoleum Alpha Moya, 5) the mausoleum Sheikh Sidi Ahmed Ben Amar Arragadi, 6) the mausoleum Sheikh Muhammad El Mikki, 7) the mausoleum Sheikh Abdoul Kassim Attouaty, 8) the mausoleum Ahmed Fulane, and 9) the mausoleum Bahaber Babadié . . . .” Case Information Sheet, Int’l Criminal Court [ICC], Situation in the Republic of Mali: The Prosecutor v. Ahmad Al Faqi Al Mahdi (Aug. 24, 2016), <https://www.icc-cpi.int/iccdocs/PIDS/publications/AlMahdiEng.pdf>.

<sup>11</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 38(viii) (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>12</sup> “World Heritage” is the UNESCO “designation for places on Earth that are of outstanding universal value to humanity and as such, have been inscribed on the World Heritage List to be protected . . . .” *FAQ: What Is World Heritage?*, UNESCO, <http://whc.unesco.org/en/faq/19> (last updated Feb. 10, 2017). Countries that have signed the World Heritage Convention may inscribe sites on the list. See *The Criteria for Selection*, UNESCO, <http://whc.unesco.org/en/criteria/> (last visited Nov. 4, 2017). Sites must meet certain criteria for selection to qualify for inclusion. *Id.* Though not a prerequisite for prosecution upon destruction, the high profile of UNESCO World Heritage sites can help to draw attention to the fact that a deliberate cultural attack has been made. For example, judges of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) have explicitly referred to the status of cultural sites as UNESCO World Heritage sites in emphasizing the gravity of criminal acts of destruction. See Micaela Frulli, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L L. 203, 209 (2011).

an Islamist group that took the city and sought to begin enforcing its members' interpretation of Islamic law by destroying sites they considered idolatrous.<sup>13</sup>

In the words of UNESCO in the wake of the Al Mahdi conviction, cultural destruction is used “to destroy people as well as the monuments bearing their identities, institutions of knowledge and free thought.”<sup>14</sup> However, as noted in the decision, Al Mahdi was “not charged with crimes against persons but with a crime against property.”<sup>15</sup> Furthermore, “even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons.”<sup>16</sup> Even during the flurry of international cooperation on this subject following World War II, “cultural property . . . was not protected under the Geneva Conventions, likely because cultural heritage destruction was not considered to be as serious as other war crimes.”<sup>17</sup> It should also be noted that in Timbuktu, Al Mahdi's destruction of religious monuments pales in comparison to the human rights abuses observers documented during the 2012 conflict in Mali.<sup>18</sup> These abuses include extrajudicial executions, sexual violence, torture, floggings, and amputations.<sup>19</sup>

The trial and conviction of Ahmad Al Faqi Al Mahdi for the crime of cultural destruction is remarkable because it was the first of its kind in several ways.<sup>20</sup> He was the first ICC defendant to enter a plea of guilty, the first

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<sup>13</sup> See *Mali Crisis: Key Players*, BBC NEWS, Mar. 12, 2013, <http://www.bbc.com/news/world-africa-17582909/>.

<sup>14</sup> Camila Domonoske, *For First Time, Destruction of Cultural Sites Leads to War Crime Conviction*, NAT'L PUB. RADIO, Sept. 27, 2016, 9:33 AM, <http://www.npr.org/sections/thetwo-way/2016/09/27/495606932/for-first-time-destruction-of-cultural-sites-leads-to-war-crime-conviction/>.

<sup>15</sup> *Al Mahdi*, Judgment and Sentence ¶ 77. There is, however, evidence that Al Mahdi was at least complicit in other crimes against the citizens of Timbuktu. See Marlise Simons, *Extremist Pleads Guilty in Hague Court to Destroying Cultural Sites in Timbuktu*, N.Y. TIMES, Aug. 22, 2016, <https://www.nytimes.com/2016/08/23/world/europe/ahmed-al-mahdi-hague-trial.html>; see also discussion *infra* Sections III.B, III.C. For more on human rights groups accusing Al Mahdi of war crimes against persons, see *Malian Jihadist Pleads Guilty to Timbuktu Shrine Destruction in Historic Trial*, FRANCE 24, Aug. 22, 2016, <http://www.france24.com/en/20160822-mali-icc-justice-timbuktu-jihadist-cultural-heritage-destruction/>.

<sup>16</sup> *Al Mahdi*, Judgment and Sentence ¶ 77. Some have speculated that a similar philosophy is evident in the Statute of the ICTY: “[G]iven the massive scale of crimes being perpetrated against people and the ensuing irreparable loss of human life, the protection of a certain kind of property *per se* was not considered a priority.” Frulli, *supra* note 12, at 208.

<sup>17</sup> Gerstenblith, *supra* note 9, at 344.

<sup>18</sup> See HUMAN RIGHTS WATCH, COLLAPSE, CONFLICT AND ATROCITY IN MALI: HUMAN RIGHTS WATCH REPORTING ON THE 2012–13 ARMED CONFLICT AND ITS AFTERMATH 4 (2014), [https://www.hrw.org/sites/default/files/related\\_material/mali0514\\_ForUpload.pdf](https://www.hrw.org/sites/default/files/related_material/mali0514_ForUpload.pdf).

<sup>19</sup> *Id.*

<sup>20</sup> See *Al Mahdi*, Judgment and Sentence ¶ 13.

defendant to be convicted of cultural destruction as a war crime before the ICC, and the first jihadist ICC defendant.<sup>21</sup> As such, the international community, and particularly those organizations charged with safeguarding the cultural property that groups like Ansar Dine have targeted in recent years, were quick to applaud his being brought to justice in an international tribunal. Despite the vocal international condemnation of cultural destruction during armed conflict, civil unrest, and revolution in the Middle East and North Africa,<sup>22</sup> until September 2016, the ICC had never before been presented with an opportunity to prosecute a war criminal accused of the destruction of cultural property.<sup>23</sup> Indeed, prior to this prosecution, the notion seemed fanciful at best due to the international courts’ lack of jurisdiction in the countries most at risk, including Iraq and Syria.<sup>24</sup> As one journalist summed up the situation, “[B]eyond scolding the Islamists of the Sahel, there’s little anyone can do to stop this wretched bout of iconoclasm. History is littered with the debris of toppled temples and smashed idols.”<sup>25</sup> Another scholar remarked in 2007, “[I]t is difficult to imagine that states or international organizations like the International Criminal Court would devote significant resources to prosecuting looters and traders if violations of treaties were treated as international crimes, as many scholars advocate.”<sup>26</sup> There is hope that the conviction “could help persuade other nations to pursue similar charges relating to Syria and Iraq, where no international court has yet jurisdiction,”<sup>27</sup> and where international efforts to preserve World Heritage sites have fallen on deaf ears.<sup>28</sup> This hope may be rooted in the notion that highly visible convictions like Al Mahdi’s help establish the prohibition of

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<sup>21</sup> Ahmad Al Faqi Al Mahdi, *the Scholar and Enforcer of Timbuktu*, NATIONAL (Aug. 19, 2016, 4:00 AM) [hereinafter *Scholar and Enforcer*], <https://www.thenational.ae/world/ahmad-al-faqi-al-mahdi-the-scholar-and-enforcer-of-timbuktu-1.138823>.

<sup>22</sup> “The failure of international law to protect the remains of the past has been glaringly and painfully obvious, as foreign governments, international organizations including UNESCO and the United Nations, and a multitude of private nongovernmental cultural organizations have issued countless statements condemning the destruction.” Gerstenblith, *supra* note 9, at 337.

<sup>23</sup> Domonoske, *supra* note 14.

<sup>24</sup> Simons, *supra* note 15.

<sup>25</sup> Ishaan Tharoor, *Timbuktu’s Destruction: Why Islamists Are Wrecking Mali’s Cultural Heritage*, TIME, July 2, 2012, <http://world.time.com/2012/07/02/timbuktus-destruction-why-islamists-are-wrecking-malis-cultural-heritage/>. To clarify, “the Sahel” is derived from an Arabic word meaning “shore,” and it refers to the region of North Africa south of the Sahara from the Atlantic Ocean to the Red Sea. Noah Butler, *Sahel*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/acref/9780195176322.001.0001/acref-9780195176322-e-1380> (last visited Nov. 4, 2017).

<sup>26</sup> Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 219–20 (2007).

<sup>27</sup> Simons, *supra* note 15.

<sup>28</sup> For example, United Nations and Arab League officials in 2014 pleaded for a halt to the cultural destruction in Syria. See ‘*Stop the Destruction*’, UN Officials Urge in Plea to Save Syria’s Cultural Heritage, UN NEWS CENTRE, Mar. 12, 2014, <http://www.un.org/apps/news/story.asp?NewsID=47340>.

cultural destruction as customary international law that may be enforced against non-state actors.<sup>29</sup>

Although international law prohibiting cultural destruction has finally yielded a tangible result, that result stands alone atop a growing pile of ancient rubble, and “in the realm of cultural heritage, the paucity of such prosecutions mean that it is very much open to question whether these legal provisions provide any actual deterrence to the commission of these violations.”<sup>30</sup> For this reason, it is important to assess the specific conditions of the Mali situation, as well as whether they bode well for the future of cultural preservation. Despite the well-earned and earnest words from UNESCO representatives upon the conviction of Al Mahdi, their predictions about the trial’s potential deterrent effect on the way state and non-state actors wage war are unlikely to come true.

When it comes to the protection of humanity’s irreplaceable cultural property, rhetorical commitment to the cause often far exceeds the legal protections that the international community can agree to adopt.<sup>31</sup> This regulatory reticence may be rooted in a basic rejection of the concept of international ownership of cultural heritage because of the challenge it presents to national ownership and sovereign decision-making.

In many ways, international laws protecting the world’s cultural heritage can be seen as “imposing obligations on nations to care for the cultural property located within their borders and to safeguard both their own and their adversaries’ cultural property during warfare.”<sup>32</sup> Depending on cultural context, the nature of a given conflict, and available resources, that imposition may be culturally unwelcome or practically impossible to achieve. Without making it clear that the destruction of heritage sites comprises war crimes, the international community risks exacerbating the impulse to destroy these sites because it appears to reward victors and punish the defeated on the basis of ideological allegiances.

In Part I, this Comment examined whether the Al Mahdi decision represents a new chapter in the international treaty regime that recognizes and

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<sup>29</sup> Francesco Francioni points to this hope in his discussion of the prosecution for the intentional destruction of the Stela of Matara by the Eritrea-Ethiopia Claims Commission. Francioni, *supra* note 7, at 13.

<sup>30</sup> Gerstenblith, *supra* note 9, at 352.

<sup>31</sup> *See, e.g.*, Frulli, *supra* note 12, at 205–06.

<sup>32</sup> Gerstenblith, *supra* note 9, at 348.

discourages cultural destruction, or if future generations will look back on it as an ultimately ineffective stab at preventing property-based war crimes. Part II explores critical elements of the modern international legal regime protecting cultural property, with a particular focus on the underlying policies of ownership and stewardship. It also discusses the roots of that regime, which includes the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (“1954 Hague Convention”), the 1972 UNESCO Convention for the Protection of the World Cultural and National Heritage (“World Heritage Convention”), and the Rome Statute of the International Criminal Court (“Rome Statute”). Part III traces the 2012 conflict in Mali and analyzes the Al Mahdi trial and conviction with a brief explanation of the 2012–2013 conflict in Mali and the ascendance of Ansar Dine in Timbuktu. It also includes a description of the nature of the cultural property that was destroyed in Mali, and an account of the destruction of the cultural heritage sites of Timbuktu.

The Al Mahdi conviction represents a rare moment when a destroyer of cultural heritage was brought to justice. However, as the following analysis reveals, it is unlikely to have an impact on the future of the preservation of cultural heritage beyond Mali because the current threat to cultural property posed by non-state actors defies the foundational presumptions of our current treaty regime.

## II. HIGHLIGHTS OF THE INTERNATIONAL TREATY REGIME PROTECTING IMMOVABLE CULTURAL PROPERTY DURING ARMED CONFLICT

The recent enforcement of international law protecting cultural heritage in Mali was possible because of the country’s membership in key organs of international law as well as its ratification of several important conventions on the subject. International and national laws restricting the destruction of cultural property during conflict have deep roots and are closely related to general rules governing armed conflict. However, for the purposes of analyzing the Al Mahdi conviction, this section will focus on post-World War II international conventions to which Mali is a party.

Before delving into the contours of international law which led to Al Mahdi’s conviction, it is important to question why the law protects cultural property in the first place. In international criminal law, the crime of cultural destruction is not characterized as a form of genocide, although one could

characterize the motivations of those who perpetrate cultural destruction as genocidal.<sup>33</sup> Despite the passionate reasoning of Rafael Lemkin, an architect of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, a provision including cultural destruction as a form of genocide was not included in the final form of that convention.<sup>34</sup> As prominent legal scholar Patty Gerstenblith has noted, this exclusion partially accounts for the ineffective enforcement of the laws against cultural destruction. Arguably, the international emphasis on the protection of physical monuments, as opposed to intangible cultural heritage or practices, can be traced back to this exclusion.<sup>35</sup> Notably, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has analyzed the connection between war crimes of persecution by way of cultural destruction and genocide,<sup>36</sup> “finding . . . that deliberate destruction of cultural heritage . . . may constitute evidence of the element of *mens rea* required for the commission of the crime of genocide.”<sup>37</sup>

That said, cultural destruction is most often characterized as a war crime and can be prosecuted under domestic law as violative of several international conventions. Most importantly for the purposes of the situation in Mali, in the absence of adequate domestic law, cultural destruction can also be prosecuted under the Rome Statute of the International Criminal Court, the violation of which led to the arrest of Al Mahdi.

#### A. *Early Roots of Cultural Property Protection*

General Eisenhower was not the first American to remind soldiers of their obligation to prevent the avoidable destruction of immovable cultural property. In 1863, United States President Abraham Lincoln commissioned the Lieber Code, designed by Francis Lieber to be a “work for mankind of historic effect and permanency.”<sup>38</sup> It specified that “churches, . . . establishments of education, or foundations for the promotion of knowledge,

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<sup>33</sup> *Id.* at 342–44.

<sup>34</sup> *Id.* at 343.

<sup>35</sup> *Id.* at 343–44.

<sup>36</sup> “While the parallel between persecution and genocide has the advantage of attaching symbolic value to the protection of cultural property, it also brings the problem of the high threshold for the presentation of evidence . . . .” Hrad Abtahi, *The Protection of Cultural Property in Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 28 (2001); see also Frulli, *supra* note 12, at 207–08 (discussing the differences between proposed and final definitions of cultural property in Article 3(d) of the Statute of the ICTY).

<sup>37</sup> Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1218 (2004).

<sup>38</sup> Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC’Y INT’L L. PROC. 112, 112 (2001).

. . . [and] museums of the fine arts, or of a scientific character . . . [were] not to be considered public property” that could be seized by a victorious army,<sup>39</sup> and that “art, libraries, scientific collection, or precious instruments . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”<sup>40</sup> It is widely acknowledged<sup>41</sup> as “the first codification of the obligation to safeguard cultural sites and objects during war”<sup>42</sup>—an obligation that arguably dates back to the Romans whose temples are now the subjects of that protection.<sup>43</sup> The Union and the Confederacy, locked in combat, also struggled to define the nature of their conflict—whether it was fundamentally civil or international—and consequently, the rules of engagement applicable to the war.<sup>44</sup> The Lieber Code provided much-needed guidelines while tabling, for the moment, this fundamental question, and its precursor was distributed amongst Union soldiers as a pamphlet to ensure they received the message.<sup>45</sup> Even so, the Lieber Code made generous allowances for derogation in deference to military strategy, and General Sherman’s “March to the Sea” arguably violated many of the civilian protections contained therein.<sup>46</sup>

The history of cultural property protection in armed conflict can seem like a litany of commitments and betrayals, even by states with a reputation for the conscientious observance of the rules of war. Building on the Lieber Code and the Brussels Declaration of 1874,<sup>47</sup> formal international legal protection of immovable cultural property<sup>48</sup> during war was, for the most

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<sup>39</sup> The Lieber Code of 1863, Instructions for the Government of Armies of the United States in the Field, Series III, Vol. 3, sec. 124, General Orders No. 100, art. 34 (Apr. 24, 1863), [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>40</sup> *Id.* art. 35. The Lieber Code notably touches on both wartime plunder and cultural destruction. This Comment notes the important distinction between the two and will focus only on the latter.

<sup>41</sup> Kornegay, *supra* note 5, at 161 (“[I]t is not an exaggeration to say that the Lieber Code’s provisions for protection of cultural property were the progenitors of the entire framework of protections for cultural property that now exist under international law.”).

<sup>42</sup> Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 *GEO. J. INT’L L.* 245, 254 (2006).

<sup>43</sup> “[I]n his prosecution, in 70 B.C., of Gaius Verres . . . Cicero distinguished between ordinary war booty (*spolia*), which a conqueror was free to take, and illegal removal of art and architectural decoration (*spoliatio*.)” *Id.* at 250.

<sup>44</sup> See Patryk I. Labuda, *Lieber Code*, OXFORD PUB. INT’L L., <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2126> (last updated Sept. 2014).

<sup>45</sup> Paust, *supra* note 38, at 113.

<sup>46</sup> Labuda, *supra* note 44.

<sup>47</sup> See, e.g., *Laws and Treaties Protecting Cultural Property: The Lieber Code of 1863*, U.S. COMMITTEE BLUE SHIELD, <http://uscbs.org/1863-lieber-code.html> (last visited Nov. 4, 2017).

<sup>48</sup> Though the exact parameters of what cultural property is are drawn differently in different conventions, see discussion *infra* Sections II.B–D, this Comment will use the term “immovable cultural property” as it is used by UNESCO, meaning “tangible cultural heritage” such as “monuments,

part, a child of the twentieth century—only a little younger than Eisenhower himself—maturing particularly rapidly after World War II<sup>49</sup> in an international community still reeling from the widespread destruction<sup>50</sup> that Eisenhower sought to palliate. After all, during World War II the Allied troops in Italy destroyed an ancient Benedictine Abbey on a hilltop called Monte Cassino on February 15, 1944, just forty-eight days after Eisenhower penned his letter discouraging cultural destruction.<sup>51</sup> The bombing of the abbey resulted in the complete annihilation of the building and the deaths of countless civilians sheltering inside, but it was ultimately deemed a military failure because the Allied forces had to fight on for three more months before the hill was captured.<sup>52</sup> Disasters like Monte Cassino paved the way for a reevaluation of wartime cultural heritage protection even before the war ended.<sup>53</sup>

*B. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, Also Known as the 1954 Hague Convention*

The 1954 Hague Convention was “the first international convention to address exclusively the subject of cultural property,”<sup>54</sup> and some have argued that the specificity with which cultural destruction has been addressed by international law—what with its own particular conventions and all—provides an important insight into the weakness with which these laws have been enforced.<sup>55</sup> Mali ratified the 1954 Hague Convention on May 18, 1961.<sup>56</sup>

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archaeological sites, and so on.” *What Is Meant by “Cultural Heritage”?*, UNESCO, <http://www.unesco.org/new/en/culture/themes/illegal-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/> (last visited Nov. 4, 2017).

<sup>49</sup> See *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 14 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>50</sup> See Gerstenblith, *supra* note 42, at 258 (“The largest destruction and displacement of cultural sites and objects known to human history occurred during World War II.”).

<sup>51</sup> Nobuo Hayashi, *Contextualizing Military Necessity*, 27 EMORY INT’L L. REV. 189, 196–97 (2013).

<sup>52</sup> *Id.* at 197–98.

<sup>53</sup> See *id.* at 198–99.

<sup>54</sup> Gerstenblith, *supra* note 9, at 346.

<sup>55</sup> *Id.* at 347. Gerstenblith particularly highlights the ongoing distinction between civilian property and cultural property in times of war as a peculiarity of international law that “has reduced, rather than enhanced, the level of protection given to cultural property,” insofar as it serves to further separate crimes against civilian bodies and civilian practices from crimes against immovable cultural property, placing the former much higher than the latter on a sort of conceptual list of priorities in the identification and prosecution of war crimes. *Id.*

<sup>56</sup> *Treaties, States Parties, and Commentaries: Mali*, INT’L COMMITTEE RED CROSS, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=ML](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=ML).

A key feature of the 1954 Hague Convention is that it actually defines cultural property, and it represents the first use of the expression “cultural property” in this context. Earlier instruments relied on “an empirical indication of objects of historical, monumental or humanitarian interest,”<sup>57</sup> but the 1954 Hague Convention defines cultural property as, *inter alia*:

[M]ovable 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; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books . . . .<sup>58</sup>

The 1954 Hague Convention is notable for its reliance on the term “people” rather than “nation” or “state” as a basic societal group unit, emphasizing in its preamble that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage *of all mankind*, since each people makes its contribution to the culture of the world.”<sup>59</sup> This emphasis carries the promise of protection for minority groups or displaced groups facing persecution from intrastate conflicts, as opposed to solely international conflicts. One scholar casts this emphasis on “people” as a “connection to human rights and [a] foreshadow[ing of] the idea of an integral obligation owed to the international community as a whole (*erga omnes*) rather than to individual states on a contractual basis.”<sup>60</sup> From this perspective, the 1954 Hague Convention can be seen as an expression of a set of international norms, a perspective that often leads to the belief that customary international

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<sup>57</sup> Francioni, *supra* note 7, at 10 n.6.

<sup>58</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention art. 1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention], <https://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf>.

<sup>59</sup> *Id.* pmb. (emphasis added).

<sup>60</sup> Francioni, *supra* note 7, at 13.

law<sup>61</sup> could serve as an avenue for the prosecution of the destruction of cultural property even when the groups in conflict are not parties to the 1954 Hague Convention.<sup>62</sup>

This promise of protection for peoples and not merely states is, however, complicated by phraseology elsewhere in the 1954 Hague Convention which appears to restrict its obligations on contracting parties to conflicts similar in nature to World War II—that is, international conflicts involving ground invasions and foreign occupations. Take, for example, the duty described in Article 5: “Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”<sup>63</sup> Article 5’s implicit conceptual basis in a situation involving one foreign power invading and occupying territory within the borders of another foreign power seems decidedly inapplicable to the type of occupation Ansar Dine witnessed in Mali.

The qualification that cultural property be “of great importance to the cultural heritage of every people” implies that cultural property is that which is important enough to be held in common. Any nation or group which accepts and obeys the norms of the 1954 Hague Convention accepts the presumptions that different cultures are subsets of a common human culture, that expressions of those cultures carry a basic intrinsic value, and consequently, should be preserved for as long as possible, regardless of armed

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<sup>61</sup> Parenthetically, it is important to define and address this perspective on customary international law as an alternative means of prosecuting the destruction of cultural heritage. For example, prior to its 2009 ratification of the 1954 Hague Convention, the United States “acknowledg[ed] it as customary international law.” Posner, *supra* note 26, at 219. Customary international law (“CIL”) is “unwritten law to which nations may have (at most) only tacitly agreed.” DONALD EARL CHILDRESS III ET AL., *TRANSNATIONAL LAW AND PRACTICE* 146 (2015). Black’s Law Dictionary defines “customary law” as “[l]aw consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.” *Customary Law*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>62</sup> See Francioni, *supra* note 7, at 13. Despite the optimism of scholars like Francioni, even the use of sources of law like the 1954 Hague Convention as evidence of CIL—regardless of the complexity of actual practice—is the subject of ongoing disagreement. Furthermore, as this Comment discusses in this section, international laws governing the preservation of cultural property in armed conflict are notably inclined to rely on language reflecting a core belief in moral imperatives and the natural law tradition of early international law. See CHILDRESS ET AL., *supra* note 61, at 149 (tracing naturalist as opposed to positivist rationales for customary international law). Understandably, “the more that ‘naturalistic’ elements are admitted into the determination of customary international law, the more difficult and less objective the inquiry may appear.” *Id.* at 152.

<sup>63</sup> 1954 Hague Convention, *supra* note 58, art. 5, ¶ 1.

conflict. The situational validity of these presumptions is particularly precarious in times of civil war, cultural revolution, and governmental collapse.

Under Article 2, “the protection of cultural property shall comprise the safeguarding of and respect for such property.”<sup>64</sup> “Safeguarding,” as defined in Article 3, relates to peacetime duties to plan for “the foreseeable effects of an armed conflict”; that is, parties to the convention have an affirmative duty to prepare for the eventuality of conflict.<sup>65</sup> “Respect,” outlined in Article 4, relates to mutual respect for a party’s own cultural property as well as its adversaries’ cultural property during armed conflict.<sup>66</sup>

Article 4, section 2 contains the military necessity exception famously espoused by Eisenhower during World War II: the obligation of respect “may be waived only in cases where military necessity imperatively requires such a waiver.”<sup>67</sup> This exception was understandably the subject of considerable debate, and the Second Protocol to the 1954 Hague Convention (“Second Protocol”), crafted in the wake of the Balkan Wars, defines the limits of the military necessity exception for the destruction of cultural sites.<sup>68</sup> It was “negotiated and adopted in order to reinforce the rather weak system of the Hague Convention” by limiting the military necessity exception.<sup>69</sup> For example, Article 10 grants “enhanced protection” to cultural property designated as “cultural heritage of the greatest importance for humanity,”<sup>70</sup> while Article 13 provides that “[c]ultural property under enhanced protection shall only lose such protection . . . if, and for as long as, the property has, by its use, become a military objective.”<sup>71</sup> Critics of the efficacy of the Second Protocol observe that it has been ratified by far fewer nations than the 1954 Hague Convention, possibly because of its narrower military necessity exception.<sup>72</sup>

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<sup>64</sup> *Id.* art. 2.

<sup>65</sup> *Id.* art. 3; *see also* Gerstenblith, *supra* note 9, at 348.

<sup>66</sup> 1954 Hague Convention, *supra* note 58, art. 4, ¶ 1.

<sup>67</sup> *Id.* art. 4, ¶ 2.

<sup>68</sup> Gerstenblith, *supra* note 9, at 351. Mali ratified the Second Protocol to the Hague Convention of 1954 on November 15, 2012. *Treaties, States Parties and Commentaries: Mali*, *supra* note 56.

<sup>69</sup> Francioni, *supra* note 37, at 1217.

<sup>70</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 10, ¶ 1(a), Mar. 26, 1999, 2253 U.N.T.S. 212, <http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf>.

<sup>71</sup> *Id.* art. 13, ¶ 1(b).

<sup>72</sup> *See, e.g.*, Posner, *supra* note 26, at 216.

However, the 1954 Hague Convention does not itself include provisions for prosecution or punishment, and so remains textually dependent on national domestic law for efficacy.<sup>73</sup> Hence, although Mali was a party to the 1954 Hague Convention as of the 2012 conflict, there was little chance that it would serve as an effective deterrent, a guide for military engagement, or a guide to post-conflict criminal liability and prosecution because of the massive governmental collapse going on at the time within the country itself.

C. *The 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, also known as the World Heritage Convention*

Among the most prominent international responses to such World War II failures to prevent cultural destruction was the establishment of the United Nations Economic, Scientific and Cultural Organization (“UNESCO”) in 1945.<sup>74</sup> The UNESCO Constitution reflects an understanding of cultural property that is held by humanity in common, and UNESCO was founded “to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for . . . human rights and fundamental freedoms . . . .”<sup>75</sup> It considers the preservation of cultural property “a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern,”<sup>76</sup> and it recognizes that there is a sense of a common human culture to be preserved despite the existence of national boundaries and inter- and intranational disputes.

Under the 1972 World Heritage Convention, sites of “cultural heritage” are defined as monuments, buildings, or other sites “of outstanding universal value from the point of view of history, art or science . . . [or] from the historical, aesthetic, ethnological or anthropological point of view.”<sup>77</sup> The shift in phraseology from the 1954 Hague Convention on display here is particularly remarkable, as the international community faces a moment in

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<sup>73</sup> Gerstenblith, *supra* note 9, at 349.

<sup>74</sup> *Id.* at 341; see also *The Organization's History*, UNESCO, <http://www.unesco.org/new/en/unesco/about-us/who-we-are/history/> (last visited Nov. 11, 2017).

<sup>75</sup> UNESCO Constitution, *supra* note 3, art. 1.

<sup>76</sup> *Id.* pmb1.

<sup>77</sup> Convention for the Protection of the World Cultural and Natural Heritage art. 1, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention], <https://treaties.un.org/doc/Publication/UNTS/Volume%201037/volume-1037-I-15511-English.pdf>; see also *What Is Meant by “Cultural Heritage”?*, *supra* note 48.

which it must restructure key cultural heritage protections. From “property of great importance to the cultural heritage of every people,”<sup>78</sup> UNESCO narrows its site designation to include only those “of outstanding universal value.”<sup>79</sup> The emphasis on an objective and universal historical and cultural narrative is of particular interest here, as ideological intranational conflicts often center on the ownership of and ability to control this type of narrative. While it may seem obvious, it is important to specify that UNESCO is premised on the notion that such a narrative is valuable to the international community as a whole.

UNESCO and its officials emphasize this perspective in their public statements. For example, Irina Bukova, the Director-General of UNESCO since 2009, has called the recent surge in attacks on cultural property “part . . . of the same global strategy of persecution and destruction, which seeks to tear at the fabric of society, to deny human rights and to quash the rule of law. . . . [W]e must win the battle of ideas . . . in order to prevent further radicalization” and to combat a “global strategy of hatred.”<sup>80</sup> Bukova characterizes the World Heritage Convention as “consider[ing] attacks on cultural heritage as attacks on our shared identity.”<sup>81</sup> It is because of this foundational premise that UNESCO is entitled to challenge the actions of groups functioning within sovereign nations like Mali.

Mali is a member state of UNESCO,<sup>82</sup> and the city of Timbuktu was designated a UNESCO World Heritage site in 1988.<sup>83</sup> Situated south of the Sahara desert on the banks of the Niger River, the city was founded, likely as a Tuareg nomad camp, around 1100 CE and grew into an Islamic trade center for salt and gold in the fourteenth century.<sup>84</sup> Between the fifteenth and sixteenth centuries, it was a center of Islamic spiritual and intellectual life in Africa, and it was home to the University of Sankore and 180 Quranic

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<sup>78</sup> 1954 Hague Convention, *supra* note 58, art. 1.

<sup>79</sup> World Heritage Convention, *supra* note 77, art. 1; *see also* *What Is Meant by “Cultural Heritage”?*, *supra* note 48.

<sup>80</sup> Irina Bukova, *Ending Impunity for War Crimes on Cultural Heritage: The Mali Case*, INT’L CRIM. JUST. TODAY: ARGUENDO (June 22, 2016), <https://www.international-criminal-justice-today.org/arguendo/ending-impunity-for-war-crimes-on-cultural-heritage-the-mali-case/>.

<sup>81</sup> *Id.*

<sup>82</sup> *Claiming Human Rights - in Mali*, CLAIMING HUM. RTS., <http://www.claiminghumanrights.org/mali.html> (last updated Jan. 28, 2010, 11:54 AM).

<sup>83</sup> *Timbuktu*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Timbuktu-Mali> (last visited Nov. 4, 2017).

<sup>84</sup> *Id.*

schools.<sup>85</sup> It is also home to three historic mosques: the Djingareyber Mosque, rebuilt and enlarged in 1570–1583; the Sankore Mosque, restored in approximately 1578–1582; and the Sidi Yahia Mosque, restored in approximately 1577–1578, as well as “sixteen mausoleums and holy public places.”<sup>86</sup> Under the Operational Guidelines for the Implementation of the World Heritage Convention, Timbuktu was selected for designation based on three discrete criteria:

Criterion (ii): The mosques and holy places of Timbuktu have played an essential role in the spread of Islam in Africa at an early period.

Criterion (iv): The three great mosques of Timbuktu, restored by the Qadi Al Aqib in the 16th century, bear witness to the golden age of the intellectual and spiritual capital at the end of the Askia dynasty.

Criterion (v): The three mosques and mausoleums are outstanding witnesses to the urban establishment of Timbuktu, its important role of commercial, spiritual and cultural centre on the southern trans-Saharan trading route, and its traditional characteristic construction techniques. Their environment has now become very vulnerable under the impact of irreversible change.<sup>87</sup>

As earthen structures, the monuments of Timbuktu are vulnerable to natural deterioration and require regular maintenance, characteristics which kept it foremost in the minds of those observing and monitoring the status of World Heritage sites that may be classified as “in danger” even before armed conflict broke out.<sup>88</sup> Sites like the Timbuktu monuments may be added to the List of World Heritage in Danger on the basis of either environmental threats—for example, an impending change in weather patterns that might cause wood to rot faster—or threats of destruction as a result of nearby armed conflict.<sup>89</sup> In

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<sup>85</sup> *Timbuktu*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/list/119> (last visited Nov. 11, 2017).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (emphasis omitted).

<sup>88</sup> “The three mosques are stable but the mausoleums require maintenance, as they are fragile and vulnerable in the face of irreversible changes in the climate and urban fabric.” *Id.*

<sup>89</sup> *World Heritage in Danger*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/158/> (last visited Nov. 4, 2017).

2012, “UNESCO immediately raised the issue of the destruction of the Mausoleums in Mali to the attention of the [ICC],”<sup>90</sup> even prior to Mali’s self-referral to the ICC.<sup>91</sup>

#### D. *The Rome Statute of the International Criminal Court*

Finally, it was under the Rome Statute, which created the ICC, that Al Mahdi was charged and convicted of the war crime of cultural destruction. Unlike many other countries rich in immovable cultural heritage and struggling with intra- and international armed conflict—such as Iraq, Iran, Syria, and Libya—Mali is a party to the Rome Statute, having ratified it on August 16, 2000.<sup>92</sup> Article 8 proscribes “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments . . . provided they are not military objectives.”<sup>93</sup> As with other international legal provisions protecting immovable property, there remains an exception for actions of military necessity. The Rome Statute is remarkable, however, in its extension of the law to reach crimes committed during intranational and not merely international conflicts.<sup>94</sup>

Like General Eisenhower, the ICC draws a sharp distinction between war crimes that destroy lives and those that destroy culture, but that very distinction highlights tensions it is perhaps ill-equipped to address. Despite the lofty mandates of the Lieber Code, victorious armies have often reserved the right to dictate the culture and beliefs of those they conquer. It has been observed that international law protecting cultural property during armed conflict could be stronger, or at least better and more carefully enforced.

<sup>90</sup> Bukova, *supra* note 80.

<sup>91</sup> A state may make a self-referral by invoking Article 14 about itself, rather than about another state party, as was probably first imagined when the Rome Statute was drafted. For a quick discussion of self-referrals, see Patrick Wegner, *Self-Referrals and Lack of Transparency at the ICC – The Case of Northern Uganda*, JUST. CONFLICT (Oct. 4, 2011, 11:06 AM), <https://justiceinconflict.org/2011/10/04/self-referrals-and-lack-of-transparency-at-the-icc—the-case-of-northern-uganda/>. For a more in-depth discussion, see Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L L. 403 (2005).

<sup>92</sup> *States Parties to the Rome Statute: Mali*, ICC, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/mali.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/mali.aspx) (last updated Nov. 3, 2003).

<sup>93</sup> Rome Statute of the International Criminal Court art. 8, ¶ 2(b)(ix), (e)(iv), 2187 U.N.T.S. 90 [hereinafter Rome Statute], [http://legal.un.org/icc/statute/english/rome\\_statute\(e\).pdf](http://legal.un.org/icc/statute/english/rome_statute(e).pdf). Article 8 paragraph 2(b)(ix) of the Rome Statute applies to international armed conflict, while paragraph 2(e)(iv) applies to non-international armed conflict. See Gerstenblith, *supra* note 9, at 346 n.32.

<sup>94</sup> CAROLINE EHLERT, *PROSECUTING THE DESTRUCTION OF CULTURAL PROPERTY IN INTERNATIONAL CRIMINAL LAW* 170–71 (2014) (ebook).

However, the international organizations that devise and enforce it remain lax “because states are unwilling to trust international organizations to serve their interests.”<sup>95</sup> Furthermore, laws protecting bodies rather than buildings are simply easier to understand as a reasonable international means of limiting power; even cooperative states adopt a “very cautious approach to constraints on their means of waging effective warfare.”<sup>96</sup>

In Mali, international human rights observers and victims have accused all of the groups involved in the 2012 conflict of grave war crimes, including torture and murder.<sup>97</sup> However, international actors, including France, the United States, and the European Union, have condemned only those committed by non-state actors.<sup>98</sup> This situation arguably makes the ICC’s high-profile prosecution of cultural destruction ring somewhat hollow.<sup>99</sup> Such optically lopsided condemnations threaten to deepen a fundamental mistrust of cultural property protections germane to the field for all states, but especially for groups attempting to enact sweeping cultural changes, as is the case for many of the extremist groups currently engaging in iconoclasm.

### III. CULTURAL DESTRUCTION IN TIMBUKTU AND THE AL MAHDI TRIAL

#### A. *Cultural Heritage in Timbuktu*

There are 333 Sufi saints buried in Timbuktu, and even during the unrest of 2012, city residents were accustomed to honoring the generations-old practice of visiting the historic mausoleums of the saints and the gravesites of relatives on a regular basis to pray and to maintain the grounds.<sup>100</sup> A Human Rights Watch report on the 2012 conflict quoted a Timbuktu resident explaining, “We pray to [the Sufi saints] for everything we look for in life,” and another resident saying, “After prayers [every week] we always visit the graves of our dead. We clean the sand the winds have left. We pray for them.

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<sup>95</sup> Posner, *supra* note 26, at 219.

<sup>96</sup> Abtahi, *supra* note 36, at 5 (noting that “Geneva law, which protects war victims,” is much more developed than “Hague law, which regulates the ‘methods and means of conducting hostilities,’” due to this “very cautious approach”).

<sup>97</sup> HUMAN RIGHTS WATCH, *supra* note 18, at 14.

<sup>98</sup> *Id.* at 12 (“While most of these actors criticized abuses by the Islamist groups, they were reluctant to publicly criticize those by the Malian army.”).

<sup>99</sup> *See id.* at 15; *see also* M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 793, 795 (2008) (“Double standards applied by governments and the lack of, or merely selective, enforcement by governments contributes to reciprocal non-compliance by non-state actors,” which in turn contributes to a “breakdown of the deterrent effect of [international humanitarian] law.”).

<sup>100</sup> *See* HUMAN RIGHTS WATCH, *supra* note 18, at 94.

For us it is a sign of respect and a reminder not to forget them or where we’ve come from.”<sup>101</sup> A BBC News article quoted yet another resident emphasizing that local pride in the shrines stemmed from their being emblematic of Timbuktu’s Islamic heritage: “We are proud that Timbuktu was founded by Muslims. It has never been a pagan city and our monuments are Muslim ones.”<sup>102</sup>

Because these sites were integral to civilians’ daily lives and were also of considerable historical value, their destruction during the 2012 Malian conflict exemplifies one of the most serious challenges to the international protection of cultural property. The World Heritage sites in Timbuktu were historically significant and recognized as such by the international community, but they also played a major role in residents’ traditional religious and cultural practices. It is often tempting to separate rationales for the protection of property during armed conflict into the protection of property used by civilians and the protection of property of a more historical or cultural nature,<sup>103</sup> but in communities like Timbuktu, that separation is impossible. The combined civilian and cultural value of the heritage sites in Timbuktu made for a particularly complicated collision between culturally hegemonic Salafi groups—attempting to bring about a rapid and radical cultural shift—and the Sufi majority populace as well as the preservation-minded international community.

### B. *Ansar Dine and the 2012–2013 Conflict in Mali*

In March of 2012, Malian military officers deposed President Amadou Toumani Toure, alleging he had failed to respond adequately to Tuareg<sup>104</sup> rebel

<sup>101</sup> *Id.*

<sup>102</sup> *Ahmad Al-Faqi Al-Mahdi: The Vandal of Timbuktu*, BBC NEWS, Sept. 27, 2016 [hereinafter *Vandal of Timbuktu*], <http://www.bbc.com/news/world-africa-37438360>.

<sup>103</sup> See Frulli, *supra* note 12, at 204.

<sup>104</sup> The Tuareg are a primarily Muslim Berberian ethnic group in North Africa of about one million people living in independent federations in Algeria, Libya, Mali, and Niger. *Tuareg*, COUNTRIES & THEIR CULTURES, <http://www.everyculture.com/wc/Mauritania-to-Nigeria/Tuareg.html> (last visited Nov. 4, 2017). The Tuareg are considered ethnic minorities in the modern countries in which they live. *Who Are the Tuareg?*, SMITHSONIAN NAT’L MUSEUM AFR. ART, <https://africa.si.edu/exhibits/tuareg/who.html> (last visited Nov. 4, 2017). Currently, about 0.9% of the population of Mali is Tuareg. *The World Factbook: Mali*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/ml.html> (last updated Nov. 6, 2017). It should also be noted that although the Tuareg are Muslim, their religious beliefs consist of “a layering of Islamic tenets on earlier beliefs,” blending Islam with other cultural and religious traditions in the region. *Tuareg*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/acref/9780195309911.001.0001/acref-9780195309911-e-937> (last visited Nov. 4, 2017).

groups attacking northern Malian towns.<sup>105</sup> Those who led the coup subsequently also failed to defeat these groups.<sup>106</sup> In April, the Tuareg organization National Movement for the Liberation of Azawad (“MNLA”) and the Islamist group Ansar Dine merged and took control of Timbuktu,<sup>107</sup> and in May, joined by Al-Qaeda in the Islamic Maghreb (“AQIM”),<sup>108</sup> they declared northern Mali an Islamic state.<sup>109</sup> It was at this time that Ansar Dine imposed their interpretation of Islamic law in Timbuktu.<sup>110</sup>

The full Arabic name of Ansar Dine is Harakat Ansar al-Dine, which means, “movement of defenders of the faith.”<sup>111</sup> It is a Malian group led by Iyad Ag Ghaly, a Tuareg rebel, and its goal is to bring Mali under Islamic law.<sup>112</sup> Like other Islamist groups in the area, they ascribe to the Salafi sect of Islam, whereas most Malians belong to the Sufi sect.<sup>113</sup> The Salafi sect regards shrines like those in Timbuktu as idolatrous.<sup>114</sup> The destruction of Sufi shrines has been a consistent feature of the actions of groups that rose to prominence during and in the wake of the “Arab Spring.”<sup>115</sup> However, the conflict between these sects dates back centuries.<sup>116</sup>

Ahmad Al Faqi Al Mahdi is a Tuareg scholar of Islam who was known for his introverted personality, his fluency in Arabic,<sup>117</sup> his flawless memorization of the Quran,<sup>118</sup> and his passion for a strict interpretation of

<sup>105</sup> *Mali Profile - Timeline*, BBC NEWS, June 28, 2017, <http://www.bbc.com/news/world-africa-13881978>.

<sup>106</sup> *Mali Crisis: Key Players*, *supra* note 13.

<sup>107</sup> HUMAN RIGHTS WATCH, *supra* note 18, at 104.

<sup>108</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 31 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>109</sup> *Mali Profile - Timeline*, *supra* note 105.

<sup>110</sup> *Id.*

<sup>111</sup> *Mali Crisis: Key Players*, *supra* note 13.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* It should be noted that all Abrahamic religions forbid idolatry, and iconoclasm is a unique feature of certain types of ideologically charged armed conflicts. For more on the rise of iconoclasm in certain interpretations of Islam, see Eleni Polymenopoulou, *A Thousand Ways to Kiss the Earth: Artistic Freedom, Cultural Heritage and Islamic Extremism*, 17 RUTGERS J.L. & RELIGION 39, 49 (2015) (“Violent iconoclastic incidents may take place in the name of religions—yet, should not be mistakenly associated to them.”).

<sup>115</sup> Gerstenblith, *supra* note 9, at 356.

<sup>116</sup> *See Sufism and Salafism, Mali’s Deep Religious Divide*, AFR. REP., Dec. 21, 2012, 7:12 PM, <http://www.theafricareport.com/News-Analysis/sufism-and-salafism-malis-deep-religious-divide.html>.

<sup>117</sup> In fact, during his trial, Al Mahdi’s rights and the charges against him were explained in Arabic. Case Information Sheet, ICC, *supra* note 10.

<sup>118</sup> This hallmark of an Islamic education was probably unique amongst the jihadist rebels of Ansar Dine; some claim that the jihadists of northern Mali “are unable even to recite the Quran.” Corinne Dufka, Opinion, *Confronting Mali’s New Jihadist Threat*, N.Y. TIMES, May 9, 2016, <https://www.nytimes.com/2016/05/10/opinion/confronting-malis-new-jihadist-threat.html>.

Islamic law.<sup>119</sup> Born in Agoune,<sup>120</sup> a village located about 60 miles west of Timbuktu and from which jihadists are known to be recruited,<sup>121</sup> he had also lived in Libya and Saudi Arabia, attended a Quranic college, and worked as a teacher in Mali prior to the conflict in 2012.<sup>122</sup>

It is unclear why exactly Al Mahdi was attracted to Ansar Dine, but observers of the rise of jihadist groups in this region have pointed to commonplace, violent attacks by bandits stealing livestock from herdsmen living in villages like Agoune as a reason why the jihadists hold such sway in the area.<sup>123</sup> In recent years, for example, the Malian government is thought to have failed to address the problem of lawlessness in the rural parts of northern Mali.<sup>124</sup> Jihadist groups, according to some residents, “provide a better alternative to the state,” and although the groups’ responses have been brutal and violative of human rights, at least these responses arguably reduce the banditry that threatens herdsmen’s livelihoods.<sup>125</sup>

When Ansar Dine and AQIM swept into Timbuktu in April of 2012, Al Mahdi assisted their administration as “an expert on matters of religion.”<sup>126</sup> In order to enforce their interpretation of Islamic law on the residents of Timbuktu, Ansar Dine and AQIM established “a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade . . . called the Hesbah.”<sup>127</sup> Al Mahdi served as the leader of the Hesbah from April to September 2012.<sup>128</sup> The Hesbah was charged with “repressing anything perceived by the occupiers to constitute a visible vice.”<sup>129</sup> Some witnesses described Al Mahdi’s demeanor as that of a “town sheriff” who “present[ed] himself as the boss of all the city’s imams.”<sup>130</sup> In addition to his crimes of cultural destruction, it appears likely from residents’

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<sup>119</sup> *Scholar and Enforcer*, *supra* note 21.

<sup>120</sup> Case Information Sheet, ICC, *supra* note 10.

<sup>121</sup> *See Vandal of Timbuktu*, *supra* note 102.

<sup>122</sup> *Scholar and Enforcer*, *supra* note 21.

<sup>123</sup> *See Dufka*, *supra* note 118.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 32 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>127</sup> *Id.* ¶ 31 (emphasis omitted). “Hesbah” has been translated as “Manners’ Brigade.” *See* Press Release, ICC, Situation in Mali: Ahmad Al Faqi Al Mahdi Surrendered to the ICC on Charges of War Crimes Regarding the Destruction of Historical and Religious Monuments in Timbuktu, ICC-CPI-20150926-PR1154 (Sept. 26, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1154&ln=en>.

<sup>128</sup> *Al Mahdi*, Judgment and Sentence ¶ 33.

<sup>129</sup> *Id.*

<sup>130</sup> *Scholar and Enforcer*, *supra* note 21.

statements<sup>131</sup> that Al Mahdi led the Hesbah in punishing the citizens of Timbuktu for moral offenses<sup>132</sup> such as smoking and drinking alcohol.<sup>133</sup> In particular, human rights activists claim the Hesbah was complicit in Ansar Dine's abuse of the women and girls of Timbuktu.<sup>134</sup>

### C. *Al Mahdi and the Destruction of Timbuktu*

As leader of the Hesbah, Al Mahdi had been tasked with monitoring traditional prayer practices at the mausoleums that were in conflict with the beliefs of Ansar Dine and the type of law they sought to impose in Timbuktu.<sup>135</sup> He met with local religious leaders and “explain[ed] on the radio what could and could not be done at the mausoleums.”<sup>136</sup> However, in June and July of 2012,<sup>137</sup> Iyad Ag Ghaly, the leader of Ansar Dine, decided that the mausoleums and mosques in Timbuktu that Ansar Dine considered contrary to their religious beliefs must be destroyed.<sup>138</sup> There was no question as to Al Mahdi's role in orchestrating the destruction of the Timbuktu mausoleums and mosques, but he also “recommended [to Ansar Dine leadership] not destroying the mausoleums so as to maintain relations between the population and the occupying groups.”<sup>139</sup> However, it ultimately fell to Al Mahdi to carry out the instruction to destroy the sites.<sup>140</sup>

On July 2, 2012,<sup>141</sup> in front of the cameras of journalists,<sup>142</sup> the Hesbah proceeded to systematically destroy nine mausoleums and the door of the Sidi Yahia Mosque.<sup>143</sup> In video footage, members of Ansar Dine can be seen sitting atop the mausoleums, chipping away the fragile earthen structures with

<sup>131</sup> See *Vandal of Timbuktu*, *supra* note 102 (“Every resident can tell stories of violence experienced or witnessed.”).

<sup>132</sup> Simons, *supra* note 15.

<sup>133</sup> HUMAN RIGHTS WATCH, *supra* note 18, at 13.

<sup>134</sup> Simons, *supra* note 15.

<sup>135</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 35 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>136</sup> *Id.*

<sup>137</sup> See *Mali Profile - Timeline*, *supra* note 105.

<sup>138</sup> *Al Mahdi*, Judgment and Sentence ¶ 36.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* ¶ 37.

<sup>141</sup> See *UNESCO Welcomes Restoration of Sacred Gate of Sidi Yahia in Timbuktu*, UNESCO (Sept. 20, 2016, 12:00 AM), <http://whc.unesco.org/en/news/1557/>.

<sup>142</sup> For example, footage of the destruction of the mausoleums of Timbuktu aired on Al Jazeera. See, e.g., Al Jazeera English, *Al Jazeera Speaks to UNESCO About Timbuktu Shrine Destruction*, YOUTUBE (July 2, 2012), <https://www.youtube.com/watch?v=TdnjW2xMh8k>.

<sup>143</sup> *UNESCO Trains Malian Armed Forces and Security on Protection of Cultural Heritage*, UNESCO (Nov. 25, 2016), [http://www.unesco.org/new/en/culture/themes/single-view/news/unesco\\_trains\\_malian\\_armed\\_forces\\_and\\_security\\_on\\_protection/](http://www.unesco.org/new/en/culture/themes/single-view/news/unesco_trains_malian_armed_forces_and_security_on_protection/).

poles and pickaxes, and using crowbars to pry apart the walls of the structures.<sup>144</sup> They planned to destroy every Sufi shrine in Timbuktu.<sup>145</sup>

As many observers have noted,<sup>146</sup> the scene was eerily familiar: it recalled that of the destruction of the Bamiyan Buddhas<sup>147</sup> by the Taliban in Afghanistan in 2001.<sup>148</sup> As at Bamiyan, the iconoclasm in Timbuktu was preceded and followed by urgent calls from UNESCO to stop the destruction.<sup>149</sup> There, too, leaders ensured that the destruction was recorded by journalists who would spread the news of the Taliban’s defiance to the rest of the international community.<sup>150</sup>

Ansar Dine seemed to emulate this style of defiant publicity in its own efforts. As the mausoleums fell, Al Mahdi explained to a journalist, “The Prophet [Mohamed] said break apart these mausoleums because all people are equal and so in a cemetery no tomb must rise higher than another,” describing his role in the destruction as “justify[ing] all decisions made in the name of sharia, the name of the Quran.”<sup>151</sup> During the destruction of the ancient door of the Sidi Yahia Mosque, Al Mahdi told journalists, “We fear that these myths [about the door] will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that [these myths are] the truth.”<sup>152</sup>

These justifications were not directly related to the conflict in which Ansar Dine was involved. The invasion Al Mahdi was trying to prevent was an invasion of the minds of the residents of Timbuktu, not a physical invasion of the mosque or of the city. Ansar Dine’s goal was not merely to take control of the city and the region while Mali’s official government crumbled, but to take control of the minds of its inhabitants. When they smashed the mausoleums to rubble, they did so intending to smash the beliefs of the citizens of Timbuktu. In the words of one journalist, “In destroying these

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<sup>144</sup> Al Jazeera English, *supra* note 142.

<sup>145</sup> Tharoor, *supra* note 25.

<sup>146</sup> See, e.g., Al Jazeera English, *supra* note 142.

<sup>147</sup> Tharoor, *supra* note 25.

<sup>148</sup> See, e.g., Kornegay, *supra* note 5, at 153–54.

<sup>149</sup> *Timbuktu Shrine Destruction ‘a War Crime,’* TELEGRAPH, July 2, 2012, 7:47 AM, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/mali/9369271/Timbuktu-shrine-destruction-a-war-crime.html>.

<sup>150</sup> See Kornegay, *supra* note 5, at 154.

<sup>151</sup> *Scholar and Enforcer*, *supra* note 21.

<sup>152</sup> *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence ¶ 38(viii) (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

sacred places, the jihadists were launching an assault on the Sufi-influenced form of Islam practised in Timbuktu.”<sup>153</sup> Reflecting later on the events of 2012, the Malian Minister of Culture “described the destruction of the Timbuktu monuments as ‘an attack on what fuels our soul, on the very essence of our cultural values. Their objective was to destroy our past, our culture, our identity, and in fact our dignity.’”<sup>154</sup>

After Mali’s self-referral to the ICC, on July 1, 2012, ICC Chief Prosecutor Fatou Bensouda “declared that the destruction of Sufi shrines in Timbuktu may constitute a war crime under the Rome Statute” and launched an official investigation.<sup>155</sup> In January of 2013, the Malian government requested help from France to subdue the groups in the north, which were moving south.<sup>156</sup> The French army recaptured Timbuktu by the end of the month,<sup>157</sup> and in August of 2013, United Nations (“U.N.”) forces began to stabilize the north.<sup>158</sup>

As a result of the 2012 conflict, 58,594 people remain internally displaced.<sup>159</sup> These displaced persons include members of the judiciary and police, who have been slow to return to northern Mali.<sup>160</sup> This delay has hindered the return of the rule of law and has possibly contributed to the ongoing prominence of jihadist groups in the area.<sup>161</sup> According to post-conflict reports from 2016, Malian villagers’ accounts of their interactions with jihadists differed as to whether they helped or hindered the armed theft of herdsmen’s cows and sheep, and as to whether they are sources of chaos or order.<sup>162</sup> In contrast to its stern rebuke of the actions of Islamist militants in the country, the Malian authorities continue to be accused of “turn[ing] a blind eye” to violations of human rights allegedly perpetrated by the Malian armed forces.<sup>163</sup> Many in Mali continue to crave justice.<sup>164</sup>

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<sup>153</sup> *Vandal of Timbuktu*, *supra* note 102.

<sup>154</sup> Alex Whiting, *The Significance of the ICC’s First Guilty Plea*, JUST SECURITY, Aug. 23, 2016, 10:30 AM, <https://www.justsecurity.org/32516/significance-iccs-guilty-plea/>.

<sup>155</sup> Bukova, *supra* note 80.

<sup>156</sup> *Mali Profile - Timeline*, *supra* note 105.

<sup>157</sup> *Id.*

<sup>158</sup> *Vandal of Timbuktu*, *supra* note 102.

<sup>159</sup> *The World Factbook: Mali*, *supra* note 104.

<sup>160</sup> HUMAN RIGHTS WATCH, *supra* note 18, at 12.

<sup>161</sup> *Id.*

<sup>162</sup> Dufka, *supra* note 118.

<sup>163</sup> HUMAN RIGHTS WATCH, *supra* note 18, at 45 (quoting Human Rights Watch senior West Africa researcher Corinne Dufka).

<sup>164</sup> For current information about ongoing human rights violations in Mali, see *Mali*, HUM. RTS. WATCH, <https://www.hrw.org/africa/mali/>. As of this writing, Human Rights Watch reports that AQIM

On September 18, 2015, a warrant was issued for Al Mahdi’s arrest,<sup>165</sup> and on September 26, 2015, Al Mahdi was apprehended by French troops in an arms-smuggling convoy in Niger<sup>166</sup> and brought to The Hague to stand trial.<sup>167</sup> Al Mahdi was charged with violating Article 8(2)(e)(iv) of the Rome Statute,<sup>168</sup> which describes cultural destruction of this type as a war crime under the subheading of “[o]ther serious violations of the laws and customs applicable in armed conflicts *not of an international character*, within the established framework of international law.”<sup>169</sup> Armed conflicts “not of an international character” are defined as those “that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>170</sup> In this context, Al Mahdi was specifically accused of violating Article 8(2)(e)(iv) by “[i]ntentionally directing attacks against buildings dedicated to religion . . . [and] historic monuments, . . . provided they are not military objectives.”<sup>171</sup>

It is important to remember that certain aspects of Al Mahdi’s trial and conviction indicate the ICC may have pursued this particular charge against him in order to reach other members of Ansar Dine guilty of war crimes against persons.<sup>172</sup> As previously noted,<sup>173</sup> although he was charged with a crime against property, there is some evidence of Al Mahdi’s involvement in other crimes against the citizens of Timbuktu during his time as the leader of the Hesbah.<sup>174</sup> The charge he faced under Article 8(2)(e)(iv) carried a possible term of up to thirty years’ imprisonment.<sup>175</sup> However, the prosecution recommended only nine to eleven years based on their agreement with Al Mahdi’s defense team.<sup>176</sup> This plea agreement, which Al Mahdi and the

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continues to clash with government forces, and both continue to violate the rights of Malian civilians. *See Mali: Unchecked Abuses in Military Operations*, HUM. RTS. WATCH (Sept. 8, 2017, 1:00 AM), <https://www.hrw.org/news/2017/09/08/mali-unchecked-abuses-military-operations/>.

<sup>165</sup> Case Information Sheet, ICC, *supra* note 10.

<sup>166</sup> Simons, *supra* note 15.

<sup>167</sup> Case Information Sheet, ICC, *supra* note 10.

<sup>168</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶¶ 2, 17 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>169</sup> Rome Statute, *supra* note 93, art. 8, ¶ 2(e) (emphasis added).

<sup>170</sup> *Id.* art. 8, ¶ 2(f).

<sup>171</sup> *Id.* art. 8, ¶ 2(e)(iv).

<sup>172</sup> Bruce Zagaris, *First Guilty Plea in ICC Occurs in Destruction of Historical and Religious Cultural Property Case in Mali*, 32 INT’L ENFORCEMENT L. REP. 338, n.5 (2016).

<sup>173</sup> *See supra* note 15 and accompanying text.

<sup>174</sup> *See Simons, supra* note 15.

<sup>175</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15-78-Anx1-Red2, Agreement Regarding Admission of Guilt Annex 1, ¶ 10(a) (Feb. 18, 2016) (Public Redacted Version), [https://www.icc-cpi.int/RelatedRecords/CR2016\\_05666.pdf](https://www.icc-cpi.int/RelatedRecords/CR2016_05666.pdf).

<sup>176</sup> *Malian Jihadist Pleads Guilty to Timbuktu Shrine Destruction in Historic Trial, supra* note 15.

prosecution signed on February 18, 2016, prior to his trial, refers to Al Mahdi's "cooperation with the Court" as a "mitigating circumstance[]" that the ICC may weigh in determining his sentence.<sup>177</sup> The ICC was not bound by this agreement,<sup>178</sup> but Al Mahdi's ultimate sentence of nine years fell within its parameters. It has been speculated that his prosecution for cultural destruction alone at this time is related to his possible cooperation in the apprehension and prosecution of others with whom he was associated in Timbuktu.<sup>179</sup> This type of deal may become an important tool in an international strategy to prosecute non-state actors guilty of war crimes.

Nevertheless, the trial itself put the crime of cultural destruction front and center. In her opening statement at Al Mahdi's trial, ICC Chief Prosecutor Fatou Bensouda emphasized the historic nature of the trial as well as the regrettably familiar facts of the case.<sup>180</sup> Though also making note of Al Mahdi's cooperation with the prosecution, she observed:

Today's trial is . . . all the more historic in view of the destructive rage that marks our times, in which humanity's common heritage is subject to repeated and planned ravages by individuals and groups whose goal is to eradicate any representation of a world that differs from theirs by eliminating the physical manifestations that are at the heart of communities.<sup>181</sup>

When Al Mahdi entered his guilty plea, he apologized and did not contest any aspect of the charges against him. Dismissing his well-publicized justifications of his actions during the attack on the mausoleums, he conceded that he had acted in an objectively "evil" way, remarking, "We need to speak

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<sup>177</sup> *Al Mahdi*, Agreement Regarding Admission of Guilt Annex 1, ¶ 12.

<sup>178</sup> *Id.* ¶ 11.

<sup>179</sup> "The ICC would bring additional charges in Mali if it could, if it had the evidence in hand. But such evidence is often extremely difficult to come by . . . While in other situations the ICC's cases against senior leaders have stalled[,] . . . in this case the ICC successfully pursued a more modest case . . . In the Al Mahdi case, it is clear that the defendant has already provided significant, detailed information about senior figures in Ansar Dine . . . and redactions in publicly-available plea agreement suggest that he has further agreed to cooperate and testify against other accused persons." Whiting, *supra* note 154.

<sup>180</sup> Statement, ICC Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the Opening of Trial in the Case against Mr Ahmad Al-Faqi Al Mahdi (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822>.

<sup>181</sup> *Id.*

justice even to ourselves. We have to be truthful, even if it burns our own hands.”<sup>182</sup>

#### IV. CONCLUSION

Al Mahdi’s trial was the first application of Article 8(2)(e)(iv),<sup>183</sup> a fact indicative of the difficulties the international community has encountered in its attempts to curtail cultural destruction, even in the face of a global epidemic.<sup>184</sup> The current legal regime is ill-suited for conflicts with and among non-state actors because existing international law protecting cultural property in conflict zones was designed for a type of war which bears little resemblance to the major conflicts of recent years. Non-state actors often attempt to establish themselves as permanent leaders in the places they invade during armed conflict and to bring about a change in the relationship between religion, the law, and the way residents live their lives. These goals complicate the World War II-era notions of cultural preservation. For the jihadists swept up in groups like Ansar Dine, the motivation to destroy World Heritage sites like those at Timbuktu may be more similar to that of civilians “in Eastern Europe and the Soviet Union [as] they tore down the statues of . . . Lenin and Stalin.”<sup>185</sup> Those who fight in modern contexts in which cultural property is at stake are unlikely to be deterred by a war crime statute wielded only against those who are unsuccessful in accomplishing widespread cultural revolution.

The international community must strike a delicate balance between apathy and intrusive interventionism in order to effectively deter cultural destruction during times of civil unrest. The Al Mahdi conviction stands as a stark reminder of the reasons why these crimes so frequently go unaddressed. As of late 2017, of the fifty-four sites currently included on the List of World Heritage in Danger, twenty-five are cultural heritage sites located in North Africa and the Middle East.<sup>186</sup>

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<sup>182</sup> Ruth Maclean, *‘I Am Sorry’: Islamist Apologises for Destroying Timbuktu Mausoleums*, THE GUARDIAN, Aug. 22, 2016, 8:32 AM, <https://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction>.

<sup>183</sup> Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 13 (Sept. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_07244.pdf](https://www.icc-cpi.int/CourtRecords/CR2016_07244.pdf).

<sup>184</sup> Simons, *supra* note 15.

<sup>185</sup> Posner, *supra* note 26, at 221–22.

<sup>186</sup> See *List of World Heritage in Danger*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/danger/> (last visited Nov. 11, 2017).

However, the sequence of events in Mali exemplifies a certain kind of progress. At the end of the day, a prominent perpetrator of culturally destructive war crimes against immovable cultural property was tried and convicted in the ICC in a display of the authority of cultural heritage laws on the world stage. As the first guilty plea before the ICC,<sup>187</sup> it will potentially be remembered as an important exemplar of the prosecution effectively using the cultural destruction charge to work with a defendant to gather evidence about war crimes committed by others at the same time.<sup>188</sup> Al Mahdi's cooperation will be crucial as the ICC continues its investigation of the 2012 conflict and as Mali continues to pick up the pieces of a broken national identity.<sup>189</sup> Although the Malian government forces that subdued the Islamist groups in the north engaged in their own torture and other human rights abuses, the government has failed to investigate or prosecute those war crimes,<sup>190</sup> so the burden of enforcement may rest with an international community now familiar with the situation.

Additionally, in August of 2017, the ICC issued a Reparations Order against Al Mahdi, ordering him to pay 2.7 million euros for his culturally destructive crimes in Timbuktu.<sup>191</sup> Though Al Mahdi is indigent, a separate agency called the Trust Fund for Victims<sup>192</sup> will match the award and prepare an implementation plan, a draft of which will be submitted to the court in 2018.<sup>193</sup> The order comes amid doubts that it can be effectively distributed, given the ongoing instability of northern Mali, and fears that such awards may incentivize future destruction.<sup>194</sup>

In terms of furthering the deterrence of culturally destructive war crimes, the events in the aftermath of Al Mahdi's arrest and subsequent trial are perhaps the most hopeful signs. On April 25, 2013, the U.N. Security Council established the United Nations Multidimensional Integrated Stabilization Mission in Mali ("MINUSMA"),<sup>195</sup> a U.N. peacekeeping force

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<sup>187</sup> *As ICC Trial Opens, Malian Extremist Admits Guilt to Destroying Historic Sites in Timbuktu*, UN NEWS CTR. (Aug. 22, 2016), <http://www.un.org/apps/news/story.asp?NewsID=54728>.

<sup>188</sup> Zagaris, *supra* note 172.

<sup>189</sup> *See* Whiting, *supra* note 154.

<sup>190</sup> *See* HUMAN RIGHTS WATCH, *supra* note 18, at 5.

<sup>191</sup> Press Release, ICC, Al Mahdi Case: ICC Trial Chamber VIII Issues Reparations Order, ICC-CPI-20170817-PR1329 (Aug. 17, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1329>.

<sup>192</sup> *See War Crimes Court Orders Mali Radical to Pay €2.7m for Timbuktu Rampage*, GUARDIAN (Aug. 17, 2017, 6:13 AM), <https://www.theguardian.com/world/2017/aug/17/war-crimes-court-icc-orders-mali-radical-pay-damages-timbuktu-rampage-ahmad-al-faqi-al-mahdi>.

<sup>193</sup> Press Release, ICC, *supra* note 191.

<sup>194</sup> *War Crimes Court Orders Mali Radical to Pay €2.7m for Timbuktu Rampage*, *supra* note 192.

<sup>195</sup> S.C. Res. 2100, ¶ 7 (Apr. 25, 2013).

that, in 2015,<sup>196</sup> was additionally “mandated to support the Malian authorities in protecting Mali’s cultural and historic sites from attacks.”<sup>197</sup> Security Council Resolution 2227 specifically directs MINUSMA to “assist Malian authorities . . . in protecting from attack the cultural and historical sites in Mali.”<sup>198</sup> Its efforts include a Quick Impact Project to rebuild Timbuktu’s manuscript libraries also destroyed during the 2012 conflict.<sup>199</sup>

Although cultural artifacts once destroyed are gone forever, modern documentation and research efforts can lead restorative efforts to help communities heal. In September of 2016, just days before Al Mahdi was convicted, citizens of Timbuktu gathered to unveil a restored version of the sacred gate of the Sidi Yahia mosque destroyed by the Hesbah in 2012.<sup>200</sup> This was the culmination of a UNESCO rehabilitation effort commenced in 2013 shortly after French forces retook the city.<sup>201</sup> It involved the efforts of local carpenters and stonemasons using traditional methods to rebuild each mausoleum destroyed by Ansar Dine.<sup>202</sup> At a 2016 consecration ceremony for the rebuilt mausoleums, Almamy Koureissi, a spokesperson for the Minister of Culture, Handicrafts and Tourism of Mali, observed, “Culture is at the heart of government action because we have found our bearings, our cultural values. We need to embrace our moral center, to remain standing, open to the world, welcoming and hospitable in accordance with our legendary traditions.”<sup>203</sup>

Furthermore, in November of 2016, UNESCO hosted a workshop at the National Museum of Mali in Bamako to train thirty representatives of Malian armed forces in the preservation of cultural heritage during armed conflict.<sup>204</sup> The workshop represented an important step for the U.N. in providing resources for member states to “familiarize them with the tools at their

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<sup>196</sup> Press Release, Security Council, Security Council, Adopting Resolution 2227 (2015), Extends Mandate of Multidimensional Mission in Mali Until 30 June 2016, Adding Military Observers to Monitor Ceasefire, U.N. Press Release SC/11950 (June 29, 2015), <https://www.un.org/press/en/2015/sc11950.doc.htm>; *see also* S.C. Res. 2227 (June 29, 2015).

<sup>197</sup> *Cultural Heritage*, MINUSMA, <https://minusma.unmissions.org/en/cultural-heritage/> (last visited Nov. 4, 2017).

<sup>198</sup> S.C. Res. 2227 ¶ 14(h) (June 29, 2015).

<sup>199</sup> *See Cultural Heritage*, *supra* note 197.

<sup>200</sup> *UNESCO Welcomes Restoration of Sacred Gate of Sidi Yahia in Timbuktu*, *supra* note 141.

<sup>201</sup> *Timbuktu Mausoleums in Mali Rebuilt After Destruction*, BBC NEWS (July 19, 2015), <http://www.bbc.com/news/world-africa-33587325>.

<sup>202</sup> *Id.*; *UNESCO Welcomes Restoration of Sacred Gate of Sidi Yahia in Timbuktu*, *supra* note 141.

<sup>203</sup> *900-Year-Old Consecration Ceremony Held for the Timbuktu Mausoleums*, UNESCO WORLD HERITAGE CTR. (Feb. 4, 2016), <http://whc.unesco.org/en/news/1430/>.

<sup>204</sup> *UNESCO Trains Malian Armed Forces and Security on Protection of Cultural Heritage*, *supra* note 143.

disposal for ensuring protection of citizens and cultural property.”<sup>205</sup> Similar man-made disasters have in the past led to greater visibility and protection of cultural property,<sup>206</sup> and there is reason to believe that the destruction in Timbuktu and the Al Mahdi conviction will do the same in Mali.<sup>207</sup> That visibility may continue to be vital in the near future—there are reports that a new Islamist group, also related to AQIM, called the Macina Liberation Front, has begun attacking Malian politicians and military.<sup>208</sup> The Malian Army continues to be accused of human rights abuses as it fights back.<sup>209</sup>

The rise of iconoclasm and resulting World Heritage losses, from Bamiyan to Timbuktu, have also mobilized international efforts to contribute to better documentation of attacks on threatened sites. For example, Endangered Archaeology in the Middle East and North Africa (“EAMENA”) uses satellite imagery to compile a spatial database that can provide risk assessment information to heritage professionals.<sup>210</sup> In the words of EAMENA, “Not all damage and threats to the archaeology can be prevented, but they can be mitigated”<sup>211</sup> by its efforts “to create an accessible body of data . . . to target those sites most in danger and better plan and implement the preservation and protection of this heritage.”<sup>212</sup>

These forms of international outreach and cooperation hold some promise to clarify the rationale and scope of international laws protecting cultural heritage even in regions undergoing major sociopolitical upheaval. While Al Mahdi’s conviction is a step in the right direction, the specific factors in place that made his prosecution possible—especially Mali’s ratification of certain key international conventions and the Rome Statute—are unique and unlikely to lead to relief for other civilian communities suffering similar atrocities. Although the fundamental logic of cultural heritage has been something of an unwritten norm for centuries, in practice, it has been frequently violated in favor of military expediency, and “impunity,

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<sup>205</sup> *Id.*

<sup>206</sup> Gerstenblith, *supra* note 9, at 355–56. In particular, Gerstenblith points to the looting that accompanied the United States’ 2003 invasion of Iraq followed by the enactment and ratification of tighter protections for Iraqi cultural property. *Id.*

<sup>207</sup> *See id.* at 387–88.

<sup>208</sup> Dufka, *supra* note 118.

<sup>209</sup> Dufka, *supra* note 118.

<sup>210</sup> *Endangered Archaeology in the Middle East and North Africa*, EAMENA, <http://eamena.arch.ox.ac.uk/> (last visited Nov. 11, 2017).

<sup>211</sup> *Id.*

<sup>212</sup> *Background and Aims*, EAMENA, <http://eamena.arch.ox.ac.uk/background-and-aims/> (last visited Nov. 11, 2017).

rather than accountability, has been the norm.”<sup>213</sup> The cosmopolitan philosophy of collective ownership of cultural treasures can be cast as a conqueror’s philosophy; a philosophy which holds those cultural treasures at arm’s length, and is likely to seem irrelevant and self-interested to those instigating radical ideological change in the states that hold them. The fundamental assumptions at the heart of the international protection of cultural heritage must evolve alongside the evolution of the rules of armed conflict in order to better reflect the realities of modern threats. In the words of ICC Chief Prosecutor Fatou Bensouda, when it comes to the destruction of cultural heritage, “[h]istory will not be generous to our failure to care.”<sup>214</sup>

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<sup>213</sup> Bassiouni, *supra* note 99, at 795.

<sup>214</sup> Maclean, *supra* note 182.