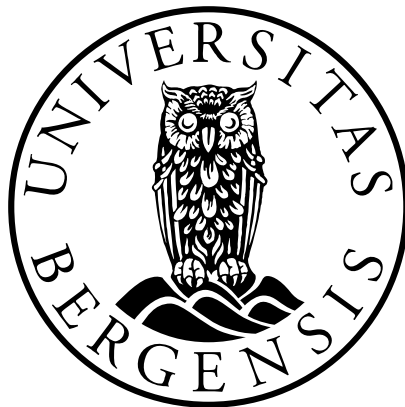


Wilful Destruction of Cultural Property as the Principal Charge before the ICC

*The Al Mahdi Case and the Gravity Threshold
for Admissibility*

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Table of Contents

- Table of Contents 1
- Abbreviations 3
- 1 Introduction 4
 - 1.1 Topic 4
 - 1.2 Thesis 5
 - 1.3 Methodology 6
 - 1.4 Limitations and Outline 6
 - 1.5 International Criminal Law 7
 - 1.6 The International Criminal Court 8
 - 1.6.1 Background 9
- 2 The Criminalisation of Wilful Destruction of Cultural Property 11
 - 2.1 History and Developments in the Protection of Cultural Property 11
 - 2.2 Underlying Offences 13
 - 2.2.1 The General Requirement of the Existence of an Armed Conflict 13
 - 2.2.2 Core Offence: Unlawful attacks against cultural property 13
 - 2.2.3 Unlawful Acts of Hostility Against Cultural Property other than Attacks 15
 - 2.2.4 Unlawful Appropriation of Cultural Property 16
 - 2.3 Destruction of Cultural Property in the Rome Statute 16
 - 2.3.1 Art. 8(2)(e)(iv) 16
 - 2.3.2 Limitations of the Rome Statute 17
- 3 Admissibility before the ICC 19
 - 3.1 Introduction 19
 - 3.2 The Gravity Threshold under the Rome Statute 19
 - 3.2.1 Origin and Purpose 20
 - 3.2.2 Interpretation and Application of the Gravity Threshold 21
- 4 The Al Mahdi Case 30
 - 4.1 About 30
 - 4.2 Background 31
 - 4.3 Findings 32
 - 4.3.1 Admission of Guilt 32
 - 4.3.2 Findings on Article 8(2)(e)(iv) of the Statute 33

4.3.3	Assessment of the Gravity of the Crime	33
4.3.4	Al Mahdi’s Contribution to the Attack	34
5	Were the Crimes Committed by Al Mahdi of Sufficiently Grave?	36
5.1	Can Destruction of Cultural Property as the Principal Charge Be “of sufficient gravity”?.....	36
5.2	Did <i>Al Mahdi</i> meet the Gravity Threshold?.....	37
	Bibliography	40

Abbreviations

AC	Appeals Chamber
ICC	International Criminal Court (the Court)
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber

1 Introduction

1.1 Topic

Destruction of cultural property and cultural heritage dates back a long time and has been an inherent component in all armed conflicts. Cultural property has been the object of protection in several international treaties over the years. The 1954 Hague Convention and its Additional Protocol I and Second Protocol contains provisions entailing individual criminal responsibility for destruction of cultural property in armed conflict.¹ The 1954 Hague Convention however, applies to a more selective range of cultural property than the customary international law applicable during armed conflict, as its limited to “cultural property of great importance to the cultural heritage of people”.²

The special significance that is given to religious sites and cultural property makes the destruction of cultural property an effective repressing tool, often used against minorities to erase their culture.³ Although destruction of cultural property and heritage may be less shocking than genocide, mass rape and other crimes against humanity, it is still of considerable significance, because such acts can have long term effects on the identity of cultural groups. Not only does destruction of cultural property impact the people of the cultural group, but it serves to decrease cultural diversity in the world.⁴

The Balkan Wars in the 1990s saw how cultural destruction was linked to attempts at ethnic cleansing. In more recent years the international community has witnessed large scale destruction of cultural property by extremist groups like ISIS, Al Qaeda and other affiliated groups. The result of this is that there has been increased calls to end impunity for this type of crime.⁵

¹ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999. [Hereafter 1954 Hague Convention, Protocol I and Second Protocol]

² 1954 Hague Convention, art. 1.

³ Gottlieb, Yaron. (2005). "Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC".

⁴ Thomas, Sarah J. "Prosecuting the Crime of Destruction of Cultural Property."

⁵ South China Morning Post 2017. UNESCO in war against Islamic State to protect world's cultural heritage from destruction.

On 26 September of 2016, the ICC convicted Al Mahdi for intentionally directing attacks against religious and historic buildings in Timbuktu.⁶ The *Al Mahdi* case represents an important development in the protection of cultural property in international criminal law. Al Mahdi is the first individual that has been held responsible for destruction of cultural property as the only or principal charge before the ICC.

However, the case has raised some questions in the international community. One of the main criticisms has been that the case was inadmissible, because it didn't meet the gravity threshold in art. 17(1)(d) of the Rome Statute.⁷ It has been questioned whether the drafters of the Rome Statute envisaged to prosecute cultural destruction when not in combination with other war crimes.⁸

1.2 Thesis

This thesis seeks to analyse wilful destruction of cultural property as the principal charge before the ICC and the gravity threshold.

All crimes falling under the Rome Statute are of a serious nature. However, art. 17(1)(d) stipulates that cases “not of sufficient gravity to justify further action by the Court” are inadmissible. Cases that are brought before the ICC must therefore be “of sufficient gravity” to be admissible. This raises questions as to how the gravity threshold should be interpreted and applied by the Court. The Rome Statute's guidance as to how this threshold should be interpreted is limited. There are no provisions expressly stating how the gravity threshold should be determined.

The aim of this thesis is to establish whether wilful destruction of cultural property as a principal charge can meet the gravity threshold. The thesis will look at how the gravity threshold has been interpreted and applied by the ICC, and try to establish how it should be applied. Secondly, the thesis will consider the *Al Mahdi* case and whether it is in line with the gravity threshold.

⁶ Prosecutor v. Ahmad Al Faqi Al Mahdi, TC, *Judgement and Sentence*, ICC-01/12-01/15-171. [Hereafter *Al Mahdi*]

⁷ Vogelgang, Eva & Clerc, Sylvain 2016. *The Al Mahdi Case: Stretching the Principles of the ICC to a Breaking Point?*

⁸ *Ibid.*

1.3 Methodology

Article 21 of the Rome Statute stipulates the Courts applicable law. The provision includes both sources of law specific to the ICC⁹ and general international sources of law.¹⁰ The sources are enumerated and ranked.

In the first place the Court shall apply the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence.¹¹ The wording establishes a hierarchy between these internal sources and other sources of law. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.¹²

The question of how these instruments should be interpreted are not addressed in the Rome Statute. The Statute only states that the interpretations must be consistent with internationally recognized human rights¹³ and that the definitions of crimes should be strictly construed and not extended by analogy.¹⁴ Where appropriate, applicable treaties and principles and rules of international law can be applied.¹⁵

The Rome Statute is a treaty. It will therefore be interpreted according to the rules set forth by art. 31 and 31 of the 1969 Vienna Convention on the Law of Treaties.¹⁶ Art. 31 of the Vienna Convention stipulates that interpretation of treaties shall be based on literal, contextual and teleological considerations. The travaux préparatoires of the Rome Statute can be used to confirm interpretations made based on literal, contextual and teleological considerations.¹⁷

1.4 Limitations and Outline

The admissibility analysis of the Al Mahdi case will be limited to the gravity threshold. The issues of self-referrals and complementarity will not be raised due to space.

Chapter 2 will look at the history and developments in protection of cultural property. It will also establish underlying offences against cultural property in international criminal law.

⁹ Rome Statute of the International Criminal Court, Art. 21(1)(a) and 21(2). [The Rome Statute]

¹⁰ Rome Statute, art. 21(b)-(c).

¹¹ Rome Statute, art. 21(1)(a).

¹² Rome Statute, art. 51(1).

¹³ Rome Statute, art. 21(3).

¹⁴ Rome Statute, art. 22(2).

¹⁵ Rome Statute, art. 21(1)(b).

¹⁶ Vienna Convention on the Law of Treaties. [Vienna Convention]

¹⁷ Vienna Convention, art. 32

Chapter 3 will look at the gravity threshold under the Rome Statute and how the gravity threshold has been interpreted and applied by the Court and the OTP.

Chapter 2 will present the *Al Mahdi* case and the Trial Chambers assessment of the gravity of the crime

Chapter 4 will analyse if destruction of cultural property as the principle charge meets the gravity threshold. and if the crimes committed by Al Mahdi were sufficient grave to justify action by the ICC.

1.5 International Criminal Law

International criminal law is a branch of public international law designed to prohibit certain categories of conduct and to hold the persons engaging in such conduct criminally liable.¹⁸

The core crimes under international criminal law are genocide, crimes against humanity, torture, aggression, war crimes and terrorism.¹⁹ International criminal law springs from international law, as well as national criminal law.²⁰ The rules of international criminal law originates from sources of international law, such as treaties and customary international law.²¹

International criminal law authorize states, or obliges them to prosecute and punish such criminal conduct, while it also regulates international proceedings before international criminal courts.²²

The body of international criminal law consist both of substantive law and procedural law. It is built on the notion that international criminal law is capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals.²³ In other words, individuals have international duties which transcends the national obligations of obedience imposed by the state. The substantial law of international criminal law consist of the rules specifying; acts that are prohibited, the subjective elements

¹⁸ Cassese, Antonio (2013). *International Criminal Law*, p.3

¹⁹ Rome Statute art.5

²⁰ Cassese (2013) p.5

²¹ *Ibid*, p.3.

²² *Ibid*, p. 3

²³ *Ibid*.

required for accountability, possible excuses or justifications for such acts, and on which conditions states may or must prosecute persons accused of one of these crimes.²⁴

International criminal law is a relatively new and rudimentary branch of law. While rules of warfare have a long tradition, it is only in more recent history, after World War II, that categories of new crimes have developed. It is also only more recently that individuals have been held directly and personally accountable for crimes committed. Rules of warfare used to be addressed to states as belligerent parties only.

The development of international criminal law has been a slow and complex process. When a new category of a crime has developed, the objective and subjective criteria for accountability have not been made completely clear. International criminal law is therefore not yet a coherent legal system.²⁵

1.6 The International Criminal Court

The ICC is a permanent international court for prosecuting and trying individuals accused of committing the most serious crimes of concern to the international community.²⁶ It consists of four organs: the Presidency, the Judicial Division, the Registry and the Office of the Prosecutor.

The Court was established by the international community and has jurisdiction over war crimes, crimes against humanity, genocide and the crime of aggression.²⁷ The main goal of the ICC is to contribute to ending impunity for perpetrators of such crimes and prevent these crimes from happening.²⁸ The primary objectives for punishment at the ICC are retribution and deterrence.²⁹ The ICC is different from other international tribunals and courts, as it is not limited by geographic or time constraints.³⁰ However, the jurisdiction of the Court is somewhat limited by complementarity and the so-called gravity threshold.³¹ The ICC is

²⁴ *Ibid.*

²⁵ *Ibid.*, p.5.

²⁶ Rome Statute, art. 1 .

²⁷ Art. 5 .

²⁸ Preamble .

²⁹ *Al Mahdi*, para 66.

³⁰ E.g. ICTY has mandate to bring to justice those responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>

³¹ Art. 17

complementary to national courts³² and can only intervene when a State is either unable or unwilling to investigate and prosecute the alleged perpetrators.³³ The case must also be of “sufficient gravity” to justify further action by the Court.³⁴

1.6.1 Background

The creation of the ICC came as a result of events taking place in the 20th century. After World War I came a period with numerous attempts at establishing international criminal institutions of different kinds.³⁵ The failure to establish international criminal institutions at that time was largely due to how high national sovereignty was placed.³⁶ The atrocities committed during World War II, however, led to the establishment of the Tokyo and Nuremberg Tribunals. This was an important development in international criminal law. Even if the Tribunals have been criticized for applying *ex post facto* law, their establishment showed the possibilities of international criminal justice.³⁷ The successful Post-Cold War establishments of the ICTY and ICTR in the 1990s increased the support for the creation of an international criminal court.³⁸

The Rome Statute, the treaty that established the ICC, was entered into force 1st of July 2002.³⁹ The Rome Statute sets out the crimes falling within the jurisdiction of the Court, the rules of procedure and the mechanisms for states to cooperate with the ICC.⁴⁰ According to art. 12, the ICC has jurisdiction over the crimes referred to in art. 5, where the alleged perpetrator is a national of a State Party or when the crime was committed on the territory of a State Party, known as territorial and active personality jurisdiction. Non-party States may accept the exercising of jurisdiction by the Court.⁴¹ This means that the ICC does not have universal jurisdiction over the crimes listed in art. 5, but works as an agent of the State.⁴² It’s

³² Art.1 and art. 17(1)(a-c)

³³ Art. 17(1)(a)-(c).

³⁴ Art. 17(1)(d).

³⁵ Cassese (2013) p. 253.

³⁶ *Ibid* p. 255

³⁷ Byron, Christine (2009). *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, p. 1.

³⁸ *Ibid* p.3

³⁹ <https://www.icc-cpi.int/about>

⁴⁰ P, 2. <https://www.icc-cpi.int/iccdocs/get-involved/lesson1.pdf>

⁴¹ Art. 12(3).

⁴² Davids, Joseph (2009) “Jurisdiction and Admissibility Before the International Criminal Court”. p. 4.

not the inherent nature of the crimes in art. 5 that gives the ICC authority, but the surrendering of jurisdictional competence on the part of either a territorial or national State.⁴³

⁴³ Murphy (2006). "Gravity Issues and The International Criminal Court", p. 311.

2 The Criminalisation of Wilful Destruction of Cultural Property

2.1 History and Developments in the Protection of Cultural Property

The Lieber Code from 1863, represents the first to attempt to codify the laws of war.⁴⁴ It was also the first legal document referring to the protection of cultural property. The first international document was the 1874 Declaration of Brussels, although it was never ratified.⁴⁵ However, the concept of protecting certain forms of immovable property largely influenced the later adopted 1907 Hague Convention, which is now considered customary international law.

During World War I, cultural property suffered grave damage after acts of destruction. The destruction of cultural property during World War I, however, paled in comparison with Germany's systematic destruction and plundering during World War II. Hitler's attempt to have Notre Dame destroyed, made it clear that a legal framework was needed to punish such acts.⁴⁶ The Nuremberg Tribunal was therefore given jurisdiction over war crimes including "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".⁴⁷ The resulting Nuremberg Trials are considered the first true international enforcement of protection of cultural property.⁴⁸

The recognition by the international community of the need for a separate instrument concerned only with protecting cultural property during armed conflicts led to the adoption of the 1954 Hague Convention.⁴⁹ The 1954 Hague Convention covers movable and immovable objects, and obligates the parties of the treaty to establish measures to safeguard cultural

⁴⁴ Instructions for the Government of Armies of the United States in the Field, 24 April 1863. [Lieber Code] <https://ihl-databases.icrc.org/ihl/INTRO/110>

⁴⁵ Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874 [Brussels Declaration]

⁴⁶ Guy-Ryan 2016. "The Destruction of Precious Cultural Property".

⁴⁷ Charter of the International Military Tribunal at Nuremberg, Art. 6(b). [Nuremberg Charter]

⁴⁸ Gottlieb (2005), p. 860

⁴⁹ 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

property.⁵⁰ Art. 28 of the 1954 Hague Convention require State Parties to “undertake[...]all necessary steps to prosecute and impose penal [...]sanctions” upon those individuals who commits breaches of the Convention.⁵¹ In other words, destruction of cultural property can produce individual criminal responsibility.

The effectiveness of the Convention was reduced by failure to enumerate specific offenses that could bring about criminal prosecutions. In addition, the implementation and enforcement of art. 28 was left solely up to member states, giving them an excessive margin of discretion.⁵² The 1977 Additional Protocol to the Geneva Conventions reiterated the obligations protect cultural property.⁵³ However, the protection of cultural property proved to be ineffective in the conflicts which followed.⁵⁴

Despite the creation of new legal framework, plundering and destruction of cultural heritage continued. The Khmer Rouge destroyed nearly 2,000 temples and monasteries during the Cambodian Civil War, as they tried to eradicate Buddhism from the country.⁵⁵ In the 1990s, the Balkan Wars witnessed the attacks on many historical sites and cities. The Old Town of Dubrovnik was shelled and Stari Most in Mostar was completely destroyed. As a result the ICTY was granted jurisdiction over the war crime of “seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.⁵⁶ With the memory of the Balkan Wars in mind, the drafters of the ICC created art. 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute, which gives the Court jurisdiction over the war crime consisting of intentionally directing attacks against “buildings dedicated to religion, education, art, science or charitable purposes, [and] historic monuments”.

The deficiencies in the 1954 Hague Convention resulted in the adoption of the Second Protocol in 1999. Unfortunately, even after the adoption of the Second Protocol, the international community has witnessed the continued disregard for cultural property and

⁵⁰ 1954 Hague Convention, art. 28.

⁵¹ *Ibid.*

⁵² Gottlieb (2005) p. 861.

⁵³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵⁴ *Ibid.*, p. 862

⁵⁵ Wallace, Charles P 1990. “Buddhism Rising Again From The Ashes of Cambodia”.

⁵⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia, 23 May 1993. [ICTY Statute], art. 3(d)

heritage, like the Taliban's dismantling of the Buddha statues in Bamiyan⁵⁷ and ISIS's destruction of artifacts in the Mosul Museum in Iraq and in Palmyra.⁵⁸

Destruction of cultural property during armed conflict has traditionally received more attention in the international arena. This has led to advancements in individual criminal responsibility for persons involved in destruction of cultural property in armed conflicts. The legal framework for destruction of cultural property committed in peacetime remains notably weaker. The justifications for this distinction, however, can be said to be questionable on both the pragmatic and normative level.⁵⁹

2.2 Underlying Offences

2.2.1 The General Requirement of the Existence of an Armed Conflict

The existence of an armed conflict is a necessary legal condition for the commission of a war crime. In addition, the destruction of cultural property must have “nexus” to the armed conflict, in order to qualify as a war crime.⁶⁰ Laws of War apply in the whole territory of states at war, or in non-international armed conflicts, the territory under the control of a party to the conflict. The Laws of War continue to apply until peace is established or a peaceful settlement is achieved.⁶¹ The armed conflict must have played a substantial role in the perpetrator's ability or decision to commit the crime, and the in the manner or purpose for which it was committed.⁶²

2.2.2 Core Offence: Unlawful attacks against cultural property

Customary international law encompasses individual criminal responsibility for unlawfully directing attacks against cultural property, both in international and non-international armed conflicts, as long as such property is not a military objective. This responsibility is distinguishable from unlawful attacks against civilian objects.⁶³ The Rome Statute, for

⁵⁷ Kakissis, Joanna 2011. “Bit By Bit, Afghanistan Rebuild Buddhist Statues”.

⁵⁸ Destruction of cultural property committed by the ISIS is extensive. For a more complete overview see: https://en.wikipedia.org/wiki/Destruction_of_cultural_heritage_by_ISIL

⁵⁹ Gottlieb (2005), p. 858

⁶⁰ See Rome Statute Art. 8(2)(b)(ix): “in the context of and was associated with an armed conflict”.

⁶¹ Prosecutor v. Kunarac, Kovac and Vukovic, TC, *Judgement*, IT-96-23-T & IT-96-23/1-T, para 55.

⁶² *Ibid*, para 58.

⁶³ O'Keefe, Roger (2010). “Protection of Cultural Property Under International Criminal Law”

example, only recognizes the war crime of intentionally directing attacks against civilian objects, when the attack takes place in an international armed conflict.⁶⁴

The meaning of “military objective” in customary international law, is the same as the definition in art. 52(2) of the Additional Protocol I. In other words, objects “which by their nature, location, purpose or use make an effective contribution to military action”, and in addition “whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time” offers a definitive military advantage.⁶⁵ In the majority of cases, however, cultural property will not constitute a military objective. Intentional attacks on cultural property will therefore often, constitute a war crime in both non-international and international armed conflicts.⁶⁶

Types of cultural property that may constitute a military objective can be; historic forts, bridges or cultural property located in the battlefield. The principal basis for which an attack against cultural property may not be a war crime, is if its use makes an effective contribution to military action.⁶⁷ Nevertheless, such an attack will only be lawful if its “destruction, capture or neutralization [...] offers a definitive military advantage”.⁶⁸ This is known in international criminal law as “military necessity”. The war crime of intentional destruction of cultural property under the Rome Statute accepts military necessity as an exception.⁶⁹ The absence of military necessity is an element of the crime when it comes to destruction of cultural property.⁷⁰ When military necessity is an element of the crime, it rests with the prosecution to prove the absence of it. If the prosecution fails to accomplish this, they have not proven that a crime has been committed. Military necessity is therefore not a “defence” in its proper form, but a challenge to if a crime has been committed.⁷¹ Military necessity as a “defence”, either as an excuse or a justification, is limited to those war crimes which the absence of military necessity is not an element.⁷²

2.2.2.1 Is it necessary that the cultural objects are destroyed or damaged?

⁶⁴ Rome Statute, art. 8(2)(b)(ii).

⁶⁵ Additional Protocol I, art. 52.

⁶⁶ O’Keefe (2010).

⁶⁷ *Ibid.*

⁶⁸ Additional Protocol I, Art. 52.

⁶⁹ Rome Statute, art.8(2)(b)(ix) and 8(2)(e)(iv).

⁷⁰ Hayashi (2010) p.130

⁷¹ *Ibid.*, p. 132

⁷² *Ibid.*, p. 134

A question that can be raised, is whether it is necessary that the cultural objects are destroyed or damaged, because of the attack, for it to constitute the war crime of attacking cultural property.⁷³

This question is solved differently in the ICTY Statute and the Rome Statute of the ICC. In art. 3(d) of the ICTY Statute, the wording of the provision is that “seizure of, destruction or [...] damage” of cultural property is prohibited. The Rome Statute on the other hand, refers to “directing an attack [against]” such property. The solution used in the Rome Statute appears to be consistent with art. 53 in the Additional Protocol I⁷⁴, and seems to be the better position, as the underlying customary international humanitarian law prohibits directing attacks against cultural property.⁷⁵

2.2.2.2. Mens Rea

The required *mens rea* of the crime is intent and knowledge.⁷⁶ The meaning of “knowledge” is “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.⁷⁷ In other words, the perpetrator must have intentionally or wilfully directed the attack against cultural property, in the knowledge that the object was cultural property.

It is unclear whether, recklessness would suffice under customary international law.⁷⁸ The ICTY has stated that the intent requirement means; “knowledge and willful” or “in reckless disregard of the substantial likelihood of the destruction or damage”.⁷⁹ While the Rome Statute’s definition is that a perpetrator has intent relating to conduct, when he “means to engage in the conduct”.

2.2.3 Unlawful Acts of Hostility Against Cultural Property other than Attacks

O’Keefe mentions demolition by the planting of explosives or by bulldozers, jackhammers or other wrecking equipment, as unlawful acts of hostilities against cultural property other than attacks.⁸⁰ He argues that such acts of hostility, are treated under the customary war crime of

⁷³ O’Keefe (2010)

⁷⁴ ICRC Commentary, Art. 53, n. 2070

⁷⁵ O’Keefe (2010)

⁷⁶ Rome Statute Art.30

⁷⁷ *Ibid*, Art. 30(3)

⁷⁸ O’Keefe (2010)

⁷⁹ Prosecutor v. Brđanin. TC, *Judgement*, IT-99-36-A, para. 599.

⁸⁰ O’Keefe (2010)

destroying the enemy's property in art. 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute, because cultural property is protected from acts of hostility other than attacks by customary international law in both international and non-international armed conflict.⁸¹

2.2.4 Unlawful Appropriation of Cultural Property

Both the Nuremberg Charter and the ICTY Statute contains provisions granting jurisdiction over the war crime of plunder of private property.⁸² Furthermore, art. 3(d) of the ICTY Statute grants the ICTY jurisdiction over the war crime “seizure of [...] works of art and science”.

The Rome Statute makes the “seizing the enemy's property unless such [...] seizure be imperatively demanded”, and the pillaging of a town or place war crimes.⁸³

Customary international law protects cultural property from seizure both in international and non-international armed conflicts, provided such seizure is not demanded by the necessities of war.⁸⁴

2.3 Destruction of Cultural Property in the Rome Statute

Art. 8 in the Rome Statute defines a number of war crimes that can be used in cases related to cultural heritage destruction. Art. 8(2)(a)(iv) makes “[e]xtensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” a war crime. Moreover, art. 8(2)(b)(ii) makes it a war crime to intentionally direct “attacks against civilian objects”. “Civilian objects” are objects that are not military objectives. «Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, provided they are not military objectives» is also war crime.⁸⁵ Furthermore, “[d]estroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded”, and “[p]illaging a town or place” can be war crimes.⁸⁶

2.3.1 Art. 8(2)(e)(iv)

⁸¹ *Ibid.*

⁸² Nuremberg Charter art. 6(b) and the ICTY Statute art. 3(e)

⁸³ Rome Statute, art. 8(2)(b)(xiii) and 8(2)(b)(xvi)

⁸⁴ O'Keefe (2010)

⁸⁵ Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv)

⁸⁶ Art. 8(2)(b)(xiii) and 8(2)(b)(xvi)

The Rome Statute's art. 8(2)(e)(iv) and art. 8(2)(b)(ix) criminalizes destruction of cultural property. The elements in art. 8(2)(e)(iv) and art. 8(2)(b)(ix) are essentially identical. Article 8(2)(e)(iv) is the non-international armed conflict analogue of art.8(2)(b)(ix).⁸⁷ The only difference is the contextual requirement of an international armed conflict in Art. 8(2)(b)(ix).

Art. 8(2)(e)(iv) constitutes *lex specialis* to other provisions proscribing destruction of civilian property.

According to the Elements of Crime, there are five condition that must be met, for an individual to be held accountable with destruction of cultural property in an armed conflict.⁸⁸ Firstly, the alleged perpetrator must have "directed an attack". Secondly, the *object* of the attack must be "one or more buildings dedicated to religion, education art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected", provided they are not military objectives. Thirdly, the perpetrator must have the requisite intention, namely that he "*intended* such building or buildings...to be the object of the attack". The conduct must have taken place "in the context of and was associated with an (international) armed conflict". Lastly, the perpetrator must have been "aware of factual circumstances that established the existence of an (international) armed conflict".

2.3.2 Limitations of the Rome Statute

«Cultural property» is not defined in the Statute. In addition, the articles that protects specific types of cultural property, provides the same level of protection to hospitals and places where sick and wounded are collected.⁸⁹

Other than historic monuments, all protected property under art. 8(2)(e)(iv) is defined by its nature or purpose.⁹⁰ This suggests that the property may lose its protective nature when its purpose is no longer fulfilled.⁹¹ A seemingly better method would be to define and differentiate cultural property from other types of property⁹², as it is done in some international conventions.⁹³

⁸⁷ Al Mahdi, para 17.

⁸⁸ Art. 8(2)(e)(iv)

⁸⁹ Art. 8(2)(b)(ix) and Art. 8(2)(e)(iv)

⁹⁰ Also art. 8(2)(b)(ix)

⁹¹ Gottlieb (2005), p. 866

⁹² *Ibid.*

⁹³ See 1954 Hague Convention art. 1

An additional disadvantage is that the Rome Statute allows attacks if they are of «military necessity» or if the property has become a «military objective»,⁹⁴ just as the 1954 Hague Convention. Furthermore, it fails to criminalize the use of cultural property in support of a military action. This can possibly be a major threat the protection of cultural property. If a party to a conflict makes cultural property a military objective, an attack by the belligerent party would not be unlawful if it constituted a “military necessity” to destroy it. If a party to a conflict, intentionally uses cultural property so that it becomes a “military objective”, it appears somewhat unreasonable that they can’t be prosecuted. Wanting to destroy cultural property of a particular group, can make it desirable to turn such buildings or monuments into military objectives. The Rome Statute should therefore criminalize the use of cultural property in support of a military action. The 1977 Protocols has recognized wrongful use of cultural property in military action. All use of historic monuments and places of worship which constitute the cultural or spiritual heritage of peoples are prohibited.⁹⁵

Gottlieb argues that «the more conservative approach to the crime of destruction of cultural property appears surprising in light of the significant developments in the field since World War II and in view of the sights of destruction witnessed by the world in recent armed conflicts such as in the former Yugoslavia.⁹⁶

⁹⁴ Gottlieb (2005) p. 867

⁹⁵ Protocol I art. 53, Protocol II, art. 16

⁹⁶ Gottlieb (2005) *ibid.*

3 Admissibility before the ICC

3.1 Introduction

Article 17 establishes the conditions for a case to be admissible before the ICC. For a case to be admissible, four conditions must be met. The first three requirements of this test are known as complementarity requirements. The complementarity principle requires the Court to consider whether the case is being or has been “investigated or prosecuted by a State”.

Secondly, the case is inadmissible if the competent State has decided not to prosecute or if the person concerned has already been tried. The second part of the admissibility test requires the Court to determine whether the case is of “sufficient gravity to justify further action”, the so-called “gravity threshold”.

The Statute does not set out which order these two conditions are to be dealt with. In practice the OTP has applied gravity first, and has not addressed complementarity if gravity provided a basis for rejecting a situation. The Chambers, on the other hand, have applied complementarity first.⁹⁷ The Rome Statute itself seems to point in the same direction, as complementarity is mentioned before gravity.⁹⁸

3.2 The Gravity Threshold under the Rome Statute

Although any crime falling within the jurisdiction of the Court is serious, art. 17(1)(d) of the Rome Statute establishes that for a case to be admissible before the ICC, it must be “of sufficient gravity to justify further action by the court”.⁹⁹

The gravity threshold plays two distinct and important roles. Firstly, the determination of the gravity threshold is of significance when the Court is deciding if a case can be tried. Secondly, the OTP assesses gravity when deciding whether to open an investigation into a situation, and when it selects individual cases from inside that situation.¹⁰⁰ The gravity analysis done by the OTP is also significant, as the OTP’s gravity analysis will decide if a case is brought before the ICC.

⁹⁷ Stegmiller, Ignaz (2009), *The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda* “p. 458.

⁹⁸ Art. 17(1)

⁹⁹ ICC-OTP.OTP Response to communications received concerning Iraq. (2006)

¹⁰⁰ El Zeidy (2008), “The Gravity Threshold under the Statute of the International Criminal Court,” p. 39

Deciding what may constitute sufficient gravity that justifies action by the Court, is a complex matter where one need to look beyond the language of art. 17(1)(d) of the Rome Statute.¹⁰¹

3.2.1 Origin and Purpose

The concept of gravity is a central principle in international criminal law. There are references to gravity throughout the Rome Statute. Despite this the Rome Statute provides little explanation into what this concept encompasses. The references to gravity in the Rome Statute reflects the philosophical vision¹⁰² of the court, but fails to provide any clear legal guidance as to how gravity should be assessed. The gravity threshold is not defined in the Rome Statute or Regulations of the Court, but when taking its preamble and Article 5 into consideration it is clear that the ICC should only hear the most serious cases of international concern. The preamble of the Statute declares that the intention of the ICC is to end impunity for “the most serious crimes of international concern”.¹⁰³ The Court should therefore hear only the most serious cases of international concern.¹⁰⁴

The gravity threshold as requirement for admissibility is in line with the overall goal the ICC, namely deterrence through the threat of prosecution and punishment of grave crimes that threaten the peace, security and well-being of the world.¹⁰⁵ The original philosophy behind introducing the gravity threshold was to prevent the Court from becoming flooded with cases and therefore ineffective.¹⁰⁶ The crimes to be tried by the Court had to be limited to those of an extremely serious nature which had grave consequences for the international community, and the criminals to be tried by it should be only the principal perpetrators.¹⁰⁷ The concept of gravity originally emerged in debates concerning the appropriate subject matter jurisdiction of the Court. Initially, the subject matter jurisdiction was much wider than what was finally granted in the Rome Statute.¹⁰⁸ The broad subject matter jurisdiction caused concerns that the Court would be over-burdened. The gravity provision was therefore added so the Court could manage the case load according to available resources. The lack of significant discussion about the gravity threshold, however, seems to dispute that the drafter intended it to be

¹⁰¹ *Ibid.*

¹⁰² deGuzman, Margaret (2008) “Gravity and Legitimacy of the International Criminal Court”, p. 1399

¹⁰³ Preamble

¹⁰⁴ Art. 5

¹⁰⁵ Preamble.

¹⁰⁶ El Zeidy (2008) p.36

¹⁰⁷ Summary record of the 2155th meeting. 1990 YILC vol.1, p. 37

¹⁰⁸ Cleary & SaCouto (2007) “The Gravity Threshold of the International Criminal Court” p. 809

interpreted as a big limitation on the Courts jurisdiction.¹⁰⁹ Some have argued that the rational deduction would be that the drafters intention was to exclude the kind of trivial conduct that the ICTY excludes based on the “seriousness” requirement in its statute, like a combatant stealing a loaf of bread in an occupied village.¹¹⁰

The contextual characteristics of crimes against humanity and genocide, aims to differentiate these crimes from other less serious crimes, through elements indicating gravity.¹¹¹

Contrastingly, war crimes do not incorporate contextual characteristics ensuring their gravity. The gravity threshold therefore ensures that cases that don’t present some indication of gravity, won’t be admissible.¹¹²

3.2.2 Interpretation and Application of the Gravity Threshold

3.2.2.1 Office of the Prosecutor

The OTP was the first organ of the ICC to interpret and apply the concept of gravity under the Rome Statute, and the OTP continues to refer to gravity when explaining the office’s policies of selecting certain investigations and cases over others.¹¹³

The concept of gravity plays a significant role in the selection of cases and situations to appear before the ICC. The OTP has first to select a situation based on the gravity of that situation. Secondly, it should select individual cases from inside a situation also on the basis of the gravity of incidents in that situation.

3.2.2.1.1 Gravity and the Decision to Investigate a Situation

Art. 53 of the Rome Statute regulates the initiation of an investigation. In deciding if there is a reasonable basis to proceed, the Prosecutor must consider three factors: (1) “if there is a reasonable basis to believe that a crime within the Court’s jurisdiction has been or is being committed”; (2) “whether the case is or would be admissible under art. 17”, which means that he has to consider gravity; and (3) if “there are nonetheless substantial reasons to believe that an investigation would not server the interest of justice”.¹¹⁴

¹⁰⁹ deGuzman (2008), p. 1416

¹¹⁰ *Ibid* p. 1424

¹¹¹ *Ibid*.p 1407

¹¹² *Ibid*, p. 1408

¹¹³ Cleary & SaCouto (2007) p. 823.

¹¹⁴ Art. 53(1)

The OTP tends to reference the gravity threshold, when justifying its selection of situations. Regarding its decision not to proceed with the Iraq Situation the OTP stated that art. 8(1) sets down a specific gravity threshold. According to this threshold “the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a *plan or policy or as a part of a large-scale commission* of such crimes”.¹¹⁵ However, since this threshold isn’t an element of the crime, the threshold only provides guidance that the Court should tend to focus on situations meeting these requirements.¹¹⁶ The OTP also emphasized that the number of potential victims, 4 to 12 victims of willful killing and limited number of victims of inhuman treatment “was of a different order than the number of victims in other situations under the investigation or analysis by the Office”.¹¹⁷ The OTP therefore concluded that the situation was “not of sufficient gravity to justify further action”.¹¹⁸ The wording “not of sufficient gravity to justify further action” seems to suggest that it’s not a comparison to other cases makes ground for prioritization, but a reference to a threshold.

This way of justifying the OTPs selection of situations might lead to some unwanted implications. One of the goals of the ICC is to encourage states to meet their obligations to prosecute grave international crimes. If the OTP declares that a situation does not have sufficiently grave cases, this might have the opposite effect, as the state no longer have an incentive to act.¹¹⁹ In addition, rejection of a situation based on inadmissibility signals that cases of similar nature are outside the Court’s scope, which may limit the deterrent effect of the Court.¹²⁰ On the other hand, if a case is rejected based on prioritization, this only signals that the Court currently has inadequate resources.¹²¹

3.2.2.1.2 Gravity in the Selection of Cases

The gravity threshold also plays a role in the selection of cases within a situation. The OTP cannot select cases that doesn’t meet the gravity threshold for admissibility. There are many potential cases that meet the gravity threshold under art. 17(1)(d) and the OTP can’t possibly prosecute them all. In selecting between admissible cases, the OTP therefore has full discretion and the Rome Statute is silent as to how the OTP should make its selection.

¹¹⁵ My emphasis. Letter Concerning Situation in Iraq (6 February, 2006) Luis Moreno-Ocampo, p. 8
http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p. 9

¹¹⁸ *Ibid.*

¹¹⁹ deGuman (2008) p. 1433.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

The OTP has confirmed that there is a distinction between gravity as a criterion for admissibility, and the assessment of gravity when exercising its prosecutorial discretion when selecting cases.¹²² The Office has created some guidelines as to how it will select cases. However, it is a challenge to identify the precise criteria adopted by the OTP when selecting cases. It is often unclear whether the OTP is applying the gravity threshold for admissibility in art. 17(1)(d) or is exercising its prosecutorial discretion when it comes to case selection.

According to the Policy Paper on Case Selection and Prioritization, the gravity of crimes as a case selection criterion refers to its strategy to focus its investigations and prosecutions “on the most serious crimes within a given situation that are of concern to the international community”.¹²³ Further, the Policy Paper states that the assessment of gravity as a selection criterion is similar to gravity as a factor for admissibility. However, given that many cases might potentially be admissible under art. 17, the OTP “*may* apply a stricter test [...] than that which is legally required for the admissibility test”.¹²⁴ The use of the word “*may*” seems to suggest that the OTP does not have to apply a stricter test.

When assessing the gravity of a crime, the OTP will take into consideration; the scale, nature, manner of commission and the impact.¹²⁵ The scale of the crimes can be considered by the number of victims, the extent of damage caused, both bodily and psychologically, and their geographical or temporal spread.¹²⁶ The manner of commission can be assessed by the means used to execute the crime, or if the crimes were systematic or resulted from a plan or policy etc.¹²⁷

Other than the gravity of the crimes the OTP takes the degree of responsibility of the alleged perpetrators into its assessment.¹²⁸ The OTP has publicly stated that it will only focus on the individuals with the greatest responsibility.¹²⁹ However, it may need to investigate and prosecute a limited number of mid- and high- level perpetrators, to build the evidentiary

¹²² See Policy Paper on Case Selection and Prioritization (2016).

¹²³ Policy Paper on Case Selection and Prioritization (2016), para 35.

¹²⁴ My emphasis. *Ibid*, para 36.

¹²⁵ *Ibid*, para 38-41.

¹²⁶ *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ Regulation 34(1) of the Regulations of the Office.

¹²⁹ Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, To the UN Security Council Pursuant to UNSCR 1593 (2005), 14 December 2006, p. 3

foundations for cases against those most responsible. If a conduct has been particularly grave, the Office may also decide to prosecute against lower level-perpetrators.¹³⁰

The Policy Paper also points out that the notion of the most responsible doesn't always correspond with the hierarchical status of an individual within a structure.¹³¹ The degree of responsibility of an alleged perpetrator will be determined based on; the nature of unlawful behaviour, degree of participation and intent, the existence of any discriminating motive, and abuse of power or official capacity.¹³²

When it comes to the prioritisation between cases, the OTP uses several strategic case prioritisation criteria. Among these criteria are the impact of investigations and prosecutions on the victims and affected communities, and their contribution to the prevention of crimes.¹³³

However, the statements made by the OTP that it will focus on the gravest crimes and the most responsible perpetrators may appear somewhat confusing when compared to their actual practice. The OTP rejected the Iraq Situation, concerned with willful killing, while on the other hand finding the DRC Situations grave enough, which concerned enlisting and conscripting child soldiers and using them to participate actively in hostilities.¹³⁴ One may argue that willful killing is more grave than conscripting and enlisting children. The same criticism has been raised against the OTP because of its rejection of the Flotilla Incident¹³⁵, whilst going forward with a case concerned with destruction of property.¹³⁶

On the other hand, one could argue that in charging Lubanga¹³⁷ and Al Mahdi, the OTP prioritised the impact of these specific types of crimes, before the nature of seemingly more grave crimes perpetrated against persons; like killings, rape and torture. The use of child soldiers was a widespread and under-addressed problem, just as destruction of cultural property in armed conflicts is a widespread problem where impunity as reigned for a long time. These decisions indicate that the OTP sees the ICC as playing an active role in

¹³⁰ Policy Paper, para 42.

¹³¹ *Ibid*, para 43.

¹³² *Ibid*.

¹³³ Policy Paper, para 50.

¹³⁴ <https://www.icc-cpi.int/drc>

¹³⁵ See *Situation on Registered Vessels of Comoros, Greece and Cambodia* (2014)

¹³⁶ Sterio (2017), "Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings, p. 70

¹³⁷ See *Lubanga*, Decision on the confirmation of charges.

communicating moral and legal condemnation.¹³⁸ The OTP might as a result, chose to prosecute crimes that haven't received adequate attention in the international community. It is important to remember that one of the goals of the ICC, is to end impunity for perpetrators of the crimes under the statute.¹³⁹

3.2.2.2 Pre-Trial Chambers

3.2.2.2.1 *Lubanga* - PTC I's Interpretation of Gravity

The first judicial interpretation of the gravity threshold came in *Lubanga*.¹⁴⁰ The Chamber applied a literal, contextual and teleological interpretation of art. 17(1)(d), in accordance with the interpretative criteria provided in art. 31 and 32 of the Vienna Convention on the Law of Treaties.

The PTC I observed that the gravity threshold under art. 17 was included in addition to the drafter's careful selection crimes in art. 6-8.¹⁴¹ In continuation, the Chamber noted that a literal interpretation makes the application of art. 17(1)(d) mandatory. The chapeau of art. 17(1) uses the term "shall", which leaves the Court no discretion as to declare a case inadmissible if it is "not of sufficient gravity to justify further action by the Court".¹⁴² The Chamber proceeded to confirm that the threshold must be applied at two different stages, the stage of initiation of the investigation and once a case arises from the investigation. It then emphasised that the scope of the decision was limited to the content of the gravity threshold when applied to a case arising from the investigation from a situation.¹⁴³

The PTC I concluded, based on the fact that the gravity threshold of art. 17 is in addition to "the gravity-driven selection of crimes",¹⁴⁴ that the relevant conduct must present particular features which render it especially grave.¹⁴⁵ Thus, the PTC I established two elements that must be present for conduct to meet the gravity threshold. First, the conduct must be either

¹³⁸ deGuzman (2008) p. 1461

¹³⁹ Preamble

¹⁴⁰ See Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-8-Corr, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, annex I, 41-63 (Feb. 24, 2006) [hereafter *Lubanga Arrest Warrant Decision*]

¹⁴¹ *Ibid*, para 41.

¹⁴² *Ibid*, para 43.

¹⁴³ *Ibid*, para 44.

¹⁴⁴ Art. 6-8

¹⁴⁵ *Ibid*, para 45.

“systematic or large-scale”. Additionally, to being systematic or large-scale, due consideration must be given to the “social alarm” such conduct may have caused in the international community.¹⁴⁶ The Chamber stated that if isolated instances were sufficient, there would be no need to establish an additional gravity threshold.¹⁴⁷ No additional interpretative arguments were used to support “social alarm” element.

Furthermore, from a teleological interpretation, the PTC I claimed that the gravity threshold against the backdrop of the Preamble led to the conclusion that the gravity threshold is “a key tool provided by the drafters to maximise the Court’s deterrent effect”.¹⁴⁸ Art. 17(1)(d) was therefore considered to ensure that the ICC only initiates “cases [...] against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court.”¹⁴⁹

This additional factor was comprised of three elements. First, the position of the person (most senior leaders). Second, the roles such persons play, through acts or omissions. Third, the role played by such State entities, organisations or armed groups in the overall commission. A focus on these types of individuals was seen to truly maximise the deterrent effect of the Court.¹⁵⁰

The PTC I set a very high threshold for gravity by focusing on senior leaders only and the developed criteria has been harshly criticised in legal literature.¹⁵¹

3.2.2.2.2 The Appeals Chamber’s Dismissal of the Gravity Threshold Established by the PTC I

The Appeals Chamber overturned the decision by the PTC I as it found the test developed by the PTC I was incorrect.¹⁵²

In *Lubanga* the gravity threshold was found to require “systematic or large-scale” conduct, causing “social alarm”. In addition, the PTC I stated that the gravity threshold required the

¹⁴⁶ *Ibid*, para 46.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*, para 48.

¹⁴⁹ *Ibid*, para 50.

¹⁵⁰ *Ibid*, para 51-53

¹⁵¹ Stegmiller (2009), p. 551

¹⁵² Prosecutor v. Ntaganda, ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (July 13, 2006) [hereafter DRC Appeals Chamber Judgment], para 68.

Court to only prosecute “the most senior leaders suspected of being the most responsible for the crimes” in order to maximise the Court’s deterrence.¹⁵³

The Appeals Chamber states that the factors introduced by the PTC I, are based on a flawed contextual interpretation of the Statute. The requirement of a systematic or large-scale conduct set forth by the PTC I, was found to be inconsistent with the definitions of the crimes within the Court’s jurisdiction.¹⁵⁴ Regarding war crimes, the requirement of a large-scale commission is an alternative requirement to the commission as a part of a plan or policy. Moreover, the Appeals Chamber noted that the statutory requirement of either large-scale commission or part of a policy is not an absolute requirement¹⁵⁵, cf. “in particular”¹⁵⁶. Lastly, the Appeals Chamber pointed to the fact that the requirement of “systematic” commission of crimes is limited to art. 7 concerning crimes against humanity. The PTC I’s interpretation can therefore be said to go against the language of the Statute.

When it came to the “social alarm” element, the Appeals Chamber criticised the PTC for not explaining where it derived this criterion from, as the Rome Statute makes no mention of “social alarm” at all.¹⁵⁷

The Appeals Chamber also disagreed that the gravity threshold restricts admissibility to cases against the most senior leaders most responsible for the crimes. Contrary to what PTC I suggested, it rightfully claimed that the exclusion of a category of perpetrators *per se*, would not lead to the highest deterrent effect.¹⁵⁸ Lower-level perpetrators would then know that there would be no risk of them being brought before the ICC, and this can clearly not be said to deter them from the commissioning of crimes under the Statute.

The teleological interpretation also conflicted with a contextual interpretation of the Statute. If only the most senior leaders and were to be brought before the Court, art. 33 which establishes rules relating to the irrelevance of superior orders would be unnecessary. In addition, art. 27 (1) stipulated that the Statute “shall apply equally to all persons without any distinction based on official capacity”.¹⁵⁹ Furthermore, the Appeals Chamber pointed to the

¹⁵⁴ *Ibid*, para 69.

¹⁵⁵ *Ibid*, para 70.

¹⁵⁶ Rome Statute, art. 8(1)

¹⁵⁷ *Ibid*, para 71.

¹⁵⁸ *Ibid*, para 73.

¹⁵⁹ *Ibid*, para 78.

language in the Preamble. The Preamble refers only to “the most serious crimes of concern to the international community”, not “the most serious perpetrators”. If the drafters of the Rome Statute wanted to limit the Courts jurisdiction to the most senior leaders it would have done so expressively.¹⁶⁰

Although, the Appeals Chamber essentially disagreed with every factor the PTC developed in its determination of the gravity threshold, it failed to come up with its own test. The Appeals Chamber had no obligation to do so, it left the ICC with a legal vacuum.¹⁶¹

Judge Pikis, however, wrote a separate and partly dissenting opinion. In his view the gravity threshold in art. 17(1)(d) should be understood as a limitation against insignificant cases, unworthy of consideration by the Court.¹⁶²

3.2.2.2.3 Newer Assessments of the Gravity Threshold by the PTC

Some newer assessments of the gravity threshold have been provided by the PTC.

In *Abu Garda*¹⁶³, the Chamber agreed with the OTP’s view that “nature, manner and impact” of the crime is essential when assessing the gravity of a case. The PTC also stated that the gravity of a case “should not be assessed only from a quantitative perspective”, as the qualitative dimension of the crime also should be taken into consideration.¹⁶⁴

Of relevance to the assessment of gravity, the Chamber found that certain factors listed in rule 145(1)(c) of the Regulations of the OTP could be of guidance. Namely, these factors included “the extent of harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.”¹⁶⁵

The PTC made no mention of factors related to the position and seniority of the perpetrator, which points in the direction that this notion as a requirement for reaching the gravity threshold has been discarded for good.

¹⁶⁰ *Ibid*, para 79.

¹⁶¹ Ochi (2011), p. 7

¹⁶² *Ibid*, Judge Pikis Separate and Partly Dissenting Opinion, para. 40.

¹⁶³ The Prosecutor v. Bahar Idriss Abu Garda ,ICC-02/05-02/09-243-Red, PTC I , Decision on the Confirmation of Charges (8 February 2010).

¹⁶⁴ *Ibid*, para. 31.

¹⁶⁵ *Ibid*, para 32.

In *Ali*¹⁶⁶ the PTC found the assertion that a case concerning omissions, could not rise to the level of sufficient gravity to be insupportable. Nothing in the Statute could be interpreted to exclude acts by omission from the purview of the Court. It would also be contrary to the object and purpose of the ICC to interpret the gravity threshold in a way which would reduce the subject-matter jurisdiction.¹⁶⁷

3.2.2.2.4 Conclusion

The language of art. 17(1)(d) and its context indicate that it's a threshold that needs to be met before a case can be brought before the Court. It does not indicate that the Court's jurisdiction is limited to the gravest situations or the most serious cases within a situation.¹⁶⁸ The gravity of other cases should be treated as unrelated to the case in question in determining the gravity threshold. The gravity threshold should be used by the Court, only to exclude cases concerning insignificant crimes, unworthy of action by the Court. The lack of discussion of the gravity threshold in the drafting history of the Rome Statute suggests that it was never intended to limit the subject-matter jurisdiction in any significant degree. The Court's jurisdiction is limited to the core international crimes, which by their nature are serious. It therefore seems that the gravity threshold only should exclude cases that can't be said to be serious enough to cause concern in the international community.

¹⁶⁶ Prosecutor v. Muthaura, Kenyatta and Ali (ICC-01/09-02/11-382-Red) PTC II, Decision on the Confirmation of Charges (23 January 2012),

¹⁶⁷ *Ibid*, para 46.

¹⁶⁸ As supported by the Appeal Chambers decision in *Ntganda*.

4 The Al Mahdi Case

4.1 About

On 27th September 2016 Ahmad Al Faqi Al Mahdi (hereafter “Al Mahdi”) was sentenced to nine years in prison by the ICC. Al Mahdi was found guilty as a co-perpetrator of the war crime consisting in intentionally directing attacks against religious and historic buildings in Timbuktu, pursuant to Art. 8(2)(e)(iv) of the Rome Statute.¹⁶⁹ In specific, Al Mahdi was charged with attacking a number of UNESCO World Heritage Sites in Timbuktu, Mali, in June and July 2012. The sites were nine mausoleums and one mosque.¹⁷⁰ Wilful destruction of cultural property and heritage, that does not constitute a military objective, has been prohibited for a long time, but no one has been indicted with destruction of cultural property as the principal or only charge before the Al Mahdi case was brought before the ICC.

The Al Mahdi case is remarkable as it is the first time that an individual has been charged with and held accountable exclusively for destruction of cultural property, not only before the ICC, but internationally. The Al Mahdi case is also exceptional as it is the first case before the ICC in which a defendant pled guilty.¹⁷¹ Lastly, Al Mahdi is the first member of an Islamist armed group to appear before the ICC.¹⁷²

The conviction of Al Mahdi by the ICC represents a noteworthy development in international criminal law. It demonstrates that the OTP has an interest in bringing cases of wilful destruction of cultural property before the ICC, and by bringing such cases before the ICC, ending the impunity that has been associated with cultural destruction crimes for such a long time. The OTP wanted to make clear that to intentionally direct an attack against historic monuments and buildings dedicated to religion constitutes a war crime, punishable under the Rome Statute. The OTP emphasized that:

“humanity’s common heritage is subject to repeated and planned ravages by individuals and groups whose goal is to eradicate the physical any representation of a world that differs from theirs by eliminating the physical manifestations that are at the heart of communities.”¹⁷³

¹⁶⁹ *Case Information Sheet*

¹⁷⁰ Pre-Trial Chamber, para. 31

¹⁷¹ *Al Mahdi TC*

¹⁷² Burke (2016), *The Guardian*.

¹⁷³ *Statement of the Prosecutor*

The case and the statement by the Prosecutor indicates that the ICC will hold future perpetrators of destruction of cultural property responsible. *Al Mahdi* gives the international community anticipation and hope that such cases will be prosecuted in the future, and that the individuals responsible will be indicted.

Willful destruction of cultural property and heritage is not a new phenomenon. Since ancient times destruction of cultural property has been a consequence of warfare. Previously, however, the destruction of cultural property was more a consequence of war, than a result of a programmed and deliberated agenda of destruction.¹⁷⁴ Today, cultural property is being destroyed at a disconcertingly high rate in different armed conflicts across the world, like ISIS's destruction of Palmyra in the Syrian Civil War.¹⁷⁵ Destruction of cultural property is actively and deliberately used as a weapon against the civilian population to cause them suffering and to eradicate their culture. This has caused an increased outcry in the international community for the prosecution of this type of war crimes. Since the crime of deliberately destroying cultural property has gained much more attention and concern internationally, the *Al Mahdi* case may set an important precedent for the ICC in future cases. Because *Al Mahdi* was the first case in which the ICC applied Article 8(2)(e)(iv), the Court proceeded to interpret the crime and its elements.¹⁷⁶ Thus, the case may provide insight into substantive international criminal law, as to how the war crime of destruction of cultural property will be interpreted in the future. *Al Mahdi* was also the first defendant to plead guilty before the ICC.

4.2 Background

The ICC Prosecutor opened an investigation into war crimes in Mali 16 January 2013, after the situation in Mali was referred to the ICC by the Malian State.¹⁷⁷

A non-international armed conflict took place in Mali in January 2012. In relation to that conflict different armed groups took control over Northern Mali. In April 2012, the groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) took control over Timbuktu, and imposed their religious and political commandments on its inhabitants. The Ansar Dine and

¹⁷⁴ Balcells (2015) p. 2

¹⁷⁵ Jeffries (2015)

¹⁷⁶ *Al Mahdi*, para 13.

¹⁷⁷ ICC Prosecutor opens investigation into war crimes in Mali <https://www.icc-cpi.int/Pages/item.aspx?name=pr869&ln=en>

AQIM created a local government, which included an Islamic Tribunal, a police force, a media commission and a morality brigade known as the *Hesbah*.¹⁷⁸ The role of the *Hesbah* was the prevention, suppression and repression of anything perceived by the Ansar Dine to constitute immorality.

Al Mahdi also known as “Abou Tourab”¹⁷⁹ was an expert of religious matters and head of the *Hesbah*.¹⁸⁰ Al Mahdi was in direct contact with the leaders of Ansar Dine and AQIM. In his role as the head of the *Hesbah* and as an expert on matters of religion, he was often consulted. He was very active in all aspects of the Ansar Dine and AQIM administrations.¹⁸¹

In June 2012, Al Mahdi was consulted by the leader of Ansar Dine and two prominent AQIM members regarding the decision to destroy the mausoleums. Al Mahdi expressed that to maintain relations with the population, he did not recommend the destruction of the mausoleums. Despite his initial objection, Al Mahdi accepted to carry out the attack without hesitation on reception of the instruction. Al Mahdi personally determined the succession in which the buildings were to be attacked, and he wrote and performed a sermon explaining and validating the destruction of the mausoleums.¹⁸²

The attack on the mausoleums was carried out between 30 June and 11 July 2012. The attack resulted in the destruction of ten of the most well-known cultural sites in Timbuktu, most of them UNESCO World Heritage Sites. The sites were dedicated to religion and historic monuments, and none of them were military objectives.¹⁸³

4.3 Findings

4.3.1 Admission of Guilt

The ICC found that Al Mahdi understood the nature and consequences of his admission of guilt, and that he made the admission of guilt voluntarily. The Court was also satisfied that the admission of guilt was supported by the facts of the case.¹⁸⁴

¹⁷⁸ Press Release 27.09.2016 <https://www.icc-cpi.int/pages/item.aspx?name=pr1242>

¹⁷⁹ Statement of the Prosecutor

¹⁸⁰ Decision of the confirmation of charges, para. 45 and 49.

¹⁸¹ *Al Mahdi*, para 32

¹⁸² *Ibid*, para 85

¹⁸³ <https://www.icc-cpi.int/mali/al-mahdi/pages/alleged-crimes.aspx>

¹⁸⁴ *Ibid*, para 42.

4.3.2 Findings on Article 8(2)(e)(iv) of the Statute

Al Mahdi as the head of the *Hesbah*, was put in charge of the execution of destroying the mausoleums and mosques. With the attackers accompanying him they directed an attack, that resulted in destruction or significant damage to all the buildings.¹⁸⁵

When it comes to the element of “directing and attack” the ICC made it clear that this includes “any acts of violence against protected objects and will not make a distinction to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group”, as international humanitarian law protects cultural objects from crimes committed both in battle and outside of it.¹⁸⁶ It was also noted that Article 8(2)(e)(iv) of the Statute criminalizes the act of directing a specific kind of attack irrespective of whether the buildings in question are destroyed.¹⁸⁷

The Court found it clear that the mausoleums and mosques were the object of the attack, and that Al Mahdi and the perpetrators intended these building to be the object of the attack. The Court established that the destroyed mausoleums and mosques, qualified as both religious buildings and historic monuments. The Court emphasized both their role in the cultural life in Timbuktu and the status of nine of these buildings as UNESCO World Heritage Sites. Their status as UNESCO World Heritage sites underlined their special importance to international cultural heritage.¹⁸⁸

The contextual element was deemed fulfilled as the acts took place in the context of, and were associated with, a non-international armed conflict between the Malian Government and groups including Ansar Dine and AQIM.¹⁸⁹ Ansar Dine and AQIM met the requirement of an organized armed group and the degree of intensity in the conflict was of sufficient intensity. Ansar Dine and AQIM had the military capacity to displace the Malian army, and take control over Timbuktu, establishing some form of government.¹⁹⁰ They were aware of the factual circumstances which established the existence of the armed conflict.¹⁹¹

4.3.3 Assessment of the Gravity of the Crime

¹⁸⁵ *Ibid*, para 45.

¹⁸⁶ *Ibid*, para 15.

¹⁸⁷ *Ibid*, para 59.

¹⁸⁸ *Ibid*, para 46-48.

¹⁸⁹ *Ibid*, para 49.

¹⁹⁰ *Ibid*.

¹⁹¹ *Al Mahdi*, para 51.

When addressing the gravity of the crime committed by Al Mahdi, the Court especially considered: the extent of damage caused or impact, the nature of the crimes committed and the circumstances of the time, place and manner.¹⁹²

The Court started its assessment by noting that crimes against property, even if inherently grave, are generally of lesser gravity than crimes committed against persons.¹⁹³ Considering the extent of damage caused, the Court emphasized that the ten mausoleums and mosques were mostly completely destroyed. It also argued that the impact of the attack on the population was enhanced by it being broadcasted in the media. The Court stressed that Timbuktu played a crucial role in the expansion of Islam in the region, and was the heart of Mali's cultural heritage. The mausoleums played a psychological role to the extent of being perceived as protecting the people of Timbuktu and the people of Timbuktu were collectively ensuring their maintenance.¹⁹⁴ The Court considered the fact that the targeted buildings were not only religious buildings, but had a symbolic and emotional value for the people of Timbuktu a relevant factor in assessing the gravity of the crime.¹⁹⁵

In addition, the Court underlined that, all sites but one, were UNESCO World Heritage Sites. Attacks on such sites were seen to be of particular gravity as their destruction not only affected the direct victims of the crime, but also the people throughout Mali and the international community. Another factor the Court emphasized in their assessment of gravity, was that the destruction of the mausoleums were aimed at breaking the soul of the people of Timbuktu. Lastly, the Court stated that the discriminatory religious motive behind the destruction undoubtedly was relevant to its assessment of the gravity of the crime.¹⁹⁶ Considering all these factors together the Court found that the crime for which Al Mahdi was convicted was of sufficient gravity.

4.3.4 Al Mahdi's Contribution to the Attack

¹⁹² *Ibid*, para 76.

¹⁹³ *Ibid*, para 77.

¹⁹⁴ *Ibid*, para 78.

¹⁹⁵ *Ibid*, para 79.

¹⁹⁶ *Ibid*, para 80-81.

Pursuant to Art. 25(3)(a) Al Mahdi was found guilty of co-perpetration of the war crime consisting of attacking protected objects. The ICC highlighted Al Mahdi's role as head of the *Hesbah* and his overall responsibility for the execution phase of the attack.¹⁹⁷

There were namely five ways, in which Al Mahdi was found to have contributed to the attack. First of all, he was responsible for supervising and overseeing the execution of the attack, using men from the *Hesbah*. Secondly, he collected, brought and distributed the necessary tools to successfully carry out the destruction. Thirdly, Al Mahdi was present at all sites of destruction, giving instructions and moral support. Fourthly, he personally participated in the attack that led to the destruction of at least five sites, and lastly he was responsible for explaining and justifying the attack to journalists.¹⁹⁸

Collectively, these contributions were seen by the Court to qualify as an essential contribution to the commission of the crime, made pursuant to an agreement with others.¹⁹⁹ The Court also emphasized that co-perpetration not only embodies his physical participation, but also encompasses his position of authority in relation to the crimes that were carried out.²⁰⁰

¹⁹⁷ *Al Mahdi*, para 53

¹⁹⁸ *Ibid*, para 40.

¹⁹⁹ *Ibid*, para 53-54.

²⁰⁰ *Ibid*, para 61.

5 Were the Crimes Committed by Al Mahdi of Sufficiently Grave?

The gravity threshold in art. 17(1)(d) requires the Court to deem cases not “of sufficient gravity” to be inadmissible. The OTP also makes a gravity assessment when choosing to open an investigation and when choosing cases from within that situation. The OTP has specified that when assessing which cases or situations that meet the gravity threshold it considers factors like “the scale, nature, manner of commission of the crimes, and their impact”.²⁰¹

5.1 Can Destruction of Cultural Property as the Principal Charge Be “of sufficient gravity”?

Although, the Court confirmed that crimes committed against persons are graver, it still saw destruction of cultural property as a crime of significant gravity, and as such meeting the gravity threshold.²⁰²

One may argue that crimes committed against persons, like killings, rape and torture, are more heinous, but this does not mean that there are no other serious crimes of international concern that justifies action by the court. You could also argue that it would lead to unwanted repercussions if the ICC only prosecuted crimes like killings and rape. If the ICC were to build up a hierarchy of the crimes within its Statute, and only prosecuting the crimes that cause the most moral judgement, like killings and rape, this sends a signal that other types of crimes are not sufficiently grave to warrant prosecution. One of the established goals of the ICC is deterrence. If the ICC had limited itself to only prosecuting crimes committed against persons, it would have signalled that destruction of cultural property is not sufficiently grave to warrant prosecution. Based on the prevalence of wilful destruction of cultural property in armed conflicts, it is clear deterrence is wanted. When impunity has been the norm for these types of crimes, commissioners of destruction of cultural property has had no real threat of prosecution. Besides, if national courts had seen that destruction of cultural property was “not of sufficient gravity” to justify action by the ICC, it would give an incentive not to pay attention to these types of cases.

²⁰¹ See Policy Paper and Rule 29(2) of the Regulations of the OTP

²⁰² See *Al Mahdi* assessment of gravity

One of the arguments that has been used to criticise the *Al Mahdi* case is that the drafters envisaged that these crimes would only be prosecuted once committed in combination with other war crimes.²⁰³

In my opinion, it would be too easy to dismiss that willful destruction of cultural property can meet the gravity threshold as a principle charge before the ICC. To take this argument to the extreme, all cultural property in a country or in several countries in an armed conflict could deliberately be destroyed and not meet the gravity threshold, if the perpetrator cannot be charged with other war crimes as well. Not every instance of cultural destruction will justify action by the Court, but clearly destruction of cultural property can meet the gravity threshold, if the scale, manner of commission and impact is significant enough. To claim that destruction of cultural property never is of sufficient gravity to justify, because conflicting physical harm to individuals is more heinous must clearly be wrong.

Moreover, the argument that destruction of cultural property is meant only to be prosecuted as an auxiliary charge to other war crimes, seems to find no support in the Rome Statute. If the drafters never intended destruction of cultural property only to be prosecuted together with other war crimes, it could have expressly stated this.

5.2 Did *Al Mahdi* meet the Gravity Threshold?

As established in the analysis of the gravity threshold, the Court should only exclude cases that can't be said to be serious enough to cause concern in the international community.²⁰⁴

The *Al Mahdi* case is in line with the goal of ending impunity for the most serious crimes of international concern.²⁰⁵ Wilful destruction of cultural property is a serious crime of international concern. During the Balkan Wars destruction of cultural property was used to remove the memory and identity, of the groups subjected to ethnic cleansing. Taliban, ISIS and other affiliated groups continues to use destruction of cultural property as their main tool to conquering and destroying groups which they are opposed to. The annihilation and looting by these groups have been of a massive scale. The fact that destruction of cultural property in today's warfare is used as a tool to erase the identity and cultural heritage of particular groups shows that this crime is of concern to international community.

²⁰³ Vogelgang & Clerc (2016).

²⁰⁴ See conclusion on the gravity threshold.

²⁰⁵ Preamble.

Furthermore, cultural heritage play an important role in people's lives, as places that gives identity, often strongly linked with their beliefs. Vibeke Jensen Director of the UNESCO Office in New York stated in relation to the destruction in Timbuktu that; "[b]y damaging and destroying cultural heritage of a community, one is in fact not only destroying the past but very much the future [...] a community's cultural heritage reflects its life, history and identity. Its preservation helps rebuild broken communities, re-establish their identities".²⁰⁶

The mausoleum and mosques that Al Mahdi destroyed were not only the heart of Mali's cultural heritage, playing a psychological role to the extent of being perceived as protecting the people of Timbuktu, but UNESCO World Heritage Sites. Their destruction as a result affected, not only the people of Timbuktu, but the entire international community.²⁰⁷

The *Al Mahdi* must therefore be said to meet the gravity threshold of the ICC.

Another issue that has been raised concerning the trial against *Al Mahdi* is that he didn't bear the greatest responsibility for the crime as other members of Ansar Dine and AQIM likely were equally responsible.²⁰⁸

As previously established the notion that only the most senior leaders most responsible for the crime, meets the gravity threshold has been rejected by the ICC. The role of the perpetrator is just one of many factors playing into the gravity determination.

Al Mahdi supervised the destruction, collected, brought and distributed the necessary tools, personally participated in the destruction of at least five sites and justified the attack before the media. As the head of the *Hesbah* and an expert on religious matters he played a key role in the destruction and must be said to bear sufficient responsibility to justify prosecution.

However, one might criticize the OTP for choosing the Al Mahdi case, while not going further with other situations, like the Flotilla incident. As previously stated the ICC has limited resources. The OTP therefore has discretion when it comes to selecting between cases. Based on the OTP's selection of cases, it sometimes chose cases concerning crimes that have been under-addressed, like the conscription of child soldiers in *Lubanga* and destruction of cultural property in *Al Mahdi*. This might seem to go against statements it has made of

²⁰⁶ UN Press Conference (30. June), New York. <http://whc.unesco.org/en/news/1178/>

²⁰⁷ See Findings

²⁰⁸ Vogelgang & Clerc (2016).

focusing on “the most serious crimes and most responsible perpetrators”, causing some confusion in the international community. The OTP seems to reject cases based on them not meeting the gravity threshold in art. 17(1)(d), however the OTP should be clearer when its using its prosecutorial discretion in selecting cases.

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