

THE PROTECTION OF CULTURAL HERITAGE AND THE ICC: THE GAP BETWEEN ASPIRATIONS AND REALITY OVER 25 YEARS



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Abstract

This chapter explores the challenges and limitations faced by the International Criminal Court (ICC) in protecting cultural heritage over the past 25 years. While the ICC has established legal frameworks to prosecute crimes against cultural property, its effectiveness is hampered by jurisdictional constraints, political interference, and the lack of a comprehensive mandate for addressing art crimes. Cultural heritage is highlighted as a cornerstone of societal identity, with its destruction constituting an assault on humanity's shared legacy. This chapter critically engages with Schabas's analysis of the Al Mahdi case, questioning the ICC's interpretation of legal definitions and the broader implications for justice. Furthermore, it highlights how the principle of military necessity is often exploited as a loophole to circumvent international law and justify the destruction of cultural property. This chapter concludes with a call for international collaboration and generational leadership to ensure the preservation of cultural heritage as a global priority.

Keywords: Cultural heritage, Rome Statute, art crimes, jurisdiction, military necessity loophole, cultural genocide

1. Introduction

At the heart of the global pursuit of justice stands the International Criminal Court (ICC) in The Hague, a symbol of international law's fight against grave injustices. Tasked with prosecuting individuals for heinous acts that shock the conscience of humanity, including genocide, war crimes, and crimes against humanity, the ICC was established with lofty ideals. It has had to navigate a sea of operational challenges that significantly hinder its effectiveness. Key among these challenges is the Court's jurisdictional reach, which is confined only to the signatories of the Rome Statute. This limitation creates a glaring blind spot in the global justice system, as powerful nations like the United States, China, and Russia stand outside its jurisdiction, leaving significant geopolitical areas untouched by the ICC's authority. This gap not only hampers the Court's reach but also raises questions about the uniform application of international justice. The ICC's credibility is further complicated by perceptions of its susceptibility to political influence. Accusations of bias and selective prosecution, especially from entities like the African Union, which criticises the Court's disproportionate focus on African nations, have cast a shadow over its claimed impartiality.¹ The perception of the ICC as a political tool rather than a neutral arbiter of justice undermines its legitimacy, particularly among those who view it as meddling in state sovereignty. The lack of an enforcement arm is another significant obstacle. Dependent on Member States for executing its verdicts, the ICC faces inconsistent co-operation, often influenced by political considerations.² This reliance highlights the Court's vulnerability and the impact of geopolitical dynamics on the execution of justice, as seen in the difficulties in arresting figures like Sudanese President Omar al-Bashir.³ Additionally, the ICC grapples with legal and political debates over the definition and categorisation of crimes within its mandate. Disputes over the interpretation of crimes, such as the crime of aggression, introduce yet another layer of complexity to the ICC's function, affecting its ability to prosecute effectively. Amidst these myriad challenges, this chapter emphasises the fundamental value of cultural heritage as a pillar of societal identity. It argues that attacks on cultural heritage are assaults on both specific communities and the broader international community. These crimes often strike at the core of what it means to be human, erasing critical chapters of human history and artistic legacy. This chapter challenges the traditional view of art crime,⁴ often sidelined in discussions

1 Schneider, 2020, p. 90–109.

2 Akande & Tzanakopoulos, 2018, p. 939–959.

3 Duursma & Müller, 2019, p. 890–907.

4 For clarity, particularly for readers unfamiliar with international criminal law, it is essential to explain that “art crime” encompasses a wide range of illegal activities targeting cultural artefacts, including theft, smuggling, forgery, and deliberate destruction. It can be perpetrated by individuals acting for personal gain or as a calculated element of state policy. Motivations vary. Political motives are exemplified by the Nazis' systematic looting of art during World War II, ideological motives are evident in ISIS's destruction of ancient sites in Iraq and Syria, economic motives underpinned

of war crimes. It argues that national identities are violated when priceless and irreplaceable treasures of art and history are stolen or destroyed. Claims of non-jurisdiction, countering terrorism operations, and military necessity are some of the main excuses used to avoid criminal liability examined in this chapter. In doing so, this chapter calls for greater ratification and urges powerful nations like the United States to help build a more varied and comprehensive legal framework for the ICC. It also suggests updating the Rome Statute to incorporate “art crimes” and adjust to the evolving global situation. This chapter encourages readers to think on these issues by highlighting the ever-changing nature of international law and the critical need to protect our shared human history.

2. The Value of Cultural Heritage

Why does cultural heritage hold such immense value? This question is at the very core of our communities and identities. Cultural legacy goes beyond mere artefacts. An essential component of our shared human narrative, it is a rich tapestry of art, history, and inherent worth. In the realm of international law, particularly in the UNESCO conventions, cultural heritage comprises a wide array of elements, each possessing unique significance. These definitions in international law are crafted to be clear and precise – avoiding metaphysical or nebulous interpretations and focusing instead on concrete features of cultural heritage. Across various international legal documents, a consistent theme emerges: the recognition of an item as part of cultural heritage is anchored in its inherent value. This worth is not defined by monetary value alone. It concerns the material importance, historical significance, or artistic merit of the object in relation to the grand narrative of human civilisation. When thinking about a nation’s cultural heritage, it is easily apparent that it includes more than just historical practices and spiritual beliefs. It encompasses the material works of art, technological innovations, marvels of architecture, and long-lasting institutions. Passed down over many generations, these tangible artefacts serve as the bedrock upon which a community builds its identity and the stories that shape its political, social, and cultural landscape.

However, the idea of cultural legacy must be differentiated from cultural creation itself. Although they serve distinct purposes in our communities, both are essential. Cultural artefacts, both tangible and intangible, are priceless because of the strength they bring to a community. They are not merely outcomes of cultural

the widespread smuggling of antiquities from conflict zones, psychological factors drove instances like the vandalism of Michelangelo’s *Pietà* by a mentally unstable individual in 1972, and mercantile motives can be seen in the black-market trade of stolen works, such as the unresolved thefts from Boston’s Isabella Stewart Gardner Museum in 1990.

activities. They embody deeper notions like nationhood, patriotism, and shared historical experiences. Artefacts of cultural heritage, from centuries-old manuscripts to ancient buildings, tell a tale about human civilisations and their past and present. Essentially, cultural heritage is more than the sum of its parts. It is a living, breathing testament to the multitude of human cultures and the richness and diversity of those cultures. It reflects of who we are as a culture, where we have come from, and the things that we hold dear. Therefore, it is essential to comprehend and maintain this legacy, not just for sentimental reasons but also for the progressive development and enhancement of our international society. Consider, for instance, a piece of literature in a language unknown to a reader; to that reader, it is just a physical object with no inherent meaning. However, in the hands of someone who understands the language and context, it transforms into a vessel of cultural identity and historical continuity. The significance of cultural heritage is brought to light by this transformation. Heritage preservation is about more than just keeping things from the past – it is about protecting the core of what it means to be human.

Consequently, there is no question that an assault on the cultural identity of a particular group may be evaluated with the same level of seriousness as an assault on the lives of this group, as demonstrated by the Second World War. The devastating impact of cultural genocide is vividly illustrated by the policies of Nazi Germany, which ruthlessly targeted the cultural heritage of those deemed inferior. In 'Axis Rule in Occupied Europe', Raphael Lemkin highlighted the multifaceted nature of genocide, emphasising how the Nazis systematically suppressed native languages and imposed their own culture through education and the rigid control of artistic expression.⁵ The destruction and looting of monuments, museums, and galleries under Nazi occupation were not mere acts of war, but part of a deliberate effort to erase the cultural identity of conquered peoples.

However, the end of the Second World War did not mark the end of cultural genocide. The early twenty-first century has witnessed similar patterns, where cultural erasure precedes and often accompanies physical violence. The main motivations for attacking cultural heritage during armed conflicts include conflict goals, where cultural property symbolises the identity or memory of the opposing group. Military strategy reasons involve targeting heritage sites for tactical advantages in a conflict. Additionally, such attacks may serve as demonstrations of strength or commitment, or due to economic incentives, such as looting to fund military operations.⁶ This phenomenon transcends the boundaries of non-state actors like ISIS, infamous for its ruthless annihilation of Christian communities and obliteration of diverse cultural heritage. It also extends to state actors, as seen in Turkey's aggressive policies against the Kurdish minority since the 1980s. In addition to targeting individuals under the guise of combating terrorism, Recep Erdoğan's regime has systematically sought to erase Kurdish cultural identity, extending its assault to the cultural realm.

5 Balakian, 2013, pp. 57–89.

6 Brosché, Legnér, Kreutz & Ijla, 2016, pp. 248–260.

The tragic bombing of the Hittite temple in Ain Dara in 2018, far removed from any legitimate military target, epitomises this policy.⁷ This act of destruction, carried out during Turkey's offensive against the YPG, was not just a military manoeuvre but an attack on the historical and cultural legacy of the region. The loss of this ancient sanctuary, a testament to humanity's long and diverse history, echoes the earlier destruction carried out in Palmyra and Mosul. These cities, once vibrant tapestries of human civilisation, have faced similar fates, with their irreplaceable monuments and artefacts reduced to rubble. The obliteration of Palmyra's temples and Mosul's historic Al-Nuri Mosque symbolises not just the loss of architectural wonders, but also the deliberate erasure of cultural and historical narratives.⁸

The continuous devastation of cultural assets in contemporary wars vividly illustrates its vulnerability. Representing our history, art, and identity, these places are remnants of the past and integral components of the multi-coloured fabric of human civilisation. The tremendous diversity that unites us as a species makes their protection more than just conservation. These feelings and emotions from around the world urge us to think about more profound and difficult topics. Does the global community truly comprehend the seriousness of these crises, or are these responses merely articulate but insubstantial displays of concern? Do our words and deeds concur regarding the safeguarding of the legacy that defines us? As the ICC commemorates its 25th anniversary, it is imperative to conduct a thorough assessment of its efficacy. Should the ICC's performance in protecting cultural assets be re-evaluated in light of this milestone? Have we reached a point where a serious reflection on its successes and shortcomings is not only beneficial but necessary? These issues challenge us to reflect on our common concerns and take action to safeguard the cultural foundations of our civilisation.

3. The ICC's Mandate and Cultural Heritage: Legal and Procedural Shortcomings

3.1 Overview of the ICC's legal framework regarding cultural heritage

The ICC's legal framework includes Articles 8(2)(b)(ix) and 8(2)(e)(iv), which protect certain types of cultural property in armed conflicts by prohibiting intentional attacks against buildings like those dedicated to religion, education, art, science, charitable purposes, and historic monuments. Although international law provides specific protection for cultural property, there are significant deficiencies in the existing legal framework, impeding the successful preservation of

⁷ Kowalczevska & Łubiński, 2022.

⁸ Munawar, 2017, pp. 33–48.

cultural assets, especially during armed situations. A major deficiency exists in the jurisdictional restrictions pertaining to non-international armed conflicts. Articles 8(2)(b)(ii) and (iv) of the Rome Statute pertain to international armed conflicts, but there are no corresponding provisions for non-international armed conflicts. The exclusion of this aspect is especially concerning considering the frequent and severe consequences of non-international conflicts on cultural property. The lack of explicit legal safeguards for such disputes constitutes a significant omission in the safeguarding of cultural property amidst internal conflicts and civil wars.⁹ Another obstacle arises within the realm of moveable cultural property. The existing framework of the Rome Statute presents challenges when it comes to prosecuting offences involving the damage or theft of portable cultural artefacts. This is particularly true in situations where cultural artefacts are confiscated or taken by one side of the conflict, not for individual gain but as a component of wider military endeavours.¹⁰ The complex nature of these circumstances creates difficulties in the application of current legal definitions and norms, resulting in an ambiguous zone regarding the safeguarding of transportable cultural assets in times of armed hostilities. Moreover, the lack of clarity in determining the exact criteria for identifying a military target introduces an additional level of intricacy to the safeguarding of cultural heritage sites. Thorough analysis of the legislative regulations is necessary to determine if a cultural heritage site may be classified as a military target. The lack of clarity on this matter adds complexity to the implementation of the law in circumstances of dispute. For example, a historical structure utilised as military barracks may be categorised as a cultural heritage site.¹¹ However, its military function complicates the distinction, rendering legal assessments and safeguards more difficult.

In exploring the ICC's legal framework regarding cultural heritage, an intriguing perspective emerges on the possibility of interpreting crimes against cultural heritage as crimes against humanity under Article 7 of the Rome Statute. Often, the destruction or damage to cultural heritage occurs within the broader context of an assault on civilian populations. Such acts may constitute a standalone crime against humanity or accompany other acts that collectively contribute to crimes against humanity, thereby adversely impacting cultural heritage. However, this interpretation is complicated by the stringent criteria that define a crime against

9 Shcherbina & Salmo, 2023.

10 These acts reflect the use of cultural property as a tool within larger strategies aimed at territorial control, ideological enforcement, or psychological warfare. For example, during the Baedeker Raids in 1942, German forces targeted British historic cities, aiming to demoralise the population by destroying symbols of cultural and historical significance. Similarly, during the Iraqi invasion of Kuwait in 1990, approximately 30,000 pieces of Islamic art were confiscated from Kuwait's National Museum as part of a broader strategy to assert dominance and control over the region. See: Brosché, Legnér, Kreutz & Ijla, 2016, *op. cit.*

11 Camerin, Camatti & Gastaldi, 2021, p. 782.

humanity.¹² For an act to be classified under this category, it must be part of a widespread or systematic attack knowingly directed against a civilian population. The act should not be isolated or sporadic, and the perpetrator must be aware of the broader context in which the act takes place.¹³ This high bar for classification poses significant interpretative challenges. Consider the case where a singular incident resulted in the destruction of a cultural site. While an intentional and substantial act may be noteworthy, it may not be considered a crime against humanity if it is not part of a broader, organised assault on a civilian population. This circumstance exposes a significant limitation in the ICC's authority: the incapacity to prosecute some offences against cultural heritage that, however severe, do not correspond to the precise categories of crimes against humanity. Therefore, while there is a theoretical basis for categorising certain acts against cultural heritage as crimes against humanity, the complexity of proving such a categorisation under the current legal framework presents considerable challenges. This requires a detailed analysis of the legal definitions and, potentially, a broadening or re-evaluation of these categories to effectively handle and prosecute offences committed against cultural heritage. This growth would enhance the safeguarding of cultural and historical heritage essential to the existence of human civilisation.

3.2. Key cases and precedents set by the ICC in cultural heritage protection

The Al Mahdi case, brought before the ICC, set a landmark precedent in international law, highlighting the protection of cultural heritage. Centred on Ahmad al-Faqi Al Mahdi, the case dealt with the intentional destruction of cultural and religious sites in Timbuktu, Mali, a UNESCO World Heritage site. Al Mahdi faced specific charges of war crimes for directing attacks against nine mausoleums and the Sidi Yahia mosque, marking the first instance where an individual was prosecuted for war crimes explicitly focused on cultural heritage. In a groundbreaking decision, Al Mahdi pleaded guilty, showing remorse for his actions. This led to a swift trial, culminating in September 2016 with his conviction and a nine-year prison sentence.¹⁴ The case sent a clear message from the ICC that the intentional destruction of cultural heritage constitutes a serious crime deserving of significant punishment.

However, in his powerful analysis of the ICC's legal interpretations and approaches, Schabas challenged the ICC's application of the term "attack" as used in the

12 It is worth noting that the ICTY has determined that the destruction or extensive damage to cultural heritage, if carried out with discriminatory intent, can qualify as persecution, a crime against humanity under Article 5(h) of its Statute. This is because such acts not only target physical structures but also aim to erase the identity, history, and dignity of a specific group, constituting severe discrimination. By recognising this, the ICTY underscores the profound impact of cultural destruction as a tool of persecution during armed conflicts. See: O'Keefe, 2010, pp. 339–392.

13 Ibid.

14 Schabas, 2017, p. 75.

Rome Statute to Al Mahdi's actions.¹⁵ In common language, the term "attack" often refers to a military operation that involves the use of weapons. This is not the case in Al Mahdi's actions, as he destroyed buildings using items not considered military weapons in a setting where there was no armed confrontation.¹⁶ Schabas stressed that the Rome Statute's definition of "attack" for crimes against humanity during peacetime may not correspond to conventional legal interpretations when applied to war crimes, such as in the case of Al Mahdi.¹⁷ Certainly, Schabas recognised the safeguarding provided to cultural artefacts according to international humanitarian law, both during and outside of armed conflicts. Nevertheless, he raised doubts over the proper application of the ICC's rules in Al Mahdi's case, indicating that the Court's interpretation may have gone beyond the ordinary concept of an "attack" according to humanitarian law.¹⁸ He further noted the distinction in the ICC's case law between offences related to the conduct of hostilities and those applicable to individuals and property under a party's control.¹⁹ The ICC's approach in the Al Mahdi case may have deviated from established legal norms, as indicated by this distinction, which may be traced back to the oldest legal instruments of armed conflict legislation. Schabas questioned the need for a distinct restriction on assaults against cultural property under the Rome Statute. He argued that this may be redundant, given the general prohibition against attacks on civilian objects, further questioning the ICC's interpretations and applications of its provisions in the Al Mahdi case.²⁰

This case raises a thought-provoking point in our discussion regarding the role of and challenges faced by the ICC. This prompts a significant but difficult question: Was Al Mahdi wrongfully convicted? The answer is not straightforward. Al Mahdi certainly committed the crimes and confessed to them, but Schabas' critique points to potential issues in the ICC's interpretation of its own statute. This predicament requires a deeper enquiry into the essence of law and justice: Should we strictly adhere to the letter of the law or embrace the spirit of the law? Must we blindly follow the text or should we use our discernment to find the meaning? In this respect, the case of Al Mahdi was demonstrative, serving a broader purpose for humanity. In the field of international law, it implies that actual application and experience may be just as important as academic understanding. It prompts us to contemplate whether rigidly adhering to the literal wording of legal legislation is always the optimal approach, or if there is space for interpretation and adjustment to the evolving reality of our world. In its own way, this case was a learning experience for the ICC and the global community, demonstrating that the pursuit of justice sometimes requires navigating the grey areas between the rigid text of the law and its dynamic interpretation.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

4. Challenges in Enforcing Protection

In our journey through the complexities of international law and its enforcement, we are entering the murky waters where politics and legal principles intertwine, particularly within the realm of the ICC. This section illuminates a crucial paradox: the more prominent a nation's role on the global stage, the less likely it is to yield to the jurisdiction of international law, especially when it comes to criminal accountability. Nobody, individual or state, welcomes criminal accusations. However, when these claims reach a global scale, the consequences become far more important. Powerful nations, with their far-reaching influence and strategic interests, often exhibit a marked reluctance to submit themselves or their citizens to external legal scrutiny. The reticence to accept the authority of an international agency such as the ICC over their citizens, even when they are involved in serious crimes, goes beyond merely avoiding criticism of their domestic or foreign policy.

This hesitation is not only a question of pride or sovereignty. The situation involves an intricate interaction between geopolitical strategy, national interests, and the overall story of power dynamics in the international system. The ICC faces significant hurdles in carrying out its mandate under these circumstances. This section examines these challenges from three perspectives: the utilisation of military necessity and counterterrorism as rationales for devastation, the complex matters concerning jurisdiction and sovereignty, and the consequences of political influences and interventions, particularly from influential entities like the United States and NATO. Each of these areas poses unique challenges and factors that need to be considered, which is why upholding the ICC's mandate is frequently a difficult task. The resistance of powerful states to international legal proceedings underscores a critical question about the impartiality and universality of international law. Exploring these difficulties reveals the intricacies that impede the ICC in its goal to enforce human rights and safeguard cultural heritage worldwide.

4.1. Military necessity as justification for destruction

The concept of military necessity, often invoked in the realm of armed conflict, has significant implications for the protection of cultural property. The roots of this principle lie in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.²¹ While aimed at safeguarding cultural heritage, the Convention includes provisions that allow for exceptions under the guise of military necessity. Article 4 of the Convention outlines the obligations to protect cultural property. It also introduces a critical loophole, with paragraphs 1 allowing for

21 Many of the provisions of the Hague Conventions were heavily influenced by the Lieber Code, drafted during the American Civil War. This foundational document introduced principles like the protection of cultural property and civilian assets during armed conflict, which became cornerstones of modern international humanitarian law.

derogation from these obligations if ‘military necessity imperatively requires such a waiver’.²² Here, the phrase “military necessity” provides a convenient escape clause that states can exploit to bypass the Convention’s protective measures. It creates a grey area where the destruction of cultural heritage can be justified under certain circumstances, which is concerning given the subjective nature of what constitutes a military necessity. Let us consider a few situations in which military necessity might justify the destruction of cultural property:

(i) Strategic advantage: A cultural site might be located in a strategically important area, such as high ground or a crucial crossroad, and controlling or destroying it could provide a significant military advantage.

(ii) Use by enemy forces: If a cultural site is being used by enemy forces as a shield, a base for operations, or for storing weapons, its destruction could be justified as a military necessity.

(iii) Preventing enemy surveillance: A historical monument or building could offer a vantage point for enemy surveillance. Destroying it might be seen as necessary to prevent the enemy from gathering intelligence.

(iv) Eliminating symbolic landmarks: Cultural sites often hold symbolic importance. Their destruction could serve to demoralise the enemy or undermine their cultural identity.²³

(v) Blocking enemy movements: Ruins of destroyed cultural sites might be used to block roads or paths, hindering enemy movement. Their destruction may thus be deemed a military necessity.

The critical issue here is the subjective interpretation of what constitutes a military necessity. It offers a convenient pretext for states to engage in the destruction of cultural heritage under the guise of military operations. This loophole not only undermines the spirit of the 1954 Hague Convention but also poses a severe threat to the preservation of global cultural heritage. It calls into question the balance between military objectives and the imperative to protect cultural landmarks, which are not merely structures but repositories of human history and identity. The flexible interpretation of military necessity thus becomes a topic of debate, often polarising legal and ethical discussions in the context of armed conflicts.

22 Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention: (1) The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property. (2) The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

23 A powerful example of the symbolic importance of cultural sites lies in the destruction of the Bamiyan Buddhas in Afghanistan by the Taliban in 2001. Their destruction was a calculated act, aimed at erasing the region’s pre-Islamic heritage and demoralising those who valued the pluralistic identity of Afghan society.

4.2. *Issues of jurisdiction and sovereignty*

The issue of jurisdiction and sovereignty presents a significant challenge in the enforcement of the Rome Statute. Currently, 124 countries are party to the Statute, including 41 from Europe, 33 from Africa, 29 from Latin America and the Caribbean, and 21 from Asia and Oceania.²⁴ Notably absent from this list are major global players such as the United States, Russia, China, India, Turkey, and Israel. Their reluctance to join the Rome Statute is a considerable detriment to global justice and human rights protection. Other factors contribute to their negative attitude towards the ICC, the most crucial of which include the following:

(i) Perceived threat to national sovereignty: The United States has long held concerns about the ICC's potential to infringe on its sovereignty, particularly in cases where American soldiers could be prosecuted for actions in conflicts abroad. For instance, the US invasion of Iraq in 2003, which led to numerous allegations of war crimes, is a scenario where the US would strongly oppose external judicial intervention, viewing it as an infringement on its sovereign decision-making.²⁵

(ii) Political and military implications: Russia's military actions in Ukraine and Syria have been contentious, with allegations of war crimes. Russia's concern is that ICC membership could lead to legal actions against its military leaders or even political figures, impacting its ability to conduct foreign policy and military operations as it sees fit.²⁶

(iii) Divergent legal systems and practices: China's treatment of the Uighur population in Xinjiang, including allegations of human rights violations and cultural suppression, exemplifies a situation where China would resist ICC jurisdiction.²⁷ China's legal system, which emphasises state sovereignty and non-interference, contrasts with the ICC's principles, making ICC membership unattractive to Chinese authorities.²⁸

(iv) Fear of politicisation and bias: Turkey's ongoing conflict with the Kurdish population, including military operations in Kurdish regions and allegations of human rights abuses, highlights its concerns about potential ICC scrutiny.²⁹ Turkey might view the ICC as a tool that could be used against it politically, particularly by Western powers, in matters it considers to be internal or related to national security.

(v) Historical and cultural factors: Israel's longstanding conflict with Palestine, including military actions in Gaza and the West Bank, raises concerns about ICC intervention. Israel might see the ICC as a platform for political attacks against its

24 The States Parties to the Rome Statute, International Criminal Court. [online] Available at: <https://asp.icc-cpi.int/states-parties> [Accessed 27 Jan. 2024].

25 Wind, 2009, pp. 83–108.

26 Skuratova, 2016, pp. 125–137.

27 Aulya, Arifin & Smith, 2023, pp. 95–122.

28 Ibid.

29 Setiawati & Naranta, 2022, pp. 14–43.

policies and actions, influenced by international pressure and bias, rather than an impartial judicial body.³⁰

Examining the reasons behind some nations' hesitancy to join the ICC reveals a tapestry of historical, cultural, and political factors that shape their perspectives. Could this reluctance be more deeply entrenched in the mindset of a certain generation? The leaders of these nations, many of whom were shaped by the era of the Cold War and a world starkly divided along political lines, often prioritise national interests over international collaboration. They view ICC membership as a potential threat, fearing sovereignty infringement, political backlash, legal clashes, and biased prosecution, all against the backdrop of delicate historical and cultural contexts. As such, it is worth considering if a change in leadership from one generation to another might result in a distinct perspective. In countries like the United States, Russia, China, India, Turkey, and Israel, the current political elite grew up in a time when national interests trumped global co-operation. But what if the reins were handed over to the millennials, a generation with a markedly different mindset? Millennials, who are often perceived as more globally minded and interconnected, might view the role of international law and the ICC through a different lens. They could see ICC membership not as a surrender of sovereignty, but a commitment to a shared global heritage and a step towards a more collaborative international community. This raises other thought-provoking questions: Is the resistance to the ICC a relic of past geopolitical divides? Could a shift in leadership across these nations facilitate a more collaborative stance towards international law and justice? As a new generation takes the helm, will millennials question established norms and instead prioritise a more global perspective that strikes a balance between national and international interests? The answers to these questions might lie in the changing dynamics of global politics and the steady change in generational viewpoints, potentially marking the beginning of a new era in global relations and the pursuit of justice.

4.3. Political influences and NATO membership

The 2018 military activities carried out by Turkey in Afrin (Syria) serve as a prime example of how political influences and the oft-mentioned narrative of the fight against terrorism intersect within the framework of international law and the preservation of cultural property. The Turkish government's formal stance, as conveyed to the United Nations, rationalised the bombing of Afrin—which led to more than 2,200 fatalities and the devastation of Mesopotamian temples recognised by UNESCO as World Heritage Sites—as a defensive measure against Kurdish terrorist groups that posed a direct threat to its national security.³¹ This rationale raises critical questions about the selective application of the military necessity doctrine. Turkey is unlikely to use the justification of military necessity if there were terrorist threats

³⁰ Kuttat, 2023.

³¹ Khan, 2018, p. 77.

near important cultural monuments inside its own borders, such as the Hagia Sophia or the ruins of Troy, which have exceptional artistic and historical significance. The contrasting approaches—namely, the swift aerial attacks in Syrian Ain Dara versus the hypothetical cautiousness in Turkey—highlight a double standard in the application of military necessity. In Turkey’s rhetoric, this necessity seems to permit not just the destruction of ancient temples, but also the killing of civilians and other actions bearing the hallmarks of war crimes. NATO membership provides further evidence of Turkey’s impunity in this case, notably the absence of resistance from other NATO countries. Indeed, in his statement in April 2018, Jens Stoltenberg, Secretary General of NATO, praised Turkey’s role in the alliance, emphasising its contributions to NATO operations and the fight against Daesh.³² He acknowledged Turkey’s security challenges and reaffirmed NATO’s solidarity with Turkey.³³ This statement reflects the political complexities and strategic considerations that often influence the responses of international bodies and alliances to the actions of their Member States. In addition to illustrating the issues of military necessity and the fight against terrorism, the situation in Afrin exposes the intricate dynamics of political alliances and their impact on the enforcement of international norms, especially regarding cultural heritage protection.

4.4 Political influences and counterterrorism efforts

The situation in Israel and the Gaza Strip, particularly the events of 2023, serves as a critical case study in examining the intersection of political influences, military strategies, and the preservation of cultural heritage. During the conflict, significant historical and cultural sites in Gaza were destroyed, including the ancient Omari Grand Mosque, which was part of the city’s rich heritage.³⁴ UNESCO’s reports highlighted further destruction of cultural and historical objects in 2021, painting a bleak picture of the ongoing damage to Gaza’s cultural fabric.³⁵ In 2023 alone, nearly 200 historical sites of significance were destroyed or damaged by Israeli airstrikes in the Palestinian enclave. These included an ancient port dating back to 800 BCE, mosques housing rare manuscripts, one of the world’s oldest Christian monasteries, and the Rafah Museum, dedicated to the multi-layered heritage of the region.³⁶ Israel’s justification for these actions have centred on targeting Hamas, alleging that the group is operating in civilian areas, including hospitals and mosques. Of the 325

32 NATO (2018). *Joint press conference with NATO Secretary General Jens Stoltenberg and the Minister of Foreign Affairs of Turkey, Mevlüt Çavuşoğlu*. [online] NATO. Available at: https://www.nato.int/cps/ic/natohq/opinions_153695.htm?selectedLocale=en [Accessed 27 Jan. 2024]

33 Ibid.

34 Hussaini, 2024.

35 Unesco.org. (2024). *Gaza: UNESCO grants enhanced provisional protection to Saint Hilarion monastery*. [online] Available at: <https://www.unesco.org/en/articles/gaza-unesco-grants-enhanced-provisional-protection-saint-hilarion-monastery> [Accessed 27 Jan. 2024].

36 Ibid.

archaeological sites registered in the entire Gaza Strip, over 200 have been damaged or destroyed.³⁷ Spanning from the Phoenician and Roman eras to more recent times, these sites included ancient churches, mosques, museums, and other significant historical and archaeological landmarks.³⁸ For Palestinians, these places symbolise not just tangible constructions, but also encapsulate their historical legacy, cultural identity, and continued existence. In addition to being interpreted as an assault on the present and the future of Palestinians, the targeting of these sites is seen as an attempt to erase the past.

This situation raises critical questions regarding the accountability of nations not party to the Rome Statute, such as Israel, which does not recognise the ICC's jurisdiction. UNESCO's efforts to draw attention to the destruction in Gaza have frequently been met with accusations of bias from Israel, framing such concerns as "anti-Semitic" and "pro-Hamas".³⁹ This scenario underscores the challenges in fostering rational discourse when emotions and political narratives overshadow logic and the universal value of cultural heritage. The case of Israel and Gaza in 2023 exemplifies the complexities of protecting cultural heritage amid military conflict and political contention. It highlights the urgent need for a more effective international framework that can hold states accountable for the destruction of cultural heritage, irrespective of their political affiliations or stance towards international bodies like the ICC. The question remains: How can the global community navigate these deeply entrenched political and emotional barriers to ensure the preservation of our shared human history and cultural legacy?

5. Reimagining Justice: Integrating Art Crimes into ICC's Jurisdiction

In the contemporary world, the theft and destruction of cultural heritage pose equally grave threats, necessitating a critical re-evaluation and expansion of the Rome Statute to encompass "art crimes". The loss of a work of art, whether through destruction or theft, is not merely a loss to the nation from which it originates but a profound loss for humanity at large, depriving future generations of their cultural legacy. Article 8(2)(b)(xii) of the Rome Statute, which addresses the destruction or appropriation of enemy property, needs to be expanded to protect works of art from theft and destruction, recognising them as unique and invaluable. The significance of this amendment becomes evident when we recall the lessons of the Nuremberg Trials. In examining the activities of the *Einsatzstab Reichsleiter Rosenberg*, the Military

³⁷ Ibid.

³⁸ Ibid.

³⁹ Corder and Casert 2024.

Tribunal at Nuremberg categorically rejected the notion that the appropriation of artworks was a preventive measure for their protection.⁴⁰ Evidence showed that the primary aim was the enrichment of the German nation and individual officers, not the preservation of cultural heritage.⁴¹ Today, the theft of cultural artefacts often results in their disappearance into the black market, making recovery nearly impossible. The expansion of the Rome Statute to include specific provisions for art crimes would address this issue. Such an amendment would also ensure that the theft and destruction of cultural heritage are recognised as war crimes, deserving of international scrutiny and action. It would not only bring justice to those who suffer from the loss of their cultural heritage but also preserve the shared heritage of humanity for future generations.

Broadening the definition of crimes against humanity to encompass the theft of artworks is an intriguing concept, one that could mark a transformative moment in international law. By considering the deliberate destruction or theft of a group's cultural heritage as parallel to its physical extermination, this expansion recognises the profound impact such acts have on the identity and survival of communities. The intentional targeting, theft, or obliteration of cultural objects could serve as a key indicator of a perpetrator's intent to erase a distinct cultural group. While this idea offers a ray of hope in filling a critical gap in international justice, practical challenges loom large, making its realisation a daunting task.

The first major hurdle is distinguishing deliberate acts of cultural destruction from the inevitable collateral damage in conflict zones. After all, in the fog of war, historical and cultural sites often suffer damage or destruction. Distinguishing such damage from a calculated assault on cultural identity demands unambiguous evidence. This challenge is exemplified in urban warfare scenarios, where cultural sites might be unintentionally harmed during military engagements. Second, proving that the theft or destruction of cultural property is part of a systematic attempt to annihilate a cultural group's identity can be complex. Unlike direct physical violence against individuals, the link between cultural theft and genocidal intent is less straightforward. For example, the looting of artefacts during a conflict might be driven by economic motives rather than an explicit intent to eradicate a community's cultural identity. Lastly, the willingness of states and international bodies to prosecute cultural theft as a crime against humanity depends on political and legal consensus. In cases where powerful nations or their allies are implicated, there might be reluctance or outright refusal to recognise cultural theft as part of a broader strategy of cultural genocide. This political dimension can significantly hinder the effective application of this expanded definition.

To summarise, incorporating the theft of cultural artefacts into the realm of crimes against humanity offers a path forward in addressing the profound impact of cultural heritage loss. While the practical challenges of implementation are

40 Roland, 2010.

41 Ibid.

significant, the potential for change lies in the hands of future generations. The millennial generation, along with emerging new leaders, carries the promise of ushering in this transformative shift. This is not a matter of ageism, but a recognition of the current reality: current leadership often exhibits reluctance towards such progressive changes. The new generation, with its fresh perspectives and commitment to global interconnectedness, holds the key to realising this vision. Shaped by a world that is more connected and culturally intertwined than ever, these future leaders may possess the necessary drive and vision to overcome the hurdles that currently impede the expansion of international law. Their approach could foster robust legal frameworks, establish clear evidentiary standards, and most importantly, cultivate the global political consensus essential for upholding and enforcing these laws.

6. Conclusion

As we reflect on the journey of the ICC over the past 25 years, it becomes evident that the Court, while established with the highest of aspirations, has faced significant challenges in fulfilling its mandate. The cultural heritage of humanity—an invaluable asset that binds us across time and space—remains under threat, often caught in the crosshairs of conflict and political agendas. The importance of preserving this heritage cannot be overstated. It is the tapestry of our shared human experience, rich in diversity and history. Regrettably, the ICC has struggled to prosecute those responsible for crimes against cultural heritage effectively. Instances from the fourth section of this chapter highlight how potential perpetrators have often remained beyond the reach of justice due to various factors. Jurisdictional limitations, political influences, and the challenges of addressing the nuances of art crimes have all played a part in this shortfall. These challenges underscore the pressing need for the Rome Statute to evolve in response to the realities of the modern world, including the consideration of enhancements to better protect cultural heritage. That said, there is real potential for change, particularly with the generational shift in leadership on the horizon. This transition is especially relevant for great powers like the United States of America and Russia, who have a long history of excellent legal academics, as demonstrated by their effective involvement in the Nuremberg Trials. A pressing question is whether the twenty-first century will see a comparable dedication to the safeguarding of cultural heritage and international justice. The next 25 years have the potential to be crucial. Should countries like the United States and Russia adopt the Rome Statute, it might signify the advent of a fresh epoch characterised by international collaboration and responsibility. This step would enhance the ICC's authority and further demonstrate the worldwide dedication to safeguarding our shared cultural heritage. The potential for this transformation rests with the upcoming generations of leaders, who, armed with new perspectives and a more globally networked mindset, might

serve as the driving force behind a revitalised and more efficient international legal system. In conclusion, the future of the ICC and the protection of cultural heritage hinges on our ability to adapt, innovate, and collaborate. The legacy of the past and the promise of the future converge at this critical juncture, presenting an opportunity for transformative change in the pursuit of justice and the preservation of our shared human heritage.

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