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Cultural Heritage and Mass Atrocities

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INTRODUCTION

'Where they have burned books,
they will end in burning human beings.'

Heinrich Heine

The practice of intentional destruction of cultural heritage has represented a scourge of humanity throughout all of its history. The unlawful destruction of the world's most cherished antiquities has rarely been an end in itself. There are different reasons why cultural property has been deliberately targeted and they all underlie the existing link between the destruction of cultural heritage and commission of mass atrocity crimes.

The deliberate destruction of cultural heritage is often carried out with the specific and discriminatory intent to target individuals and groups on the basis of their specific shared characteristics such as the cultural, ethnic, or religious background. It is often perpetrated in the sheer will to erase entire communities through the eradication of their historical traces and symbols, and therefore their culture and identity. This is why it can constitute evidence of a 'cultural genocide' or 'cultural cleansing', namely actions undertaken to destroy ethnic groups' culture through a spiritual and cultural demolition. It is not surprising that in the occasion of UNESCO's General Conference in November 2017, chairing an international panel on the topic of cultural cleansing and violent extremism, ex-Director-General Irina Bokova took the opportunity to stress that violent extremists target cultural heritage because they know that it a force for resilience, and they are aware of the 'power of culture to delegitimize their claims and false promises[1]'.

[1] I.BOKOVA, *'*Cultural Cleansing – Cultural Diversity under Attack*'*, Report on the Heritage and Cultural Diversity at Risk in Iraq and Syria, International Conference, 3 December 2014 (UNESCO, Paris), viewed 1 February 2021, available at <https://en.unesco.org/news/unesco-and-partners-stand-against-cultural-cleansing-and-violent-extremism>.

Considering that culture constitutes an intrinsic part of a population's identity, an attack on cultural heritage is most likely intended as an assault on the very essence of a group and its right of existence. As pointed out by the United Nations Special Rapporteur on cultural rights, Karima Bennoune, it 'is impossible to separate a people's cultural heritage from the people itself and the people's rights[2]'. As emphasized by Francesco Francioni,

> 'the concept of human dignity, which informs […] human rights […] includes people's entitlement to the respect of the cultural heritage that forms an integral part of their identity, history and civilization. Destruction or desecration of symbolic objects and sites that are essential to the enactment of a people's culture (be it a library, a place of workship, a sacred site for indigenous peoples) is a violation of their collective dignity no less than a violation of their personal dignity.[3]'

This thesis explores the connection between the deliberate destruction of cultural heritage and mass atrocities in the attempt to develop a conceptual framework for meeting the challenge of protecting cultural heritage against war crimes, crimes against humanity, genocide and ethnic cleansing. The first chapter addresses the problem starting from some prefatory clarifications about 1) the legal definition of 'cultural heritage' contained in the specialist culture conventions and 2) why the destruction of cultural heritage occur. The second one deals with the legal consequences under international law of the deliberate destruction of cultural heritage. It distinguishes between the destruction in the context of armed conflict, where destruction can amount to a) war crime, b) crime against humanity and c) as evidence of the intent to commit genocide, and destruction in peacetime, where the criminalization under international law is much more uncertain. While the third

[2] See 'Report of the Special Rapporteur in the field of cultural rights', UN Doc A/71/317, 9 August 2016, para. 53.
[3] See F.FRANCIONI, '*Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity',* (2004) 25 in Michigan Journal of International Law, p. 1212.

chapter introduces the theme of the individual criminal responsibility for deliberate destruction of cultural heritage, providing an overview of selected cases and relevant judgments by the ICTY and the ICC, the fourth one is about culture crimes entailing state responsibility, with the mention of the ICJ case-law about genocide cases. The purpose of chapter five is to highlight the progress made within the framework of the United Nations, through an overview of the evolving role of the UN Security Council in the protection of cultural heritage and the subsequent developments that followed. Finally, the thesis will draw general conclusions in favor of the connection between assaults on cultural heritage and mass atrocities.

The terrain is fraught and complex but the subject is certainly worthy of a great deal of discussion, not only because cultural heritage represents 'the rich and diverse legacy of human artistic and engineering ingenuity, but also because it is intertwined with the very survival of a people as a source of collective identity[4]'. This is why 'defending cultural heritage is more than a cultural issue; it is a security imperative that cannot be separated from the protection of human lives'[5].

[4] T.G.WEISS & N.CONNELLY, '*Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones*', J.Paul Getty Trust 2017, p. 4. See also J.NAFZIGER in '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, Chap. 6.
[5] UNSC Resolution 2347 (24 March 2017) UN Doc S/RES/2347.

CHAPTER 1

The Connection between Mass Atrocities and Cultural Heritage

1.1 The Problem

The deliberate destruction and theft of cultural heritage perpetrated by the Islamic State of Iraq and the Levant (ISIL, or sometimes ISIS or Da'esh) in Middle East and North-West Africa since 2014 has been devastating. Nothing has been spared from this unbridled destruction: from Sufi cultural sites, mosques and historic Muslim tombs to prized historical sites such as Palmyra, Nimrud and Hatra. Individual states, international organizations, religious authorities, and people worldwide have strongly reacted against such acts of inhumanity and intolerance.

However, destruction and loss of cultural property is not something new and it has constantly occurred as a consequence of iconoclasm or as an incidental result of armed conflicts. This is why periods of warfare or conflict have always seen cultural heritage at risk. As early as 391 AD, Theophilus, the patriarch of Alexandria, was encouraged to oppress paganism on the orders of the Christian Emperor Constantine during the persecution of pagans in the late Roman Empire. When the pagans took refuge in the *Temple of Serapis* in Alexandria, the Christians stormed the sanctuary destroying it. In China, during Mao Zedong's Cultural Revolution, everything related to traditional Chinese culture was destroyed. It was more than just a revolt to instill an ultra-left-party-system in China: thousand of historical sites, scrolls, relics and books were damaged as part of the communist campaign's agenda. It seemed that the more permanent solution to rid the country of traditionalist influences was through the removal of their symbols and the destruction of old customs, habits and ideas. During the 1991-1999 Wars of

Yugoslav Succession, the systematic destruction of religious structures and historical monuments in Bosnia-Herzegovina, Croatia and Kosovo was one of the largest demolition of cultural heritage in Europe since WWII. The devastation was part of an ethnic cleansing campaign to create ethnically homogeneous territories, abolishing cultural diversity and pluralism. In March 2001, the military and para-military forces of the Taliban Government of Afghanistan destroyed the two Buddhas of Bamiyan in the discriminatory intent to eradicate any cultural manifestation extraneous to the Taliban ideology. They were moved by the fanatic conviction that the 'real God is only Allah, and all other false gods should be removed[6]'. Between June and July 2012 in Mali, the extremist Islamic group *Ansar Dine* devastated the ancient city of Timbuktu. The intentional destruction of ten religious and historic buildings - nine of which were included in the UNESCO World Heritage List since 1988 - was part of a broader systematic attack aimed at targeting the moderate form of Islam practiced in that territory.

The unifying feature of the examples provided is the discriminatory intent of the perpetrators, who deliberately destroy cultural heritage intending to erase the distinctiveness of a given human community. They are aware that cultural heritage 'represents a unique and irreplaceable body of values since each people's traditions and forms of expression are its most effective means of demonstrating its presence in the world[7]'. In this way, they attempt to annihilate communities by destroying those cultural touchstones that define their identity and memory. Therefore, when perpetrators destroy cultural heritage, 'they demolish much more than an outstanding and irreplaceable object. They destroy the special – often spiritual – connection between that object and a human community, a fundamental element of the cultural and social identity of the latter, ultimately upsetting the community as such'[8].

When talking about the intentional destruction of cultural heritage, it is precisely

[6] See F.FRANCIONI and F.LENZERINI, '*The Destruction of the Buddhas of Bamiyan in International Law'*, (2003) 14(4) in European Journal of International Law, p. 626.
[7] UNESCO, Mexico City Declaration on Cultural Policies (1982), November 1982, Part IV, para 1.
[8] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 77.

such spiritual and social meaning the real target of perpetrators. It is through the assertion of cultural identity that peoples contribute to their liberation and conversely, 'any form of domination constitutes a denial or an impairment of that identity[9]'. It is not by chance that during the 16th century - when art and culture became a powerful symbol of the prestige and power of the State - in its political treatise '*The Prince*', Niccolò Machiavelli wrote that:

> 'there is no safe way to possess a city other than its destruction. He who becomes master of a city accustomed to freedom and does not destroy it, may expect to be destroy by it, for in rebellion it has always the watchword of liberty and its ancient privileges as a rallying point, which neither time nor benefits will ever cause it to forget.[10]'

To sum it up, 'if you really want to destroy a people, its pride, its self-esteem, and its sense of belonging to its own cultural identity, you need to destroy its cultural heritage[11]'.

1.2 Defining Cultural Heritage

Any exploration of the topic must begin with the question: what is "cultural heritage"? The perpetual questions that lie behind the legal definition of "cultural heritage" were not so easily answered over the course of time. This is why the term has many meanings as the parameters of what is encompassed by international cultural heritage law have expanded over the last century.

At the beginning of the 19th century, the lexicon of international law did not even contain the term 'cultural property'. It was necessary to wait until the second half of the 19th century for its first appearances. The early instruments were

[9] UNESCO, Mexico City Declaration on Cultural Policies (1982), November 1982, Part IV, para 2.
[10] N.MACHIAVELLI, '*Il Principe' ('The Prince'),* 1532, p. 51.
[11] See *supra* note 8.

adopted with the specific aim of regulating the methods and means of combat, such as the Final Protocol of the Brussels Conference on the Rules of Military Warfare ('Brussels Declaration') and the two 1907 Hague Conventions: the 1907 Hague Convention Respecting the Laws and Customs of War on Land ('1907 Hague Convention IV') and its Regulations and the 1907 Hague Convention on Bombardment by Naval Forces in Time of War[12]. However, the conventions did not mention a unitary category of cultural property, but rather an empirical and diverse list containing 'buildings dedicated to religion, art and science, or charitable purposes … historic monuments', as well as sites that had nothing to do with culture, such as hospitals and places dedicated to the care of the sick and wounded[13].

Only with the Consitution of the United Nations Educational, Scientific and Cultural Organization ('UNESCO Constitution') in 1945, that 'cultural property' has developed as a specific subject of international law. The term - often referred to by the analogous "cultural property[14]" in the earlier legal instruments - was first defined in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict as:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
>
> (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a);

[12] See F.FRANCIONI, *'Cultural Heritage'*, in The Max Plank Encyclopedia of Public International Law, viewed 1 February 2021, available at <https://opil.oplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1392 >.
[13] *Ibid.*
[14] The expression 'cultural property' was used for the first time in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'[15].

The treaty - primarily aimed at preventing new widespread destruction of cultural heritage after World War II - was the first one implementing UNESCO's cultural mandate as well as the first international treaty of universal application focusing exclusively on the protection of cultural property in armed conflict. But most importantly, for the first time it set out specific criteria for the definition of 'cultural property' and recognized that 'damage to cultural property belonging to any people whatsoever means damage to cultural heritage of all mankind, since each people makes its contribution to the culture of the world[16]'.

The evolving definitions contained in the subsequent cultural conventions reflect the historical contexts in which the documents were drafted as well as the expanding and diversifying membership of UNESCO and priorities of its Director-General at the relevant times.[17] As proof of this, the 1970 postcolonial sensibility along with the rise of national sentiments, placed importance on policies addressing cultural loss as a consequence of illicit traffic in the newly independent states. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property defines cultural property as:

'property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science[18]'.

The Convention acknowledges that 'cultural property' constitutes one of the

[15] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240, art. 1 ('1954 Hague Convention').
[16] *Ibid.*, Preamble.
[17] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 3.
[18] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231, art. 1 ('1970 UNESCO Convention').

essential elements of civilization and national culture and that it is 'incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation and illicit export[19]'.

According to Article 1 of the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage (the World Heritage Convention), the following categories shall be considered as 'cultural heritage':

> - 'monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
> - groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
> - sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view[20]'.

The treaty, which has acquired a near-universal character with its 193 states parties, has provided the basis for the developing of an effective system - based on modern scientific methods - for the collective protection of the cultural and natural heritage of outstanding universal value. For this reason, the Convention established a Committee with the task of creating under the title of 'World Heritage List' an inventory of properties forming part of the cultural heritage and natural heritage in terms of the criteria defined in Articles 1 and 2.

The 2001 Underwater Cultural Heritage Convention defines it as all traces of human existence having a cultural, historical or archaeological character and

[19] *Ibid.,* Preamble.
[20] Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151, art.1 ('World Heritage Convention').

which has been partially or totally underwater, periodically or continuously, for at least 100 years such as:

> (i) 'sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context;
> (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
> (iii) objects of prehistoric character[21]'.

When the debate over the definition of 'cultural property' started to gain attention in international law conversations, a much-debated article entitled '*Two Ways of Thinking about Cultural Property*' was published in the *American Journal of International Law* in 1986 by the Stanford professor John Merryman. The article posited that there are two competing narratives when thinking about the legal protection of cultural heritage. The first is the nationalistic way, which consists of thinking about cultural property as part of national cultural heritage. This implies the attribution of national character to objects and gives nations a special interest, legitimizing their desire to retain cultural property within state boundaries and enforce national export controls. The second is the international way, which views cultural property as a component of a 'common human culture, whatever its place of origin or present location, independent of property rights or national jurisdiction[22]'. As a corollary of this way of thinking, nations would support the broadest access and circulation of cultural property, promoting mutual understanding and cultural interchange. Just to clarify, the internationalist perpective is embodied the 1954 Hague Convention, while the nationalistic one in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

[21] Convention on the Protection of Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), UNESCO Doc 31C/Res 24, art. 1.
[22] J.MERRYMAN, '*Two Ways of Thinking about Cultural Property'*, (1986) 80(4) in American Journal of International Law, p. 1.

What is clear from this dual perspective definition is that it cannot properly explain the present state of international law. Nowadays, there is no doubt that are more than just two ways of thinking about 'cultural property'. Since the adoption of the 1954 Convention, international law on the protection of cultural property has constantly been evolving and transforming. The increasing complexity in the ways of thinking about 'cultural property' has led to an extraordinary expansion of the scope of protection. Indeed, the successive cultural conventions have grown from immovable and movable heritage to include 'intangible heritage'. Aware that it is not less worthy of protection and its destruction or disruption is potentially more grave in its consequences and more difficult to heal, its protection became a priority for Asian and African States facing the challenges of rapid economic development in the late twentieth century. First defined by the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage in Article 2, 'intangible heritage' refers to practices, representations, expressions, knowledge and skills and associated instruments, objects, artifacts, and cultural spaces that communities and individuals recognize as part of their cultural heritage. Cultural, as it provides to communities a sense of identity and continuity among the generations. Intangible, 'as it lies essentially in the human spirit, is transmitted by imitation and immersion a practice, and does not necessarily require a specific place or material objects'.[23]

UNESCO's final cultural convention is the 2005 Convention of the Protection and Promotion of the Diversity of Cultural Expressions. Conscious that cultural diversity forms a common heritage of humanity, the convention defines it as the manifold ways in which the cultures of groups and societies find expression. What should be cherished and preserved for the benefit of all, as stated in Article 4 of the Convention, are all the cultural expressions resulting from the creativity of individuals, groups and societies, cultural activities, goods and services, and cultural industries. One of its primary objectives is that cultural goods 'convey

[23] *Ibid.*

identities, values and meanings[24]' and must therefore not be treated as solely consumer goods.

What emerges is that there is no universal legal definition of cultural property. Each UNESCO convention, recommendation and declaration has tried to define the subject in accordance with the specific purpose and scope of application. Of course, the more precise and descriptive is the definitional scope of cultural heritage, the easier is to guarantee adequate legal protection.

1.3 Destruction of Cultural Heritage: why does it occur?

According to UNESCO, threats to cultural heritage in the event of armed conflict result from: intentional destruction, collateral damage, forced neglect, illicit trafficking of cultural objects and, in some cases, terrorism[25].

The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage describes 'intentional destruction' as:

> 'an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience".

States or non-States actors can carry it out - whether in times of armed conflict ot peacetime - with a specif aim, e.g., 'attacking cultural diversity and cultural rights; erasing memory of current and past events, civilizations and peoples; erasing evidence of the presence of minorities, other peoples, philosophies, religions and

[24] Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311, Preamble.
[25] UNESCO, 'Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict', document number C38/49, 2 November 2015.

beliefs; or deliberately targeting or terrorizing individuals and groups on the basis of their cultural, ethnic or religious affiliation, or their ways of life and beliefs[26]'.

Collateral damage occurs when the damaged heritage is not deliberately targeted. In this case, the destruction can be defined as incidental considering that it is often an inevitable part of the war. For example, since 2011, the Krak des Chevaliers, a Crusader castle at the border of Syria and Lebanon and listed as a UNESCO World Heritage Site, has been threatened by a three-year civil war. The rebel fighters barricaded themselves in the fortress for months, using it as shelter and exploiting its value as an ancient military stronghold after the Syrian Arab Army blockaded their village. Government forces eventually launched a series of airstrikes as they closed in on the villagers, inflicting structural damage to the walls and one of the towers, in addition to widespread damage to the overall appearance[27]. Of course, when talking about collateral damage, the devastation is not necessarily less catastrophic than it would have been as a consequence of deliberate action.

Forced neglect describes a broad category of damages of cultural heritage that may occur during an armed conflict as an indirect consequence. 'Such damage may occur because the local populations have left the region, war has made access impossible, or maintenance budgets and equipment have been reallocated to meet wartime needs[28].'

Finally, looting and illicit traffic of cultural property is a well-documented phenomenon that aims to recover cultural heritage antiquities and sell them on the black market. It expropriates people of their history and culture and serves as a 'fundraising device' to fuel organized crime and funding terrorism. In this regard, in Resolution 2199, the Security Council noted with dismay that terrorist groups generate

[26] See 'Report of the Special Rapporteur in the field of cultural rights', UN Doc A/71/317, 9 August 2016, para 33.
[27] T.G.WEISS & N.CONNELLY, '*Cultural Cleansing and Mass Atrocities'*, J.Paul Getty Trust 2017, p.12.
[28] *Ibid.*

> ‘income from engaging directly or indirectly in the looting and smuggling of cultural heritage items from archeological, sites, museums, libraries, archives, and other sites in Iraq and Syria, which is being used to support their recruitment efforts and strengthen their operational capability to organize and carry out terrorist attacks[29]’.

This attitude of the terrorist groups has been later emphasized in the ‘Report on the Protection of Heritage in Situations of Armed Conflict[30]’, when Jean-Luc Martinez - president-director of the Louvre Museum in Paris - observed that ‘blood antiquities’ may have represented ‘up to the fifteen to twenty per cent of ISIS’s revenue sources’.

Whatever the reasons behind the intentional destruction of cultural property, it is hard to ignore that the most significant damage is inflicted upon the vulnerable populations. First of all, the value of cultural heritage as a spiritual element of people's identity is ineluctably affected, together with the system of social cohesion through which monuments, buildings, museums and libraries enable societies to organize and define themselves throughout history. In addition to these ‘moral and social costs', when high-profile sites are intentionally destroyed, the post-crisis recovery, the tourism revenue losses as well as the loss of jobs related to the maintenance of heritage structures, may have a disastrous impact from an economic point of view. Beside, ‘the destruction of heritage during war deepens the wounds and intensifies lingering animosities and the accounts to be settled afterward[31]’. This is why the reconstruction of cultural heritage is an indispensable element in the broader peacebuilding process.

It is impossible to overlook the fact that when cultural heritage is destroyed, there are enormous costs for everyone. For the atrocious loss of a non-renewable

[29] UNSC Resolution 2199 (12 February 2015) UN Doc S/RES/2199, paras 15-16.
[30] ‘Report on the Protection of Heritage in Situations of Armed Conflict’, November 2015, viewed 1 February 2021, available at <http://traduction.culture.gouv.fr/url/Result.aspx?to=en&url=https://www.culture.gouv.fr/Espace-documentation/Rapports/Cinquante-propositions-francaises-pour-proteger-le-patrimoine-de-l-humanite>.
[31] T.G.WEISS & N.CONNELLY, ‘*Cultural Cleansing and Mass Atrocities’*, J.Paul Getty Trust 2017, p. 13.

resource which belongs to the all humanity. This is why the deliberate destruction of cultural heritage is an urgent wake-up call about the gross and systematic human rights violations.

CHAPTER 2

Destruction of Cultural Property

as a Crime under International Law

2.1 Criminalization of Acts Against Cultural Heritage in Times of Armed Conflict

The international legal framework for the protection of cultural heritage has developed through two parallel but different settings, namely the contexts of peacetime and armed conflicts. It thus appears proper to analyze the two scenarios with their specific features separately.

The first customary international rules regarding cultural property treatment during wartime started to be codified between the second half of the nineteenth and the beginning of the twentieth centuries. The earliest efforts made clear that although cultural and religious sites and monuments, and works of art and science, may be bound to the territory of a state, 'they attracted international protection because of their importance to all humanity, such acts constituted war crimes, and perpetrators of such acts would be held to account[32]'.

The Lieber Code[33] of 1863 - even though not binding at the international law level - was one of the earliest instruments of modern humanitarian law to contribute to the development of the legal protection of cultural heritage, providing a model for subsequent texts. Promulgated by President Lincoln as General Orders

[32] A.F.VRDOLJAK, '*The Criminalisation of the Intentional Destruction of Cultural Heritage'* (October 19, 2015). Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives. Ed. M. Orlando and T. Bergin. London: Routledge, 2016, p. 2.

[33] Prepared by Francis Lieber and promulgated as General Order No.100 by President Lincoln, 24 April 1863, reproduced in D. Schindler and J. Toman (eds.), The Laws of Armed Conflicts. A Collection of Conventions, Resolutions and Other Documents, (3rd ed, Dordrecht, 1988).

No. 100, it set out rules of conduct during hostilities in the American Civil War, stating that:

> 'Classical works of art, libraries, scientific collections, or precious instruments, such astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded' (Article 35).

Sometime later, the destruction of Strasbourg's cathedral during the Franco-Prussian War of 1870-71 led to an international conference that adopted the 1874 Brussels Declaration[34], which incorporated the core pillars of the protection of cultural heritage during armed conflict in place today. Article 8 provided that in the course of belligerent occupation:

> 'All seizure or destruction of, or wilful damage to, institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities'. (emphasis added)

After the watershed event of WWI, the need to establish a more specific legal framework for the wartime protection of cultural heritage led to the adoption of the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (known as the 'Roerich Pact'). Adopted by nations of the Pan-American Union, it granted protection to historic monuments, museums, scientific, artistic, educational and cultural institutions[35] (Article 1), not only in times of war but also in times of peace. The Roerich Pact paved thus the way for more stringent international law standards in the field of protection of cultural

[34] International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, not ratified, (1907) 1 (supp.) in American Journal of International Law.
[35] Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), entered into force 26 August 1935, art. 1.

heritage to be adopted.

We can generally say that two different relevant approaches have been followed to criminalize acts against cultural property in times of war. The first one, the *civilian-use* rationale, incorporates a traditional international humanitarian law orientation and reflects the idea of prioritizing the safeguarding of the civilian population and those who are not involved in the hostilities from deliberate attacks. As a corollary of this approach, protection is afforded primarily only to buildings such as hospitals, churches and schools given that their devastation involves the killing of many civilians and affects potential use by other civilians in the course of a conflict. The Hague regulations of 1899 and 1907 reflected this *civilian-use* approach with provisions addressed to States and which thus did not provide for the criminalization of individual behavior. Article 27 of Regulations attached to the 1907 Hague Convention Concerning the Laws and Customs of War on Land (Hague IV) requires that:

> 'in sieges and bombardments all necessary steps must be taken to spare, as far as possible, building dedicated to religion, art, science, or charitable purposes, historic monuuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'.

Article 56 of Section III – concerning occupied territories, states that:

> 'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.'

The *civilian-use* approach is also exemplified in the provisions regarding offences against cultural heritage embodied in the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) created by the Security Council in the

1990s. At the time, the provisions prescribing acts against cultural property 'were still inspired by general IHL instruments – mainly the Hague Regulations of 1907 and the Geneva Conventions of 1949 – and there was no attempt to draw offences more specifically shaped to criminalize serious acts against cultural heritage, notwithstanding the existence of the 1954 Hague Convention and the 1977 AP I and II[36]'. In this respect, the ICTY has failed to address the concern that cultural heritage deserves adequate protection because of the cultural value in itself, both for the local community and the whole of humanity. An example is Article 3 (d) of the ICTY Statute which does not differentiate between different elements of property and it only loosely takes into consideration their cultural value which criminalizes:

> 'seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science'.

This is rather disappointing considering that when the ICTY Statute was drafted, former Yugoslavia was going through an unprecedented destruction of invaluable cultural property and all belligerents were already parties to the 1954 Hague Convention and its first Protocol. The ICC provisions prohibiting acts against cultural heritage contained in Articles 8(2)(b)(ix) and 8(2)(e)(iv) recall the orientation of the Hague Regulations of 1907 since there is a a prohibition on 'intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'. This is a very general list in which the recognized need to create more specific provisions has unfortunately not been met.

The second rationale, the *cultural-value* approach, is aimed at directly criminalizing acts against cultural heritage with a 'view to specifically protect the

[36] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 104.

property for its intrinsic and universal value[37]'. Its orientation is reflected in the 1954 Hague Convention, which was the first international multilateral treaty with a universal vocation focusing exclusively on the protection of cultural heritage in the event of armed conflict and still represents the 'cornerstone of the protection of tangible cultural heritage under international humanitarian law [38] '. The Convention was designed to protect a precise segment of cultural property which was not distinctively covered by the 1949 Conventions, namely 'property of universal cultural value which falls within the more definite concept of cultural heritage[39]'. This idea is markedly reflected in Convention's opening, when it expresses the wish to protect the property of great importance to the cultural heritage of every people, and therefore for the value in itself. The Convention was later supplemented by an optional protocol - known as First Protocol[40] - which dealt with the exportation of cultural property from occupied territory. After the barbaric acts committed against cultural heritage between the end of the 1980s and the beginning of the 1990s, a review process led to the subsequent adoption of a Second Protocol in 1999, which strengthened several provisions of the Convention and its First Protocol. While the First Protocol applies during belligerent occupation and peacetime, the Second Protocol applies during international armed conflict and non-international one. The *cultural-value approach* may also be inferred by the decision to distinguish between two different levels of protection: a 'general protection [41] 'for the movable and immovable property of great importance to the cultural heritage of every people and a 'special protection' for a restricted range of cultural property[42]. The second, however, has never worked and it is virtually extinct; this is why the Second Protocol replaced the regime of

[37] *Ibid*., p. 101.
[38] *Ibid*., p. 46.
[39] M.FRULLI, '*The Criminalization of Offences against Cultural Heritage in Times for Armed Conflict: the Quest for Consistency*', (2011) 22(1) in The European Journal of International Law, p. 205.
[40] Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (opened for signature 14 May 1954, entered into force 7 August 1956) 249 UNTS 358.
[41] See Chap I 1954 Hague Convention ('General provisions regarding protection').
[42] See Chap II 1954 Hague Convention.

'special protection' with a system of 'enhanced' protection[43] which includes cultural property that meets the following three conditions:

> 'a. it is cultural heritage of the greatest importance for humanity;
> b. it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;
> c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used' (Article 10).

To grant enhanced protection, each Party should submit to the Committee for the Protection of Cultural Property in Armed Conflict a list of cultural property for which it intends to request it. Currently, there are 17 cultural properties from 10 State Parties inscribed on the Enhanced Protection List[44]. These include sites in Armenia, Azerbaijan, Belgium, Cambodia, Cyprus, Czech Republic, Georgia, Italy, Lithuania and Mali. For example, enhanced protection was granted to Castel del Monte on November 23, 2010 given that it complies with the three conditions of Article 10. On December 7, 2018, the Committee decided to grant enhanced protection to the remains of the ancient Villa Adriana. Built in the 2nd century AD and extending over 120 hectares in the surrounding of Tivoli, the villa bears witness to the magnificence of the Roman Empire. Later, it was the turn of the National Central Library of Florence, first example since the Italian Unification of architecture applied to library construction. Enhanced protection was also granted to the 17-m pyramidal structure of the Tomb of Askia located in Gao, Mali, a splendid example of the monumental mud building traditions of the West African Saehel and witness to the empire that prospered in the 15th and 16th centuries in

[43] See Chap 3 ('Enhanced protection') Second Protocol.
[44] List of Cultural Property under Enhanced Protection, viewed 1 February 2021, available at <http://www.unesco.org/culture/1954convention/pdf/Enhanced-Protection-List-2017_EN.pdf>.

that geographical area.
As far as regards criminal responsibility, Article 15 states that:

> ‘1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
> a. making cultural property under enhanced protection the object of attack;
> b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
> c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
> d. making cultural property protected under the Convention and this Protocol the object of attack;
> e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
> 2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.’

As the 1954 Hague Convention, also Protocols I and II adopted in 1977 and implementing the Geneva Conventions of 1949 on humanitarian law, reflected the *cultural-value*-oriented approach. Article 53 of Protocol I (1977) relates to the protection of cultural objects and states that:

> ‘Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of

> peoples; (b) to use such objects in support of the military effort; (c) to make such objects theobject of reprisals.'

Also, Article 85(4)(d) of the Protocol I lists among the grave breaches of the Protocol itself the act of:

> 'making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement […] the object of attack, causing as a result extensive destruction thereof [...]'

The two different orientations contemplate the distinct dimensions informing the protection of cultural heritage. However, as we will analyse in the following paragraphs, the resulting image is of a fragmented normative framework not devoid of gaps and inconsistencies.

2.2 Two Qualifications: War Crime and Crime against Humanity

One of the first binding instruments to qualify attacks against cultural heritage as war crimes was the Commission on the Responsibility of the Author of the War and on Enforcement of Penalties, established at the Paris Peace Conference in 1919. It filed a draft list of war crimes, enclosing the 'wanton destruction of religious, charitable, educational and historic buildings and monuments [45] '. However, only after WWII, 'the prosecution of war crimes started to become more effective with the adoption of adequate accountability mechanisms.

The Charter of the International Military Tribunal (usually referred to as the

[45] '*Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities*', (1920) 14(1/2) in the American Journal of International Law, p. 115.

'Nuremberg Charter') included as a war crime in Article 6(b):

> 'plunder of public and private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity'.

Although a *civilian-use* approach was clearly traceable, the importance of this definition lies in the fact that it was 'the first international rule penalizing acts against cultural property that served as a basis for international criminal trials[46]'.

The 1993 Statute of the International Criminal Tribunal of the Former Yugoslavia (ICTY) qualifies in Article 3(b)(d) as a violation of the laws or customs of war:

> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

Article 20(e)(iv) of the 1996 International Law Commission's Draft Code of Crimes lists in Article 20(e)(iv) among the war crimes:

> seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science[47];

Article 8(2)(b)(ix) of the ICC Statute[48] in Part 2 about jurisdiction, admissibility

[46] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 102.
[47] See Draft Code of Crimes against the Peace and Security of Mankind, 1996, viewed 1 February 2021, available at < https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf>.
[48] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

and applicable law, includes among war crimes the following acts:

> 'Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives'.

On September 27, 2016, the ICC pronounced its first ruling on crimes against cultural heritage. Specifically, the ruling concerned Ahmad Al Faqi Al Mahdi – a member of the terrorist group Ansar Dine - who was sentenced to nine years' imprisonment for the war of crime of intentionally razing to the ground ten religious and historic buildings in 2012 in Timbuktu, Mali[49].

The 2004 Cambodian Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Democratic Kampuchea[50] gave the Extraordinary Chambers the:

> 'power to bring to trial all suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979'.

The UN Security Council has confirmed this same standpoint with Resolution 2347 of 24 March 2017, wich stated that:

> 'directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments may constitute, under certain circumstances and pursuant to international law a war

[49] See Chapter 3, paragraph 3.3 'The ICC Judgment in the *Al Mahdi* Case'.
[50] See Law on the Establishment of the Extraodinary Chambers, with Inclusion of Amendments as Promulgated on 27 October 2004, viewed on 1 February 2021, available at < http://www.ivr.uzh.ch/dam/jcr:00000000-2a24-73b9-0000-00006f37c748/ECCCLaw.pdf>.

crime and that perpetrators of such attacks must be brought to justice'.

In addition to the *civialian-use* and the *cultural-value* orientations discussed above, a third rationale is the *human dimension* approach, which can be mainly inferred from the jurisprudence of ICTs and qualify acts against cultural property as crimes against humanity. Indeed, in the majority of cases involving the intentional destruction of cultural heritage, the real target of perpetrators is not the 'heritage in itself but, rather, the communities and persons for whom the heritage is of special significance[51]'. This unequivocal discriminatory persecutory intent is better reflected in the notion of crimes against humanity. It is worth mentioning that, as early as the end of WWII, persecution on political, racial or religious grounds was already qualified crime against humanity under Article 6 of the Charter establishing the International Military Tribunal defined in paragraph (c), which included under the qualification of 'crimes against humanity':

> 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether ot not in violation of the domestic law of the country where perpetrated'.

The Tribunal convicted Alfred Rosenberg on the charge of crimes against humanity for having organized a system of organized plunder of public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January 1940, 'he organized and directed the *Einsatzstab Rosenberg*, which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses[52]'. Later, in 1960, the District Court of Jerusalem convicted

[51] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p.81.
[52] J.E. KIEFFER., '*Trial of the Major War Criminals before the International Military Tribunal Nuremberg*', *14 November 1945-1 October 1946*', (1950) 44(4) in American Journal of International Law, pp. 778-783.

Adolf Eichmann – head of the Jewish office of the Gestapo during WWII - for both war crimes and crimes against humanity[53], 'establishing that the destruction of synagogue and other buildings dedicated to religion may amount to persecution[54]'.

In the 1991 Report of the International Law Commission on the work of its forty-third session, during the preparatory work of the Draft Code of Crimes against Peace and Security of Mankind, the ILC stated that:

> 'persecution on social, political, racial, religious or cultural grounds, […] relates to human right violations […] committed in a systematic manner or on a mass scale by government officials or by groups that exercise de facto power over a particular territory and seek to subject individuals or groups of individuals to a life in which enjoyment of some of their basic rights is repeatedly or constantly denied[55]'.

According to the Commission, persecution may take many forms, including the 'systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other groups[56]'.

As regards the provisions contained in the international criminal tribunals under the name of crimes against humanity, there is no precise definition of persecution. The only unequivocal element resulting from the definitions is 'the discriminatory element characterizing acts of persecution and differentiating these acts from other crimes against humanity[57]'. The ICTY Statute includes among the crimes against humanity under Article 5(h) 'persecutions on political, racial and religious grounds' and the formula is the same contained in Article 3(h) of the International

[53] 'The Attorney-General of the Government of Israel v. Eichmann', (1962) 56(3) in The American Journal of International Law. , p. 5.
[54] F. FRANCIONI & A.F. VRDOLJAK., '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 111.
[55] See Report of the International Law Commission on the Work of its Forty-Third Session, UN Doc A/46/10/suppl 10 (1991), p.104, commentary on art. 21, para. 9.
[56] *Ibid*.
[57] F.FRANCIONI & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law*', Oxford University Press, 2020, p.111.

Criminal Tribunal for Rwanda Statute. However, considering the general character of these provisions, the extent of the crime against humanity of persecution can be mainly inferred from jurisprudence. In its turn, Article 7(1)(h) of the ICC Statute added some details to the previous definitions of crimes against humanity, meaning:

> 'acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender […] or other grounds that are universally recognized as impermissible under international law'.

Article 7(2)(g) finally gives a definition of persecution, namely 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.

When discriminatory intentions drive perpatrators, the deliberate destruction of cultural heritage can be configured as a crime against humanity. In this regard, in May 2015 the UN General Assembly, condemning the barbaric acts of destruction and looting of the cultural heritage of Iraq carried out by ISIL, stated that 'the destruction of cultural heritage, which is representative of the diversity of human culture, erases the collective memories of a nation, destabilizes communities and threatens their cultural identity [58] '. By doing so, the General Assembly 'emphasized that the principal value affected by destruction of cultural goods is the cultural and spiritual significance of cultural heritage [59] '. Considering the destruction of cultural property exclusively as a crime against property, does not bring justice to all those who have been intentionally deprived by their own and unrepeatable signs in history. Is clearly evident that the current legal regime has usually failed to focus on the human dimension, which generally remains hidden when attacks against cultural property are identified only as war crimes and not as

[58] UNGA Resolution 69 (281) (28 May 2015) UN Doc A/RES/69/281.
[59] See *supranote* 53.

a crime against humanity. Criminalization would therefore benefit from a more nuanced approach placing 'such crimes at the intersection between crimes against property and crimes against people[60]'.

2.3 Destruction of Cultural Property as Evidence of Intent to Commit Genocide

In 1944, the Polish-Jewish jurist Raphael Lemkin, a veteran of the experience of the Holocaust in Eastern Europe, published his book 'Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, and Proposals for Redress', in which he documented the Nazi policies of the systematic killing of Jewish people during the Holocaust.

In Lemkin's opinion, the actions involved were directed 'against individuals, not in their individual capacity, but as member of the national group[61]'. In the conviction that new conceptions required new terms, he introduced the term *genocide* - as a derivation "from the Greek word *genos* (tribe, race) and the Latin *cide* (by way of analogy, see homicide, fratricide)[62]". As Lemkin wrote, 'genocide is effected through a synchronized attack on different aspects of life of the captive peoples[63]'and at this respect, he enumerated the "ways of genocide" in eight areas: 'political, social, cultural, economic, biological, physical, religious, and moral[64]'. Regarding the cultural field, he cited - among other actions – 'prohibiting or destroying cultural institutions and cultural activities; by substituting vocational

[60] Y.GOTTLIEB, '*Attack Against Cultural Heritage as a Crime Against Humanity'*, 52 (2020) in Case Western Reserve Journal of International Law, p. 289.
[61] R.LEMKIN, '*Axis rule in occupied Europe: laws of occupation, analysis of government, proposals for redress'*, Clark, *N*.J: Lawbook Exchange, 2008, p. 79.
[62] E.C.LUCK, '*Cultural Genocide and the Protection of Cultural Heritage'*, (2018) 2, J.Paul Occasional Papers in Cultural Heritage Policy, J.Paul Getty Trust 2017, p. 18. See also E. Novic, '*The Concept of Cultural genocide. An International Law perspective',* Oxford, 2016.
[63] See *supranote* 57.
[64] *Ibid*., 82-90.

education for education in the liberal arts, in order to prevent humanistic thinking, which the occupant considers dangerous because it promotes national thinking[65]'. Lemkin further added that:

> 'Generally speaking, genocide does not necessarily mean the immediate destruction of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups[66]'.

Lemkin's role was later fundamental in building support for UN General Assembly Resolution 96 (I) of December 11, 1946, which invited the Economic and Social Council to draw up an international treaty on the crime of genocide. The resolution stated that:

> 'genocide is a denial of the right of existence of entire human groups. […] such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups and is contrary to moral law and to the spirit and aims of the United Nations.[67]'

When UN Secretary-General Trygve Lie appointed Lemkin as one of the three independent experts with the task of producing a Secretariat draft of a genocide convention, the draft 'made no mention of physical, biological, and cultural

[65] *Ibid*.
[66] See *supra* note 59.
[67] UNGA Resolution 96 (I) (11 December 1946) UN Doc A/RES/96(I).

genocide as distinct categories[68]'. Indeed, it listed in Article I[69]:

1) Causing the death of members of a group or injuring their health or physical integrity;
2) Restrincting births;
3) Destroying the specific chacteristics of the group.

During the subsequent debate in the Sixth Committee over the draft provisions on cultural genocide, the intergovernmental Ad Hoc Committee modified the Secretariat Draft including a distinct section in Article III on 'cultural genocide' and stating:

> 'In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:
> 1. Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
> 2. Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group'.

The Sixth Committee's question was not whether cultural genocide was a valid notion or an appropriate topic for the eventual convention, but whether the draft Article III should be retained. The debate in the Sixth Committee was lively and polarized, 'but no delegate suggested that cultural genocide did not exist or should not be addressed by some organ of the United Nations[70]'. In the end, the notion of

[68] E.C. LUCK, '*Cultural Genocide and the Protection of Cultural Heritage'*, (2018) 2, J.Paul Occasional Papers in Cultural Heritage Policy, J.Paul Getty Trust 2017, p. 24.
[69] Draft Convention on the Crime of Genocide , (26 June 1947) UN Doc E/447.
[70] E.C. LUCK., '*Cultural Genocide and the Protection of Cultural* Heritage', (2018) 2, J.Paul Occasional Papers in Cultural Heritage Policy, J.Paul Getty Trust 2017, p. 24.

cultural genocide was rejected by the General Assembly Sixth Committee by 25 votes to 6, with 4 abstentions and 13 delegations absent, considered too vague and to removed from the physical or biological destruction that motivated the Convention[71]. This is why the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention') - even if codified for the first time the crime of genocide demonstrating the international community's commitment to ensure that the atrocities committed during WWII would never happen again - presents significant gaps considering the total absence of references to 'cultural genocide'.

As observed by the ICTY in the case *Prosecutor v Krstic*, the meaning of the word 'genocide' according to customary international law is still nowadays restricted. Of course, the physical destruction of a group is the most obvious method, 'but one may also conceive of destroying a group through purposeful eradication of its culture and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community[72]'. With due regard to the principle of *nullum crimen sine lege,*

> 'an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide[73]'.

At the same time, however, the Trial Chamber pointed out that:

> 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent

[71] See *Prosecutor v Kristic*, Case No. IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para 576.
[72] *Ibid.*, para 574.
[73] *Ibid*., para 580.

to physically destroy the group[74]'.

This means that 'the existence of a systematic and deliberate plan of destruction of cultural heritage may disclose evidence of the intent to destroy a human community – i.e., intent to commit genocide – on the condition that it is accompanied by physical or biological destruction of the targeted group[75]'.

2.4 Prohibition of Deliberate Destruction of Cultural Heritage in Peacetime

Issues arising from defining when and whether an armed conflict exists 'render initiatives to extend international protection of cultural heritage during peacetime especially pertinent[76]'.

As early as 1935, the Roerich Pact, provided protection for cultural heritage in both times of war and in peace. Starting from the 1950s, this principle has been constantly reiterated by UNESCO in international binding legal instruments, including the 1954 Hague Convention, in which the High Contracting Parties were of the opinion that preservation of cultural heritage could not be 'effective unless both national and international measures have been taken to organize it in time of peace[77]'. In peacetime, the 1972 World Heritage Convention validated the same assumption with regard to the cultural and natural heritage of outstanding interest, stating that:

> "[T]he existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all

[74] *Ibid.*
[75] F.FRANCIONI & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 84.
[76] VRDOLJAK A.F., '*Intentional Destruction of Cultural Heritage and International Law'*, (2007) in European University Institute.
[77] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240, Preamble.

> the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong [...] [P]arts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole [...] [I]t is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value[78]'.

In the preliminary works of the 2003 UNESCO Declaration, it was stated that one of its aims was to 'prevent and prohibit the intentional destruction of cultural heritage, and when linked, natural heritage, in time of peace and in the event of armed conflict[79]'. However, the meeting of experts on the draft Declaration concerning the Intentional Destruction of Cultural Heritage noted that the need expressed by the General Conference for the elaboration of such a Draft Declaration reflected 'the uncertainties still evident in customary international law on the existence of rules providing clear obligations to protect cultural heritage from intentional destruction both in time of peace and in time of armed conflict[80]'.

Although it is evident that 'customary international law on the prohibition against intentional destruction of cultural heritage during peacetime is not as clearly defined as the prohibition during armed conflict', it is possible to deduce some considerations about its effectiveness. First of all, 'the exponential growth of international cultural property law in the past fifty years bears witness to the emergence of a new principle according to which parts of cultural heritage of international relevance are to be protected as the common heritage of humanity[81]'. A stated by Francioni, the principle is valid both in the event of armed conflict and in peacetime. This is reinforced by the ever-increasing number of signatories states to the legal document providing for the protection of cultural heritage during

[78] See UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151, Preamble.
[79] Draft UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 July 2003, UNESCO Doc. 32C/25, para. 2;
[80] UNESCO 32C/25, Annex II, p. 3, para. 9.
[81] See F.FRANCIONI, '*Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*', (2004) 25 in Michigan Journal of International Law, p. 1209; and O'Keefe, p. 1213.

peacetime. As at 29 December 2020, the World Heritage Convention has 194 state parties with while 140 states ratified the 1970 UNESCO Convention. This 'proves the existence in the international community of a general *opinio juris* on the binding character of the prohibition of acts of deliberate destruction of cultural heritage of major value for humanity[82]'.

Another important consideration is that, as pointed out by Lenzerini, if the destruction of cultural heritage is prohibited during an armed conflict, when destruction is inherent to the management of war operations, *a fortiori* it should be especially prohibited in times of peace[83]. Thus, it would be simply illogical to ensure greater protection during an armed conflict and not in peacetime. In this regard, a positive trend is represented by the growing recognition that destruction of cultural property is not necessarily related to the context of armed conflict and as explained below, it is this consciousness that fosters the adoption of 2003 UNESCO Declaration.

Meaningfully, 'international criminal law is increasingly prohibiting the intentional destruction of cultural heritage during periods of peacetime when it has been targeted because of its affiliation to a particular ethnic or religious group[84]'. Indeed, the destruction of cultural heritage can result in gross and systematic violations of human rights even in the absence of armed conflict, especially when connected to the discriminatory and persecutory treatment of minority groups. One such example is represented by the Rohinga people, which despite being the largest ethnic Muslim group in Myanmar, it is not recognized among its 135 ethnical minorities [85] . Since the 1970s, the Rohingya have been systematically discriminated as a targeted group through the Myanmar's genocidal policies which included – among other terrible practices – the destruction of the Rohingya's

[82] F.LENZERINI, '*The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage: One Step Forward and Two Steps Back'* (2003) 13(1), in The Italian Yearbook of International Law Online, p. 134.
[83] *Ibid*., p. 13.
[84] VRDOLJAK A.F., '*Intentional Destruction of Cultural Heritage and International Law'*, (2007) in European University Institute.
[85] UNHCR, 'Culture, Context and Mental Health of Rohingya Refugees', Geneva, 31 August 2018, viewed 1 February 2021, available at <https://www.unhcr.org/protection/health/5bbc6f014/culture-context-mental-health-rohingya-refugees.html%3E>.

tangible and intangible cultural heritage. The intent was obiously to annihilate the cultural, social and religious traces defining their specific identity. Regretfully, these genocidal acts have been silently perpetrated: years targeting Rohingya without provoking any significant reaction from the international community. Finally, in 2017, opening the Human Rights Council 36th session, the ex-UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein described the situation in Myanmar as a 'textbook example of ethnic cleansing[86]'. Later on, in the 2018 Human Rights Council, the exhaustive findings of the Independent International Fact-Finding Mission on Myanmar[87] confirmed that the gravest crimes under international law have been committed. The outcome was clear: 'Myanmar military should be investigated and prosecuted in an international criminal tribunal for genocide, crimes against humanity and war crimes[88]'. On July 4, 2019, the Prosecutor of the International Criminal Court Fatou Bensouda, sought request to open an investigation into alleged crimes committed within the ICC's jurisdiction against the Rohingya people. Later, on November 14, 2019, a significant development took place as a result of the decision by the Judges to authorize an investigation with wide parameters, sending a 'positive signal to the victims of atrocity crimes in Myanmar and elsewhere[89]'. Precisely, the Chamber has authorized an investigation in relation to *any crimes* within the jurisdiction of the Court. This includes 'any future crimes, committed at least in part on the territory of Bangladesh, or on the territory of any other State Party or State which would accept the jurisdiction of this Court in accordance with article 12(3) of the Rome Statute, insofar as such crimes are sufficiently linked to the situation, and

[86] Z. AL HUSSEIN at the 'Report of the Human Rights Council on its 36th Session', UN Doc A/HRC/36/2, 11 to 29 September 2017.

[87] In March 2017, the UNHRC established the Independent International Fact-Finding Mission on Myanmar (IIFFMM) to establish the facts and circumstances of the alleged human rights violations by military and security forces and abuses occurring in Myanmar.

[88] UNHRC 'Report of Detailed Findings of the Independent International Fact-Finding Mission on Myanmar', UN Doc A/HRC/42/CRP.5, 9-27 September 2019.

[89] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorization to commence an investigation into the Situation in Bangladesh/Myanmar, 22 November 2019, viewed 1February 2021, available at <https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar>.

irrespective of the nationality of the perpatrators[90]'. Even Myanmar is not a party to the Rome Statute, the Chamber concluded that the Court might exercise jurisdiction over crimes that were partially perpetrated on the territory of a State Party, such as Bangladesh, which has ratified the Rome Statute in 2010. Indeed, the Chamber recognized the existence of 'a reasonable basis to believe widespread and/or systematic acts of violence[91]' may have been committed across the Myanmar-Bangladesh border.

The hope is that the final judgment will reflect the overall criminality involved recognizing the connection between cultural losses and human rights violations, in times of armed conflict as well as in peacetime. Only then will it be possible to bring justice to the victims and affected communities.

[90] *Ibid.*
[91] *Ibid.*

CHAPTER 3

Individual Criminal Responsibility for Deliberate Destruction of Cultural Heritage

3.1 Prosecution of Individuals under International Criminal Law

After WWII, the regime of individual criminal responsibility for the breach of international obligations regarding cultural heritage has started to be codified in international humanitarian law, with the 1977 Additional Procotols to the 1949 Geneva Convention. Article 16 of the Second Protocol to the Hague Convention requires each State Parties to take the necessary legislative measures to establish their jurisdiction over deliberate destruction of cultural heritage when such an offence is committed in their territory, when the alleged offender is a national of the State or when it is present in their territory[92]. Similarly, Article 10 of the Council of Europe Convention on Offences affirms that:

> 'Each Party shall ensure that the following conducts constitute a criminal offence under its domestic law, when committed intentionally:
> a) the unlawful destruction or damaging of movable or immovable cultural property, regardless of the ownership of such property;
> b) the unlawful removal, in whole or in part, of any elements from movable or immovable cultural property, with a view to importing, exporting or placing on the market these elements under the circumstances described in Articles 5, 6 and 8 of this Convention'.

Paragraph VI of the 2003 UNESCO Declaration, dedicated to individual criminal

responsibility, affirms:

> 'States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization'.

We can generally say that any criminalization of individuals responsible for the destruction of cultural heritage must have a reasonable basis in international law. As pointed out by Francioni and Lenzerini, two conditions must be satisfied: a) the conduct of the person accused must present the 'objective' element of an internationally wrongful act, i.e., the breach of an international obligation, b) such conduct must be 'subjectively' related to a person who can be held accountable under international law[93]. A regards the second condition, Article 25 of the Statute of the ICC states that a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment if that person:

> (a) [c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such

[93] See F.FRANCIONI & F.LENZERINI, '*The Destruction of the Buddhas of Bamiyan and International Law*' (2003) 14(4) in European Journal of International Law, p. 644.

contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court;

or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose'.

Article 7 of the Statute of the ICTY embodies similar provisions stating that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal

determines that justice so requires.

As regards the first condition, considering that international law in general terms applies to States, 'its customary rules cannot normally be used with regard to individuals[94]'. However, there exists a significant exception to this general rule which occurs when individuals are accountable for the so-called *crimina juris gentium*, namely crimes of particular gravity - which derived their bases from the *ius naturale* - and which, by reason of their cruelty or savagery, legitimize any authority or State to punish them. But the question arises: can deliberate destruction of cultural heritage be comprised in the rigid listing of these crimes? International custom in this field indicates that 'deliberate extensive destruction of cultural heritage may be included among international crimes[95]'. As we have pointed out in Chapter II, the Statute ICTY includes as a war crime – and therefore part of the wider notion of *crimina juris gentium* - under Article 3(d) 'the 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'. The same can be affirmed as far as regards Articles 8(b)(ix) and 8(c)(iv) of the ICC Statute and Article 20(e)(iv) of the Draft Code of Crimes Against the Peace and Security of Mankind[96]. Moreover, in *Prosecutor v Dario Kordic and Mario Cerkez*, the ICTY stated:

> '[The act of destruction of cultural heritage] when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the

[94] *Ibid*., p. 644.
[95] *Ibid*.
[96] See Draft Code of Crimes against the Peace and Security of Mankind, 1996, art. 20, viewed 1 February 2021, available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf>.

requisite discriminatory intent, may amount to an act of persecution'[97].

Again, this is 'also part of the broader concept of *crimina juris gentium*[98]'. However, it should be pointed out that even if the application of international criminal law through its tribunals – in addition to the existing treaty regimes – has represented the main tool for addressing individual criminal responsibility for deliberate destruction of cultural heritage, their competencies are rigorouosly *limited in time and in space*. Indeed, they only function with regard to offences perpetrated in the territories and in the time span to which their statutes or institutive treaties refer. For example, no international court or tribunal exercises jurisdiction over the criminal activities committed in Afghanistan in March 2001 which led to the shameful destruction of the Buddhas of Bamiyan by the Taliban forces. The ICC Statute was adopted on July 17, 1998 and entered into force only on July 1, 2002, and this is why – because of its *ratione temporis* restriction envisioned in Article 11[99] – it did not have jurisdiction. However, the simple unavailability of an international criminal court should not prevent the criminalization of deliberate destruction of cultural heritage. In this regard, Article 8 of Draft Code of Crimes Against the Peace and Security of Mankind asserts that:

'[w]ithout prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of

[97] See *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001, para. 207.
[98] See F.FRANCIONI & F.LENZERINI, '*The Destruction of the Buddhas of Bamiyan and International Law*' (2003) 14(4) in European Journal of International Law, *p.* 645.
[99] Article 11 of the Rome Statute of the ICC affirms that '[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute'.

where or by whom those crimes were committed'[100].

The commentary subsequently added:

> '[a]s a practical matter it would be virtually impossible for an international criminal court to single-handedly prosecute and punish the countless individuals who are responsible for crimes under international law not only because of the frequency with which such crimes have been committed in recent years, but also because these crimes are often committed as part of a general plan or policy which involves the participation of a substantial number of individuals in systematic or massive criminal conduct in relation to a multiplicity of victims[101]'.

The Commission thus considered that the successful implementation of the Code required a cumulative approach to jurisdiction based on 'the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court[102]'. Article 8 therefore establishes 'the principle of the concurrent jurisdiction of the national courts of all States parties to the Code based on the principle of universal jurisdiction and the jurisdiction of an international criminal court for the crimes set out in articles 17 to 20 of part two[103]'. It moreover confirms that, as remarked by Francioni and Lenzerini, 'the principle of universal jurisdiction for crimes under international law is also part of customary law[104]'. This embraces the intentional destruction of cultural heritage, but only under the condition of the physical presence of the alleged offender in the territory of the

[100] See Draft Code of Crimes against the Peace and Security of Mankind, 1996, viewed 1 February 2021, available at <https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf>.
[101] *Ibid*., commentary to Article 8, para. 4.
[102] *Ibid*., para (5).
[103] *Ibid*.
[104] See F.FRANCIONI & F.LENZERINI, '*The Destruction of the Buddhas of Bamiyan and International Law*' (2003) 14(4) in European Journal of International Law, p. 645. Accordingly to this position see also (inter alia) FRANCIONI, '*Crimini Internazionali'*, in Digesto delle Discipline Pubblicistiche' (1989), vol.IV, p. 476; D. BODANKY, '*Human Rights and Universal Jurisdiction'* in M.Gibney (ed.), World Justice? U.S. Courts and International Human Rights, Oxford: Westview Press, 1991, pp. 1 and 8.

State provided by the right to exercise its jurisdiction[105].

3.2 ICTY Case Law on Cultural Persecution: Jokić, Strugar, Hadzihasanovic and Kubura, Prlić et al

During the conflict in the former Yugoslavia, hundreds of religious and cultural monuments of great importance for the cultural heritage of humanity have been systematically destroyed.

Everything was targeted: historic buildings, museums with their irreplaceable collections, archives, synagogues and churches. They were 'eradicated as a way of eliminating all discernible traces of a people's identity[106]'; it was an 'attack on collective memory, as if what came before never existed[107]'. It suffices to mention the sad fate of the Old Town of Dubrovnik, included in the World Heritage List, the National Library in Sarajevo and the city of Mostar in Bosnia-Herzegovina. What is disturbing is not the epilogue of cultural property in the course of these conflicts, but rather 'the fact that many of the "victims" were not unavoidable casualties, but were deliberately damaged or destroyed by opposing forces, despite international conventions that explicitly prohibit such actions[108]'. This led to a major 'cultural catastrophe' for all the communities of the war zone and for the European heritage as a whole, which will emerge from the war singularly amputated[109]. This was undoubtedly a decisive factor for the drafters of the ICTY Statute, under which attack and other acts of hostility against cultural property are dealt with under Article 3(d)(e) as a subcategory of war crimes. The role of ICTY

[105] See F.FRANCIONI & F.LENZERINI, '*The Destruction of the Buddhas of Bamiyan and International Law'* (2003) 14(4) in European Journal of International Law, p. 647.
[106] M.S.ELLIS, '*The ICC's Role in Combatting the Destruction of Cultural Heritage'*, (2017) 49(1) in Case Western Reserve Journal of International Law, p. 21.
[107] *Ibid*.
[108] K.J.DETLING, '*Eternal Silence: the Destruction of Cultural Property in Jugoslavia'*, (1993) 17(1) in Maryland Journal of International Law.
[109] See 'The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina presented by the Committee on Culture and Edutcation', 2 February 1993, viewed on 1 February 2021, avaiable at < http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=6787&lang=en>.

has been of decisive importance in addressing the issue of deliberate destruction of cultural heritage, charging individuals guilty of this crime in twelve important case[110].

In December 1991, Yugoslav forces under the leadership of Miodrag Jokić - commander of the 9th Military Naval Sector of the Yugoslav Navy - unlawfully shelled the Old Town of Dubrovnik. In *Prosecutor v. Miodrag Jokić*[111], the commander was convicted of six counts, including devastation not justified by military necessity, unlawful attack on civilian objects and destruction or wilful damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historic monuments and works of art and science. The importance of the Jokić case lies in the fact that the ICTY judges had to pronounce themselves on a very serious attack on an internationally protected town full of historic monuments, rather than 'only' attacks on single institutions or building dedicated to religion or education[112]', in addition to the proper *cultural-value* considerations made in grounding their sentencing decision. Indeed, in recalling the gravity of crimes, the ICTY stressed that the Old Town of Dubrovnik was - among other things - 'an outstanding architectural ensemble illustrating a significant stage in human history[113]' and that the shelling attack on the Old Town was an attack 'not only against the history and heritage of the region, but also against the cultural heritage of humankind'. The Trial Chamber also focused attention to the statement contained in the preamble to the World Heritage Convention according to which 'deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage

[110] *Prosecutor v. Plasvic*, Case No. IT-00-39&40; *Prosecutor v Radoslav Brdanin*, Case No. IT-99-36-T; *Prosecutor v Miodrag Jokic*, Case No. IT-01/42/1-S; *Prosecutor v. Krajisnik*, Case No. IT-00-39-T; *Prosecutor v. Pavle Strugar*, Case No, IT-01-41-A; *Prosecutor v. Jadranko Prlic et al*, Case No. IT-04-74-T; *Prosecutor v Mićo Stanišić & Stojan Župljanin*, Case No. IT-08-91-T; *Prosecutor v. Radovan Karadžić & Ratko Mladić*, Case No. IT-95-5-I); *Prosecuto v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T; *Prosecutor v. Naletilic & Martinovic*, Case No. IT-98-34-T; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T.

[111] *Prosecutor v. Miodrag Jokic*, Case No. IT-01/42/1-S, Sentencing Judgment of 18 March 2004.

[112] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law',* Oxford University Press, 2020, p.108.

[113] *Ibid*., para. 51.

of all the nations of the world[114]'. In addition, the Old Town was a 'living city' and 'the existence of its population was intimately intertwined with its ancient heritage[115]'. By his own admission, 'Jokić was aware of the Old Town's status, in its entirety, as a United Nations Educational, Scientific and Cultural Organization ("UNESCO") World Cultural Heritage site pursuant to the 1972 Convention for the Protection of the World Cultural and Natural Heritage ("UNESCO World Heritage Convention")' [116] . Furthermore, the Trial Chamber noted that '[r]estoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings[117]'.

In the case *Prosecutor v. Pavle Strugar,* the Trial Chamber charged the General Pavle Strugar of the then Yugoslav People's Army (JNA) essentially with the same crimes as Jokić. The Chamber found that Strugar had the 'material ability to prevent an attack on Dubrovnik by the JNA forces deployed in the region[118]' and found him guilty of the war of crime 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', within the meaning of article 3(d) of the Tribunal's Statute, for his role in the bombardment of the Old Town of Dubrovnik. The Chamber also lightened the elements of the crime of destruction or wilful damage of cultural property within the meaning of Article 3(d), asserting that the conduct is criminal if:

> (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples;
> (ii) the damaged or destroyed property was not used for military purposes at

[114] *Ibid*., para. 49.
[115] *Ibid*.
[116] 'He was further aware that a number of buildings in the Old Town and the towers of the Old Town's Walls were marked with the symbols mandated by the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention"). He was also aware of the presence of a substantial number of civilians in the Old Town on 6 December 1991', *Ibid*. para. 23.
[117] *Ibid*. para. 52.
[118] *Prosecutor v. Pavle Strugar*, Case No, IT-01-41-A, Judgment of 31 January 2005, para. 398.

> the time when the acts of hostility directed against these objects took place;
> (iii) the act was carried out with the intent to damage or destroy the property in question[119].

An assessment of the utmost gravity of cultural property crimes was similarly made by the Trial Chamber in *Prosecutor v. Biljana Plavšić*, involving a campaign of ethnic separation whose gravity was illustrated – among the other things – by the scope of the wanton destruction of property and religious buildings. In the Sentencing Judgment, the following factors were taken into consideration:

> 'Some 29 of the 37 municipalities listed in the Indictment possessed cultural monuments and sacred sites that were destroyed. This includes the destruction of over 100 mosques, 2 mektebs and 7 Catholic churches. Some of these monuments were located in the Foča, Visˇegrad and Zvornik municipalities, and dated from the Middle Ages. They were, quite obviously, culturally, historically and regionally significant sites. As one example, the Prosecution referred to the wanton destruction of the Aladža mosque in Foča, which had been in existence since the year 1550. According to the witness, this mosque was a pearl amongst the cultural heritage in this part of Europe[120]'.

For these and sever other reasons, Plavšić highlighted the parallel between a people and their history as represented by cultural monuments[121], noting that '[e]verything that in any way was reminiscent of the past, […] was destroyed[122]'.

In the case *Hadzihasanovic and Kubura*, Enver Hadžihasanović and Amir Kubura, both part of the Corps of the Army of Bosnia and Herzegovina (ABiH) have been prosecuted for allegedly having ordered and exercised command over ABiH and El Mujahed Detachment of the Bosnian Army (EMD) units which acted

[119] *Ibid*., para. 312.
[120] *Ibid*., para. 44.
[121] ELLIS M.S., '*The ICC's Role in Combatting the Destruction of Cultural Heritage'*, (2017) 49(1) in Case Western Reserve Journal of International Law, p. 43.
[122] *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1- S, Sentencing Judgment of 27 February 2003, para. 44.

unlawfully against Bosnian Serbs and Bosnian Croats, including through damage to Serb and Croat institutions and public buildings. The case made some room for *human-dimension* considerations when - in considering the seriousness of the crime of destruction of or damage to institutions dedicated to religion - the judges have affirmed the necessity to take much greater account of 'the spiritual value of the damaged or destroyed property than the material extent of the damage or destruction[123]'.

Another ICTY judgment representing an important step toward holding to account individuals for the tremendous suffering of the people of Bosnia and Herzegovina, can be found in the multi-accused trial *Prlić et al* regarding the destruction of the Old Bridge of Mostar (Stari Most) and other religious properties in East Mostar. The judges managed to focus on the human dimension underlying the deliberate destruction of cultural heritage when recognizing the exceptional character of the Old Bridge as well as its historical and symbolic nature. They stated that it was of particular importance for the inhabitants of the town of Mostar and of special value to the Muslim community, also symbolizing 'the link between the communities, despite their religious differences[124].' Furthermore, the Trial Chamber focused on the psychological impact of the destruction, affirming that:

> '[…] between June and December 1993, the HVO (Bosnian Croat Army) deliberately destroyed ten mosques in East Mostar, which had no military value, as well as the Old Bridge of Mostar on November 1993, whose destruction had a major psychological impact on the morale of the population; that the HVO had to be aware of that impact – as well as of the institutions dedicated to religion – in particular because of its great symbolic, cultural and historical value[125]'.

Finally, the Trial Chamber found that the HVO committed those crimes 'with the

[123] *Prosecutor v Hadzihasanovic and Kubura*, Case No, IT-01-47-7, (Judgment of 5 December 2006, para. 63.
[124] *Prosecutor v Prlić et al,* Case No, IT-04-74-AT, Judgment of 29 May 2013, para 1282.
[125] *Ibid*., vol. 3 para. 1960.

intention of discriminating against the Muslims of the Municipality of Mostar and violating their basic rights to life, human dignity, freedom and property between May 1993 and April 1994, and that these crimes constitute the crime of persecution [126] '. Disappointingly, despite these considerations, the Appeals Chamber later considered that the destruction of the Old Bridge of Mostar was justified by military necessity and partly reversed the Trial Chamber findings acquitting the defendants of the charge of persecution.

This very brief overview of the ICTY's practice shows that the tribunal has been effective in establishing and implementing the individual criminal responsibility for the deliberate destruction of cultural heritage. Regarding the material elements (*actus reus*) of war crimes against cultural heritage, the case-law has shown the criminalization of attacks against cultural heritage would apply as long as the damaged or destroyed property is not used for military purposes at the time of hostility. As to the requisite intent (*mens rea*), the perpetrators must act with the intent – direct or indirect - to damage or destroy the property in question. Although *Prlić et al* represented a failure in denying that destruction of cultural heritage can amount to a crime against humanity of persecution, the hope is that in determining the individual criminal responsibility for deliberate destruction of cultural heritage, the *cultural-value* and the *human-dimension* rationales could mutually reinforce and do not exclude each other[127].

3.3 The ICC Judgment in the Al Mahdi Case

On September 27, 2016, the International Criminal Court (ICC) pronounced its first ruling on the subject of crimes against cultural heritage. Specifically, the ruling concerned *Ahmad Al Faqi Al Mahdi*, who was sentenced to nine years'

[126] *Ibid*., vol. 3 para. 1171.
[127] See F.FRANCIONI, & A.F.VRDOLJAK, *'The Oxford Handbook of International Cultural Heritage Law',* Oxford University Press, 2020, p.114.

imprisonment for the war of crime of intentionally razing to the ground ten religious and historic buildings between June 30 and July 11, 2012 in Timbuktu, Mali. This is not only the first sentence pronounced by the ICC for crimes against cultural heritage, but also the first case judged by an international jurisdiction in which the imputation was based solely on this type of crime.

In early April 2012, the groups *Ansar Dine*[128] and *Al-Qaeda in the Islamic Maghreb* (*AQUIM*)[129] took control of Timbuktu, imposing their religious and political edicts on the territory through a local government which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade called the *Hesbah*[130]. From its creation in April 2012 until September 2012, *Al Mahdi* led the *Hesbah* with the task of regulating the morality of the people of Timbuktu, repressing anything perceived by the occupiers to constitute a visible vice.[131] In this context, the mausoleums of saints and mosques of Timbuktu - frequently visited by the residents as places of prayer and pilgrimage - were monitored for around one month by *Al Mahdi* to raise awareness amongst the population to stop such practices. In late June 2012, the leader of *Ansar Dine* in consultation with the *AQUIM* members decided to destroy the mausoleums and gave *Al Mahdi* - as the chief of the *Hesba* - the instruction to conduct the attack. The destruction involved ten of the most important sites in Timbuktu:

(I) The Sidi Mahmoud Ben Omar Mohamed Aquit Mausoleum
(II) The Sheik Mohamed Mahmoud Al Arawani Mausoleum
(III) The Sheik Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum
(IV) The Alpha Moya Mausoleum
(V) The Sheikh Mouhamad El Mikki Mausoleum

[128] *Ansar Dine* is regarded as a Tuareg Jihadist Salafist movement, aiming to impose Sharia law in all of Mali.
[129] *AQIM* is a militant Jihadist Salafist organization that is considered to be the successor of the *Salafist Group for Preaching and Combat.*
[130] Summary of the Judgment and Sentence in the case of *The Prosecutor v. Ahmad Al-Faqi Al-Mahdi*, para. 14, viewed on 1 February 2021, available at < https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf>.
[131] *Ibid*.

(VI) The Sheik Abdoul Kassim Attouaty Mausoleum

(VII) The door of the Sidi Yahia Mosque

(VIII) and (IX) The two mausoleums adjoining the Djingareyber Mosque

Except for the *Sheikh Mohamed Mahmoud Al Arawani Mausoleum*, all these buildings were included in the UNESCO World Heritage List since 1988.

On July 18, 2012, the Malian Government – under Article 14 of the Rome Statute[132] - referred the situation in Mali since January 2012 to the ICC[133], claiming the violation of both crimes against humanity and war crimes, namely Article 7 and Article 8 of the Rome Statute. The *OTP* Report on the Situation in Mali - aimed at determining whether there was a reasonable basis to proceed with an investigation[134]- indicated that the information available was sufficient to believe that war crimes have been committed in Mali since January 2012. However, it did not find enough elements to conclude that the alleged acts were committed in the context of a widespread or systematic attack against the civilian population and in furtherance of a State or organizational policy[135].

Al Mahdi, once arrested in Niger, was transferred to The Hague on 26th September 2015 and on December, 17 the Prosecutor filed the 'Chef d'accusation retenu par l'Accusation contre *Ahmad Al Faqi Al Mahdi'*. In the charge, it was found that there were substantial grounds to believe that the Islamist militant committed the war crime of intentionally directing attacks against buildings dedicated to religion and historical monuments under article 8(2)(e)(iv) of the Rome Statute.[136] Later, on February 18, 2016, the OTP and *Al Mahdi* signed an agreement regarding its admission of guilt, including all modes of liability alleged

[132] Rome Statute of the International Criminal Court (adopted on 17 July 1998, enered into force on 1 July 2002) UN Doc A/CONF.183/9, Article 14 'Referral of a situation by a State Party'.
[133] The full letter is available at <https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C3BCB5B173F57/0/ReferralLetterMali130712.pdf>.
[134] *Ibid*., Article 53 'Initiation of an investigation'.
[135] *Ibid*.
[136] ICC, Office of the Prosecutor, '*Chef d'accusation retenu par l'Accusation contre Ahmad Al Faqui Al Mahdi'*, ICC-01/12-01/15-62, 17 December 2015.

therein.[137] During the trial the Chamber found that *Al Mahdi* contributed to the attacks in the following ways:

> (i) he supervised the execution of the operations, using men from the *Hesbah* and overseeing the other attackers who came to participate in the operations;
> (ii) he collected, bought and distributed the necessary tools/means to successfully carry out the attack;
> (iii) he was present at all of the attack sites, giving instructions and moral support;
> (iv) he personally participated in the attack that led to the destruction of at least five sites;
> (v) he was responsible for communicating with journalists to explain and justify the attack.[138]

The Chamber found that the crime committed by *Al Mahdi* has been of significant gravity, recalling that the destroyed sites reflected part of Timbuktu's history and role in the expansion of Islam. They were of great importance to the people of Timbuktu, given that the city's mausoleums and mosques played a psychological role to the extent of being perceived as protecting the population. The Chamber, moreover, assigned a predominant role to the cultural value of the property, stating that the 'targeted buildings were not only religious buildings but also had a symbolic and emotional value for the inhabitants of Timbuktu'[139], who were deeply attached to them, reflecting their commitment to Islam. Taking into account all these factors, the Chamber convicted *Al Mahdi* of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the *Rome Statute* sentencing him to 9 years of imprisonment.

[137] '*Agreement regarding admission of guil't*, ICC-01/12-01/15, February 2016.
[138] ICC, Trial Chamber VIII, *Prosecutor v. Ahmad Al-Faqi Al-Mahdi*, judgment of 27 September 2016.
[139] *Ibid.*

In the *Al Mahdi* trial, neither the OTP nor the Court considered the offences against Timbuktu's cultural heritage as crimes against humanity. Going back in time, in the OTP Article 53 (1) Report, it was stated that the information available weas insufficient to conclude that crimes against humanity under Article 7 have been committed in Mali since January 2012. The same Report affirmed that the assessment might have been revisited in the future, but it remains still not clear whether there has been subsequent analysis. However, the contextual elements to conclude that crimes against humanity have been committed were present at the time the ten religious buildings were attacked. They include the following:

> (i) An attack against any civilian population - meaning a course of conduct involving the multiple commission of acts pursuant to or in furtherance of a State or organizational policy to commit such attack;
> (i) An attack of a widespread or systematic nature;
> (ii) The accused's knowledge of the attack;
> (iii) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender other grounds that are universally recognized as impermissible under international law, in connection with any crime within the jurisdiction of the Court;
> (iii) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health[140].

It is thus unequivocal that the acts committed could have been criminalized under Article 7 of the Rome Statute. Considering that cultural heritage is one of the main elements that characterizes the identity of a particular group or community, it is easy to deduce that the attacks against the civilian population in Northern Mali were discriminatory in nature, pursuant to the ideology of the perpetrators that these objects have had to be destroyed. Indeed, the terrorists intentionally targeted the moderate form of Islam practiced in that territory and the systematic attack was

[140] Rome Statute of the International Criminal Court (adopted on 17 July 1998, enered into force on 1 July 2002) UN Doc A/CONF.183/9, art. 7.

aimed at subjecting the inhabitants to the jihadists' extreme version of Sharia obedience and the strict moral dictates of the *Hesbah.*

In August 2017, the ICC handed down its order on reparations, concluding that *Al Mahdi* was liable for 2.7 million euros for both individual and collective reparations for the community of Timbuktu. This has been the first time in which the ICC has issued reparations to victims of crimes against cultural heritage. In its Reparations Order, the Chamber first of all considered it necessary to address the importance of cultural heritage, stating that it plays a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future.[141] Because of their purpose and symbolism, most cultural property and cultural heritage are of unique sentimental value and as result, they are not fungible or readily replaceable. [142] The destruction of international cultural heritage thus carries a message of terror and helplessness, destroying part of humanity's shared memory and collective consciousness and making humanity unable to transmit its values and knowledge to future generations[143]. Regarding the relevant victims of the destruction of the protected buildings, the Chamber considered not only the inhabitants of Timbuktu – who suffered the most - but also people throughout Mali and the international community, ordering reparations also for moral harm. This shows that the ICC was actually capable of considering that the attacks committed were not merely crimes against property. It is conceivable that the OTP consciously decided to avoid a cumulating charging approach - prosecuting *Al Mahdi* for both war crimes and crimes against humanity – due to efficiency reasons. Indeed, a reference to crimes against humanity may have delayed or even prevented an agreement over a guilty plea, thus making the proceedings significantly longer[144]. However, the decision to choose a cost-effectiveness model in charge of the crimes determined a failure in identifying the full criminal responsibilities of the accused, especially taking

[141] Reparations Order, ICC-01/12-01/15 1/61, 17 August 2017.
[142] HRC/Redress Submissions, ICC-01/12-01/15-188, para. 7.
[143] Second Expert Report, ICC-01/12-01/15-214-AnxII-Red2, para. 44.
[144] P.ROSSI, '*The Al Mahdi Trial Before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity'*, Research Gate, January 2017, p. 98, para. 5.

into account all the evidence regarding the discriminatory motive behind the attack.

Taking into account the above-mentioned elements that allow the classification of an attack against cultural heritage as a crime against humanity under the Rome Statute, it is clear how the Al Mahdi case is extremely topical considering in how many other cases it is possible to trace the same criminal behaviors. Undoubtedly, the role of the ICC in prosecuting crimes against cultural heritage needs to be strengthened and this can be done primarily by the qualification of the deliberate and discriminatory destruction of cultural heritage as a crime against humanity. The hope is that the mentioned trial can mark the beginning of a new trend of prosecution, capable of embracing the intentional destruction of buildings dedicated to religion, education or art or from a specific human rights viewpoint.

CHAPTER 4

Cultural Crimes entailing State Responsibility

4.1 State Responsibility in International Humanitarian and International Criminal Law

Every violation of an international obligation by a State entails its international responsibility. Accordingly, when violating binding obligations to respect cultural heritage, States can be held accountable for their unlawful conduct.

The regime of State responsibility for acts of intentional destruction of cultural heritage is regulated under customary international law and it is extensively codified by the Draft Articles on State Responsibility for Internationally Wrongful Acts, which formulate the general conditions under international law in the case of wrongful actions or omissions by the State, and the legal consequences which flow therefrom. The Draft Articles were adopted in 2001 by the International Law Commission (ILC) and even though they have never become a legally binding multilateral instrument, they are commonly recognized as 'a document reflecting general principles of international law on the responsibility of States for wrongful acts[145]'. Whereas it is not possible to find a specific responsibility regime in cultural heritage treaties, the Draft Articles can be invoked in the case of wrongful conducts originating from the violations of the obligations established by these treaties. Indeed, Article 1 states that:

> 'Every internationally wrongful act of a State entails the international responsibility of that State'.

[145] See F.FRANCIONI & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p.60.

In addition, according to Article 30 and Article 31, the State responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing; to offer appropriate assurances and guarantees of non-repetition and to make full reparation for the injury caused by the internationally wrongful act. Article 31 further clarifies that injury includes any damage - whether material or moral - caused by the internationally wrongful act of a State. As regards reparation, they take the form of restitution, compensation and satisfaction, either singly or in combination.

Reparations provisions, both restitutionary and compensatory, have already been enforced in the treaties of peace following WWI. Indeed, the 1919 Treaty of Versailles[146], under Article 245, compelled the German Government to

> 'restore to the French Government the trophies, archives, historical souvenirs or works of art carried away from France by the German authorities in the course of the war of 1870-1871 and during this last war' in accordance with a list drafted by the French Government'.

Likewise, Article 247 urged Germany to furnish to the University of Louvain, 'manuscripts, incunabula, printed books, maps and objects of collection corresponding in number and value to those destroyed in the burning by Germany of the Library of Louvain'. Germany was also forced to return the leaves of the triptych of the Mystic Lamb painted by the Van Eyck brothers, formerly in the Church of St. Bavon at Ghent and the leaves of the triptych of the Last Supper, painted by Dierick Bouts, formerly in the Church of St. Peter at Louvain.

Similar conditions were imposed by the 1919 Treaty of St Germain on Austria, by the 1920 Treaty of Trianon on Hungary and by the 1919 Treaty of Neuilly on Bulgaria. Later on, after World War II, the 1945 Paris Conference on Reparation stated that:

[146] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), entered into force 10 January 1920.

> ‘Objects (including books, manuscripts and documents) of an artistic, historical, scientific (excluding equipment of an industrial character), educational or religious character which have been looted by the enemy occupying Power shall so far as possible be replaced by equivalent objects if they are not restored.[147]’

However, while there exist more recent international treaties regarding cultural heritage regulating individual criminal responsibility, the same cannot be said in the case of norms on State responsibility. The only provision can be found in Article 91 of Protocol I to the 1949 Geneva Convention, which states that:

> ‘A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces’.

Regretfully, the enforceability of Article 91 is limited by the fact that Protocol I only regulates situations emerging from international armed conflicts and it is therefore irrelevant when dealing with crimes committed during non-international armed conflicts and peacetime. Protocol II – although dealing with the latter – does not contain a provision dealing with State responsibility in conformity with Article 91 of Protocol I. This *vacuum* ‘demonstrates that the drafters of the 1977 Protocols considered this subject matter as an issue only affecting international relations between States and, thus, not be treated in the context of merely internal conflict[148]’. Although State responsibility is not regulated by any of the norms of the Hague Convention and its protocols, Article 38 of the Second Protocol states that:

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[147] Final Act and Annex of the Paris Peace Conference on Reparation, 21 December 1945.
[148] F.FRANCIONI & A.F.VRDOLJAK, ‘*The Oxford Handbook of International Cultural Heritage Law’*, Oxford University Press, 2020, p. 612. See also T.MERON, ‘*The Geneva Conventions as Customary Law’* (1987) 81(2) American Journal of International Law.

> ‘No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation’.

Therefore, State responsibility ‘may be ascertained in accordance with the general provisions of international law in cases in which a State has violated the substantive obligations of the 1954 Hage Convention and its Protocols[149]’. This evident lacuna of provisions regarding State responsibility is even more inconsistent considering that most of the provisions of cultural heritage treaties recognizes that the duty of protection and management of cultural heritage belongs primarily to the States. For example, Article 4 of the 1972 UNESCO World Heritage Convention (UHC) states that:

> ‘Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage […] belongs primarily to that State’.

Likewise, Article 18 of the 2001 UNESCO Underwater Heritage Convention (UHC) and Article 11 of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage contain similar provisions. The only provision entailing State responsibility is contained in Article VI of the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, which – even if not legally binding – appears to contemplate some obligations of customary international law affirming that:

> ‘A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of

[149] *Ibid*., p. 608.

> cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law'.

Meaningfully, Member States have recognized the necessity of addressing State responsibility in Article VI on the wave of the emotional impact following the violent destruction of the Buddhas of Bamiyan by military and para-military forces of Afghanistan's Taliban government in March 2001[150]. The tragic event has given rise to the overriding need to penalize this type of conduct. In this way, they wished to prevent criminal offenders from repeating similar wrongful acts, 'making it clear that these violations may be considered serious breaches of international law and, thus, entail the same legal consequences of international crimes[151]'.

As far as regards international criminal tribunals, Article 25(4) of the ICC Statute states that:

> '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'.

This demonstrates that State responsibility cannot simplistically be left out when the wrongful conduct of a natural person is to some extent interlinked with the conduct of a State. In this respect, it is important to cite the example of the Eritrea-Ethiopia Claims Commission[152] which held Ethiopia liable for the unlawful damage inflicted upon the Stela of Matara[153] in May 2000 by occupying Ethiopian

[150] See F.FRANCIONI & F.LENZERINI, '*The Destruction of the Buddhas of Bamiyan and International Law'* (2003) 14(4) in European Journal of International Law, p. 619.
[151] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law',* Oxford University Press, 2020, p.611.
[152] See Eritrea-Ethiopia Claims Commission – Partial Award: Central Front – Eritrea's Claims 2, 4, 6, 7, 8 & 22, Decision of 28 April 2004, para. 114.
[153] The Stela of Matara is an obelisk of about 2,500 years old and 18 feet high of great historical and cultural significance for both Eritrea and Ethiopia. It is located near the small village of Matara a few kilometers south of Senafe Town, in the province of Akkele Guzay – on the frontier between Eritrea and Ethiopia.

Army.

More recently, Security Council Resolution 2347 recalled the recent decision of the ICC in the case *Prosecutor v. Ahmad Al Faqi Al Mahdi,* which for the first time considered the intentional attacks against religious and historic buildings as war crimes and, therefore, involving both State and individual responsibility for international crimes. However, despite this interrelation between State and individual responsibility, 'while proper international regimes of punishment of individual criminal responsibility have been established and successfully applied in the last two decades, corresponding legal procedures do not yet exist with regard to the multilateral response to State responsibility for international crimes'[154].

4.2 ICJ and Genocide Cases: Bosnia and Herzegovina v. Yugoslavia, Croatia v. Serbia

The 1948 Genocide Convention embraced positive obligations for States starting from its opening sentences whereby States Parties commit to prevent and punish the crime of Genocide. The two genocides cases brought before the International Court of Justice (ICJ) – *Bosnia and Herzegovina v Yugoslavia and Croatia v Serbia* – were focused on the specific question of whether a State could be held accountable for perpetrating genocide in breach of the Convention.

In March 1993, Bosnia and Herzegovina filed a genocide case against Jugoslavia –later Serbia and Montenegro – before the ICJ. Unlike the cases brought before the ICTY involving individual criminal responsibility, the dispute concerned the responsibility of a State, Yugoslavia, for the alleged violations of its obligations as a Member State to the 1948 Genocide Convention. The application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of

[154] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p. 616.

the Court[155]. In its judgment, the ICJ considered that there was 'conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group[156]'. It took note of the submission of Bosnia and Herzegovina that the destruction of such heritage was 'an essential part of the policy of ethnic purification and was 'an attempt to wipe out the traces of [the] very existence' of the Bosnian Muslims[157]. However, the Court found out that 'although such destruction [might] be highly significant inasmuch as it [was] directed to the elimination of all traces of the cultural or religious presence of a group', the destruction of historical, cultural and religious heritage could not be considered to embody the deliberate infliction of conditions of life aimed at physically destroying the group. For this reason, according to the Court, it did not fall within the categories of acts of genocide listed in Article II of the Genocide Convention. In this respect, the Court recalled the decision of the Sixth Committee of the General Assembly during its examination of the draft text of the Convention to not include cultural genocide among the list of criminal acts. Later on, the International Law Commission (ILC) corroborated this orientation, affirming that:

> 'As clearly shown by the preparatory work for the Convention […], the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group[158].'

In this way, the ICJ confirmed the ICTY's interpretation in Krstić where the Trial Chamber recognized that 'despite recent developments, customary international

[155] 'Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.', Article IX, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.
[156] Application of the Convention for the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*, ICJ Judgment of 26 February 2007, para. 344.
[157] *Ibid*.
[158] Report of the International Law Commission on the Work of its Forty-eighth Session, 26 July 1996, pp. 45-46, para. 12, viewed 1 February 2021, available at <https://legal.un.org/ilc/documentation/english/reports/a_51_10.pdf>.

law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group[159]'. Therefore, an attack against those cultural or sociological characteristics of a human group that define its own distinct identity would simply not fall under the definition of genocide. At the same time, however, the ICJ approved the consideration made by ICTY in the same case affirming that:

> 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group[160]'.

In its judgment, the Court has not found Serbia's responsibility for having committed, inspired or incited the perpetration of genocide. However, it found Serbia accountable for having violated its obligations to prevent genocide in the massacre of Srebrenica of July 1995 – where more than 8,000 Bosnian Muslim men and boys were killed by Bosnian Serb forces during the Bosnian War.

In early 2005, Croatia filed another *Genocide* case against Serbia and Montenegro before the ICJ pursuant to the Genocide Convention claiming – among other things – the bombing of Dubrovnik and the attack on the village of Vukovar. Croatia perceived the alleged intentional destruction of cultural property in connection with a broader plan aimed at the annihilation of an ethnic group, and thus within the scope of the Genocide Convention. In its Memorial, Croatia provided wide evidence to demonstrate that Croatian cultural property was destroyed or removed during the course of the occupation, as in the case of 'the parish of St. Joseph's church (built in 1912) [which] was mined and the church was completely destroyed leaving only a pile of bricks[161]'. It can also be read that:

> 'the occupation was designed to make continued Croatian life in Bogdanovci

[159] *Prosecutor v Kristic*, Case No. IT-98-33-T, Trial Chamber Judgment of 2 August 2001, para. 580.
[160] *Ibid*.
[161] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Application instituting proceedings filed on 2 July 1999; and Memorial, at para 4.36.

> impossible. The whole village was seriously damaged, but Croatian infrastructure was the particular target: family houses of Croatian civilians, farm buildings important for their livelihood, and many sacral objects (the Church Rising of the Holy Cross, the fire station, the Community center, the Farming Co-operation etc.)[162]'.

At the beginning of September 1991, the Yugoslav's People Army (JNA) attacked Vukovar, Osijek and Ernestinovo. Right after, with the help of the special formations of the Serb Territorial Defence and the Serb paramilitary group, they attacked the village of Šarengrad and occupied it. The Memorial reported that during the day, the tower of the Catholic Church was hit and the JNA repeatedly fired at it until half of the church was completely destroyed. The parish house and the Carmelite Nunnery were completely destroyed in an attack that lasted the whole night and was 'mounted with increasing intensity[163]'. However, despite these and other countless proofs demonstrating the unlawful seizure, alienation and devastation of the Croatian cultural heritage, the Court made it clear that it was unlikely to alter its finding of law on the general question of interpretation of the Genocide Convention made in the earlier genocide case[164]. In its final judgment, it considered that even if acts constituting the physical element of genocide had been committed, they had not been perpetrated to the extent that they could have underlined the existence of a genocidal intent as part of the *mens rea* element.

What emerges from the analysis of the above-mentioned cases, is that while States can be held responsible not only for perpetrating genocide, but also for breaches of other 'accessory' obligations under the Genocide Convention such as failing to prevent or punish genocide, they cannot be held accountable for 'secondary' crimes such as cultural cleansing. Indeed - as previously discussed in Chapter II in the section dedicated to the destruction of cultural heritage as

[162] *Ibid*., at para. 4.55.
[163] *Ibid*., at para. 4.57
[164] See VRDOLJAK A.F., '*Genocide and Restitution: Ensuring Each Group's Contribution to Humanity'*, (2011) 22(1) in The European Journal of International Law, p. 38.

evidence of the intent to commit genocide – the Genocide Convention does not give any legal value to cultural cleansing. However, the ICJ itself has recognized that there can be circumstances in which 'ethnic cleansing' may fall under some of the constitutive elements of genocide. In *Bosnia v. Serbia* the Court stated that:

> '[…] This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (Krstic´, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (Stakic´, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts'.

If it is true that in perpetrating 'ethnic cleansing', cultural destruction is simply one different and deliberate stage of the plan, it should definitely be taken into account among the necessary specific intent – the *dolus specialis* – in order to classify the crime as genocide. This would at least be a legal 'reward' for not being

able to prosecute cultural genocide as a crime in itself.

4.3 The politics of R2P

State responsibility for deliberate destruction of cultural heritage may also be envisioned in connection with the doctrine of *responsibility to protect* (R2P) such heritage.

During the 1990s, following the atrocities committed in Rwanda and the Balkans, the international community began to debate whether States retain full and unconditional sovereignty when human rights are grossly violated or whether the international community owns the right to intercede for humanitarian purposes. In 2000, former UN Secretary-General Kofi Annan released a report entitled 'We the Peoples – The Role of the United Nations in the 21st Century', later become widely known as the 'Millenium Report'. Recalling the inadequacy of the Security Council to act decisively in Rwanda and in former Yugoslavia, Kofi Anann set out a challenge to Member States, saying: 'If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?'

The challenge was accepted by the International Commission on Intervention and State Sovereignty (ICISS), established by the Canadian Government in 2001, which addressed the question in its report entitled 'The Responsibility to Protect'. The document - in addition to recognize a residual responsibility to the international community when States fail to safeguard their people's rights - found that sovereign States have not only the right to regulate their own affairs, but also the primary 'responsibility' to protect their populations from avoidable catastrophe. At this regard, it established three distinct regimes of responsibilities:

> 'A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at

risk.

B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.

C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert[165]'.

In September 2005, at the high-level UN World Summit meeting, Member States formally accepted the principle of the responsibility to protect. As outlined in the 2005 World Summit Outcome, 'each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity[166]'. In this framework, the meaning of the term 'atrocitity crimes' has been expanded to the point of including the relatively new expression 'ethnic cleansing' which - while not being recognized as an independent crime under international law - 'includes acts that are serious violations of international human rights and humanitarian law that may themselves amount to one of the recognized atrocity crimes, in particular crimes against humanity[167]'. From its side, the international community - through the United Nations - has committed to encourage and help States in building adequate capacity to protect their populations from mass atrocities crime. It also accepted 'the responsibility to use appropriate diplomatic, humanitarian and other peaceful means[168]' and to take collective action, in a timely and decisive manner, when peaceful means are

[165] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty', viewed 1 February 2021, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.
[166] UNGA Resolution 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138.
[167] United Nations 'Framework for Analysis for Atrocity Crimes – A Tool for Prevention', July 2014, p. 1, viewed 1 February 2021, available at < https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf>.
[168] *Ibid*.

'inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity[169]'.

Later on, the 2009 'Report of the Secretary-General on Implementing the Responsibility to Protect' outlined a three-pillar strategy in order to implement the R2P in conformity with the 2005 World Summit Outcome, as follows:

> Pillar I - The protection responsibilities of the State: 'the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement[170]'.
>
> Pillar II - International assistance and capacity-building: 'commitment of the international community to assist States in meeting those obligations, seeking 'to draw on the cooperation of Member States, regional and subregional arrangements, civil society and the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system[171]'.
>
> Pillar III - Timely and decisive response: 'the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection[172]'.

As pointed out by the report, the first pillar of the responsibility to protect is a matter of State responsibility, in the stated belief that 'prevention begins at home and the protection of populations is a defining attribute of sovereignty and statehood in the twenty-first century [173] '. However, when national political leadership is weak and lacks the capability to protect its population efficiently, or

[169] *Ibid*.
[170] 'Report of the Secretary-General on Implementing the Responsibility to Protect', UN Doc A/63/677, 12 January 2009, p. 8.
[171] *Ibid*., p. 9.
[172] *Ibid*.
[173] *Ibid*., p. 10, para. 14.

'faces an armed opposition that is threatening or committing crimes and violations relating to the responsibility to protect', the measures envisaged in the second pillar could play a key role in in the implementation of the first one. They could also complement the third pillar, given that none of them is conceived to work independently from the others.

In 2015, the repeated cycles of violence and the serious violations of human rights occurring in several countries such as the Central African Republic, Iraq, Libya, Sudan, the Syrian Arab Republic and Yemen, led to the adoption of the 'Report on a Vital and Enduring Commitment: Implementing the Responsibility to Protect'. In the latter, the Secretary-General included another scope of prevention, namely 'preventive recurrence of atrocities crimes[174]'. This revolves around the responsibility to rebuild, an element that was taken into account in the 2001 ICISS Report but was left out in the 2005 World Summit Outcome and the 2009 Report of the Secretary-General. It envisaged longer-term commitment to peacebuilding processes, 'emphasizing support for reconciliation and accountability[175]'.

As far as regards the specific link between cultural heritage and R2P, the outrageous deliberate destruction and misappropriation of cultural property in the armed conflicts in Iraq and Syria - which led the UNESCO ex Director-General Irina Bokova to talk about 'cultural cleansing -, have highlighted the need for a deeper consideration on their existing link. For this purpose, the Secretariat organized the Expert Meeting on the 'Responsibility to Protect' as applied to the protection of cultural heritage in armed conflict, which took place in November 2015 at UNESCO Headquarters. The meeting was attended by 22 experts and representatives of governmental and non-governmental organizations and was moderated by proefessor Roger O'Keefe, Professor of Public International Law at University College London. The participants concurred that deliberate 'destruction and misappropriation of cultural heritage could constitute war crimes and crimes

[174] 'Report of the Secretary-General on A Vital and Enduring Commitment: Implementing the Responsibility to Protect', UN Doc A/69/981-S/2015/500, 13 July 2015, pars, 65–67.
[175] *Ibid*.

against humanity and could provide evidence of genocidal intent[176]' and recalled that such acts have also been frequently associated with ethnic cleansing. Therefore, they agreed that deliberate destruction of cultural property during armed conflict fall within the scope of the R2P, not because they wanted to expand the parameters of the doctrine but given that 'it was a question merely of articulating and highlighting such protection as an aspect of the responsibility to protect as already delineated[177]'.

Regarding the operationalization of the R2P for the protection of cultural heritage in armed conflict, several suggestions were made to implement UNESCO Member States' responsibility in order to prevent the destruction of cultural heritage during armed conflict in their territory. For example, the establishment of 'bilateral and multilateral cooperation with a diverse range of actors, state and non-state, public and private', but also the training of experts and the dissemination of information and education[178] given that they all play a pivotal role in strengthening States' capacity. As already discussed above, when States manifestly fail to fullfil their own R2P, the international community as a whole has the responsibility to respond collectively in a timely and decisive manner. Even if 'United Nations has a strong preference for dialogue and peaceful persuasion', as pointed out in the 2009 'Report of the Secretary-General on Implementing the Responsibility to Protect', the international community's response may also include sanctions or coercitive coercive military action in extreme cases. Of course 'military intervention and the recourse to force can only be a last resort and the relevant decision must be taken with the utmost caution[179]'. Indeed, as pointed out by Lenzerini, the use of military force requires a preliminary costs/benefits evaluation, especially made in terms of loss of human life and human suffering. Indeed, its use can be justified only when 'military action is indispensable for

[176] UNESCO, 'Expert Meeting on the 'Responsibility to Protect' as Applied to the Protection of Cultural Heritage in Armed Conflict, Final Report', Paris, 26-27 November 2015, para. 7.
[177] *Ibid*. para. 8.
[178] *Ibid*. p. 4.
[179] See HIPOLD P., 'Responsibility to Protect (R2P) – A New Paradigm of International Law?', Koninklijke Brill Nv, Leiden, 2015, p. 31.

protecting populations against destruction of cultural heritage' and it must be carried out 'with the authorization and under the guidance of the Security Council, acting pursuant to Chapter VII of the United Nations Charter, complying with its collective R2P'[180]. In this regard, the UN Security Council stated that:

> 'Non-state actors, as well as States, can commit egregious crimes relating to the responsibility to protect. When they do, collective international military assistance may be the surest way to support the State in meeting its obligations relating to the responsibility to protect and, in extreme cases, to restore its effective sovereignty[181]'.

[180] LENZERINI F., '*Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage*', (2016) 51(2) in The International Spectator, p. 80.
[181] 'Report of the Secretary-General on Implementing the Responsibility to Protect', UN Doc A/63/677, 12 January 2009, para. 40.

CHAPTER 5

The Progress made within the framework of the United Nations

5.1 The United Nations (UN) Security Council and the Protection of Cultural Heritage

During the course of the time, the UN Security Council has progressively established cultural property protection as part of its mandate[182], in the belief that the unlawful destruction of cultural heritage is a threat to the maintenance of international peace and security.

This growing concern for the Security Council has resulted in the adoption of several resolutions addressing cultural heritage destruction in country-specific situations of armed conflict. One example is Resolution 1267 of 1999 in which - reaffirming territorial integrity and national unity of Afghanistan and reiterating the deep concern over the continuing violations of international humanitarian law - the Security Council called for 'respect for Afghanistan's cultural and historical heritage[183]'. Later on, on May 22, 2003, after the Iraq invasion, the Security Council stressed 'the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq[184]'. At the same time, it encouraged all Member States to take appropriate steps 'to facilitate the safe return to Iraqi institutions of Iraqi cultural property', including the establishment of a prohibition on trade or transfer of those items that have been illegally removed. In addition, the Security Council called upon the UNESCO, the Interpol, and other international

[182] Article 24(1) of the UN Charter states that: '[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.' Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[183] UNSC Resolution 1267 (15 October 1999) UN Doc S/RES/1267.
[184] UNSC Resolution 1483 (22 May 2003), UN Doc S/RES/1483, Preamble.

organizations, as appropriate, to assist in the implementation of its provisions[185]. In the case of UK, the UNSC statement was substantiated in the adoption of the 'Iraq (United Nations Sanctions) Order 2003', which affirmed that 'the importation or exportation of any item of illegally removed Iraqi cultural property is prohibited[186]'.

In 2012, addressing the violent conflict in Mali, the UNSC unanimously adopted Resolution 2056 strongly condemning 'the desecration, damage and destruction of sites of holy, historic and cultural significance, especially but not exclusively those designated UNESCO World Heritage sites, including in the city of Timbuktu[187]'. It also recalled that attacks against buildings dedicated to religion or historic monuments might constitute violations of international law under Additional Protocol II to the 1949 Conventions and the Rome Statute of the International Criminal Court, to which Mali was a State Party. The Security Council pushed ahead its agenda, extending the mandate of the UN peacekeeping mission in Mali also to cultural preservation. Indeed, it entrusted the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) to assist the transitional authorities - 'as necessary and feasible' and with all necessary means - in protecting from attack the cultural and historical sites in Mali, in collaboration with UNESCO[188]. Regrettably, when renewing the MINUSMA's mandate in 2018, it seems that cultural preservation was no longer a priority considering that the Security Council only requested the peacekeeping mission to go forward 'to operate mindfully in the vicinity of cultural and historical sites[189]'. Addressing the ongoing multi-sided civil war in Syria started in 2011, the UNSC adopted several resolutions in order to protect its cultural heritage, albeit they only date from 2014. One of the first was Resolution 2139, adopted by unanimous vote on February 2014, which firmly condemned the shameful destruction carried out

[185] *Ibid.*, para. 7.
[186] *See* 'The Iraq (United Nations Sanctions) Order 2003', UK Statuatory Instruments, viewed on 1 February 2021, available at <https://www.legislation.gov.uk/uksi/2003/1519/article/8/made>.
[187] UNSC Resolution 2056 (5 July 2012) UN Doc S/RES/2056, Preamble.
[188] UNSC Resolution 2100 (25 April 2013) UN Doc S/RES/2100, para. 16(f) and para. 17.
[189] UNSC Resolution 2423 (28 June 2018) UN Doc S/RES/2423, para. 67.

by Al-Qaeda and its affiliates. In this regard, the Security Council called all parties to take appropriate steps to save Syria's rich cultural heritage and to ensure the protection of its World Heritage Sites[190], demanding the end of all violence which has led to immense human suffering in the country. In the subsequent Resolution 2199, adopted on February 12, 2015, the Security Council condemned the extensive destruction of cultural heritage occurring in Syria and Iraq by ISIL, ANF and all other individuals, groups and entities associated with Al-Qaida[191].

More recently, deliberate attacks against cultural heritage resulted in the ignominious destruction of high-profile sites, many of them being among the most recognized locations around the world as World Heritage Sites. This, for example, is what happened in January 2017, when the Islamic State of Iraq and the Levant (ISIL, or DAESH) won back control over Palmyra and destroyed the Tetrapylon and parts of the ancient Roman theatre. The city, an oasis in the Syrian desert, was inscribed on the UNESCO World Heritage list in 1980 as being one of the most fervent cultural centers of the ancient world and not surprisingly appears in the list of World Heritage in Danger since 2013. As cleverly pointed out by ex Director-General of UNESCO Irina Bokova, the new blow against cultural heritage in Palmyra showed that the cultural cleansing led by violent extremists was aimed at destroying 'both human lives and historical monuments in order to deprive the Syrian people of its past and its future[192]'. Disgracefully, this was not the only occasion in which Palmyra's ruins have been stormed, depriving the Syrian people of its knowledge, its identity and history. Back in 2015, ISIL destroyed the ancient Temple of Baalshamin, a UNESCO World Heritage Site[193], which was built nearly 2,000 years ago and witnessed the pre-Islamic history of the country. Responding

[190] UNSC Resolution 2139 (22 February 2014) UN Doc S/RES/2139.
[191] UNSC Resolution 2170 (15 August 2014) UN Doc S/RES/2170 and UNSC Resolution 2199 (12 February 2015) UN Doc S/RES/2199, para. 15.
[192] UNESCO, 'News Release: UNESCO Director-General condemns destruction of the Tetrapylon and severe damage to the Theatre in Palmyra, a UNESCO World Heritage site', 20 January 2017, viewed on 1 February 2021, available at < https://whc.unesco.org/en/news/1620>.
[193] UNESCO, 'News Release: Director-General Irina Bokova firmly condemns the destruction of Palmyra's ancient temple of Baalshamin, Syria', 24 August 2015, viewed on 1 February 2021, available at < https://news.un.org/en/story/2015/08/507122-syria-unesco-chief-condemns-destruction-palmyras-ancient-temple>.

to these deplorable acts, the Security Council released a press statement in January 2017 reiterating its 'grave concern for the protection of the World Heritage Site of Palmyra and the systematic campaign of destruction of cultural heritage in Syria by ISIL/Daesh[194]'.

From the analysis of the above-mentioned resolutions, it clearly emerges that the protection of cultural property in armed conflict has represented a growing preoccupation for the Security Council, 'which had up until now been the matrix of UNESCO's heritage standards[195]'. Indeed, the UNSC interventions in the cultural heritage field have attempted to instill a kind of collective discipline which – far from freeing Member States from their own duties and responsibilities – is aimed at channeling their individual actions promoting, at the same time, 'the unanimous support of subjects of law for the general interest to humanity of the protection and safeguarding of the cultural heritage of the people[196]'. Nevertheless, it is questionable whether the Security Council has channeled its attention towards attacks against cultural heritage as human rights violations and not only as a threat to the international peace and security.

5.2 Why Resolution 2347 Matters

A more specific consideration of the link existing between destruction of cultural heritage and human rights' violations - even if only implicit - seems to have occurred with the the unanimous adoption of Resolution 2347 by Security Council on March 2017.

As the culmination of a proposal launched by UNESCO and the governments of France and Italy, the Resolution represented a 'historic milestone' in the

[194] UNSC Press Release: 'Security Council Press Statement on Destruction of Cultural Heritage, Executions in Palmyra', UN Doc SC/12690, 20 January 2017.
[195] V.NÉGRI, 'Legal Study on the Protection of Cultural Heritage through the Resolutions of the Security Council of the United Nations' (UNESCO, 2015), viewed 1 February 2021, available at <www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/ CLT/pdf/Study_Negri_RES2199_01.pdf>.
[196] *Ibid*., p. 12.

common struggle to safeguard endangered heritage[197]. Its singular importance of lies in the fact that it is has been the first one committed exclusively to the protection of cultural heritage as a matter of peacebuilding and security manintenance. This is noteworthy considering that - as pointed out by the UK Deputy Permanent Representative to the UN Peter Wilson - the adoption of the Resolution has allowed to respond to 'cultural destruction with the same intensity and same unity of purpose as any other threat to international peace and security[198]'.

Resolution 2347 condemns the destruction, looting and smuggling of cultural heritage notably by terrorist groups, such as ISIL, Al-Qaida and Al-Nusra Front (ANF). At this regard, the Security Council reaffirms that terrorism – in all its forms and manifestations – represents one of the most serious menaces to the maintenance of international peace and security and that any 'acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed[199]'. The SC has gone further recognizing that the destruction of cultural heritage may threaten not only the maintenance of peace and security, but also the 'social, economic and cultural development of affected States[200]'. With regard to the latter, it specifically emphasized that the destruction of cultural heritage constitute an 'attempt to deny historical roots and cultural diversity[201]' and thus inherently alluding to the nexus between the destruction, removal or theft of cultural heritage and human rights. It is worth mentioning, however, that the Security Council had already identified this link in the past. Indeed, in Resolution 2071 addressing the situation in Mali, it strongly condemned – less implicity – 'the abuses of human rights committed in the north of Mali by armed rebels, terrorist and other extremist groups, including violence against its civilians, notably women and children, killings, hostage-taking, pillaging, theft,

[197] See speech by Mrs Audrey Azoulay, Minister of Culture and Communication, Overview of the Security Council Meeting Record on the Adoption of Resolution 2347 on the Protection of Cultural Heritage in Armed Conflicts, UN Doc S/PV.7907, 24 March 2017.
[198] See statement by Ambassador Peter Wilson, UK Deputy Permanent Representative to the United Nations, Overview of the Security Council Meeting Record on the Adoption of Resolution 2347 on the Protection of Cultural Heritage in Armed Conflicts, UN Doc S/PV.7907, 24 March 2017.
[199] UNSC Resolution 2347 (24 March 2017) UN Doc S/RES/2347, Preamble.
[200] *Ibid.*
[201] *Ibid*.

destruction of cultural and religious sites [202] '. At this point, an ongoing inconsistency seems to emerge from the way Security Council has connected the destruction of cultural heritage with human right's violations, despite having done clearly in the past [203] . Of course, taking into account that human rights considerations are not specifically part of the Security Council mandate, they could be considered as belonging to it when the human rights violations amount to a threat to international peace and security[204]. Indeed, only when it will be clear that that the aggravated forms of human rights violations - resulting in the commission of mass atrocity crimes – are closely linked to the deliberate destruction of cultural heritage, it will be possible to address the issue through a comprehensive and systematic approach.

Despite these incongruities, the Resolution has the merit of having implicity substantiated the idea of a 'global cultural heritage governance' built on the support of a variety of institutions, mechanisms, tools and relationships through which the collective interests of the international community in protecting cultural heritage is implemented on the global plane[205]. Indeed, the Resolution has urged Member States to develop powerful national measures at the legislative and operational levels and to improve judicial cooperation with the assistance of international organizations and agencies such the UN Office on Drugs and Crime (UNODC), in cooperation with UNESCO and the International Criminal Police Organization (INTERPOL) as consider appropriate. It has also called them to provide cooperation in investigations, prosecutions and confiscation as well as in the return of illicitly traded cultural property and in judicial proceedings[206], in compliance with domestic legal systems as well as with the United Nations Convention against Transnational Organized Crime and other significant regional, subregional and bilateral agreements.

[202] UNSC Resolution 2071 (12 October 2012) S/RES/2071.
[203] See K.HAUSLER in '*Intersections in International Cultural Heritage Law'*, CARSTENS A., VARNER E., Oxford University Press, 2020.
[204] See *supranote* 196.
[205] JAKUBOWSKI A., 'Resolution 2347: Mainstreaming the protection of cultural heritage at the global level', (2018) in Questions of International Law, para. 4.2
[206] *Ibid*., para. 12.

Significantly, the Security Council has encouraged the consolidation of Member States cultural property in a network of 'safe havens' in their own territories in order to protect them, 'while taking into account the cultural, geographic, and historic specificities of the cultural heritage in need of protection[207]'. By saying so, the Security Council has recalled the 2016 Abu Dhabi Declaration on Safeguarding Endangered Cultural Heritage which triggered the creation of an 'international network of safe havens to temporarily safeguard cultural property endangered by armed conflicts or terrorism on their own territory, or if they cannot be secured at a national level, in a neighboring country, or as a last resort, in another country'. However, contrary to the Abu Dhabi Declaration, Resolution 2347 has restored the boundaries of State sovereignty, stressing that Member States – rather than international bodies – have the responsibility to protect their cultural property and thus limited the creation of safe havens to their own territories. This decision was also taken in view of complaints by some members of the UNSC such as Egypt, strongly convinced that safe havens should have been established only on its territory[208].

The Security Council has further expanded the scope of cultural heritage protection recalling the UNESCO Heritage Emergency Fund[209] as well as the institution of an international fund for the protection of endangered cultural heritage, as proclaimed in the already mentioned 2016 Abu Dhabi Declaration. In addition, it has encouraged Member States, in the spirits of the principles of the UNESCO Conventions, 'to provide financial contributions to support preventive and emergency operations[210]', undertaking all appropriate efforts for the recovery

[207] *Ibid*., para. 16.
[208] It this regard, Mr. Aboulatta stated: 'We also reiterate that the protection of cultural heritage, including through the establishment of a network of safe havens, can be undertaken only with the support of the State custodian of that cultural heritage. Safe havens should be established only on its territory. Egypt rejects any interference, present or future, in the internal affairs of a State on the pretext of protecting cultural heritage. We reject the transfer of a State's cultural heritage out of its territory under the pretext of conserving it in safe havens. We have only to look at our own cultural heritage and that of other countries.' Overview of Security Council Meeting Records, UN Doc S/PV.7907, p. 14.
[209] 'The Heritage Emergency Fund - a multi-donor and non-earmarked funding mechanism - was established by UNESCO in 2015, to enable the Organization to respond quickly and effectively to crises resulting from armed conflicts and disasters caused by natural and human-made hazards all over the world', see < https://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity/emergencyfund2>.
[210] *Ibid*., para. 15.

of cultural heritage.

The Resolution has also cleverly pulled together several policy arrangements , such as the #Unite4Heritage campaign launched in March 2015 as a response to address the intentional destruction of cultural heritage by violent extremist groups. It is worth mentioning that in the wake of the campaign - which is now becoming a widely expanding global movement - the 38th General Conference of UNESCO adopted the 'Strategy for the Reinforcement of the Organization's Actions for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict'. The latter has two pivotal objectives: on one side, to strengthen Member States' ability to prevent, mitigate, and recover the loss of cultural heritage and diversity as a result of conflict; on the other, to incorporate the protection of culture into humanitarian action, security strategies and peacebuilding processes. Later on, on June, 29 2015, the ex Director-General of UNESCO Irina Bokova launched the 'UNESCO's Global Coalition – Unite4Heritage', which is designed to reinforce the mobilization of governments and other heritage stakeholders in the face of intentional damage to cultural heritage. This initiative had significant consequences in the case of Italy, leading the Italian National 'Task Force in the framework of UNESCO's Global Coalition Unite4Heritage' (hereafter the 'Italian Task Force') and UNESCO to sign a Memorandum of Understanding. According to the document, the Italian Task Force may be able to operate with the following roles:

- Assessing damage and risk to cultural and natural heritage;
- Devising operational plans for urgent safeguarding measures for the affected cultural and natural heritage;
- Providing technical supervision and training in order to assist national authorities and other local actors in implementing emergency preparedness and response measures for the protection and safeguarding of cultural and natural heritage;
- Assisting in transferring movable cultural heritage property at risk to

safe havens;

- Fighting against the looting and the illicit trafficking of cultural properties through the mobilization of the relevant department of the Italian Carabinieri (Comando Carabinieri per la Tutela del Patrimonio Culturale)[211].

The integration with global, regional and national policies aimed at counteracting cultural heritage crimes committed in armed conflicts has been further complemented by the provision of other relevant technical tools such as the INTERPOL Database of Stolen Works of Art[212], the UNESCO Database of National Cultural Heritage Laws[213], the WCO ARCHEO Platform[214] and the UNODC SHERLOC online portal[215].

From the analysis of Resolution 2347, two different considerations can be made. First, with its adoption, the Security Council has turned the protection of cultural heritage into a crucial topic in the broader context of the international maintenance of peace and security. In addition, as pointed out by Jakubowski, it has encouraged the integration of the often dispersed and fragmented regimes of international law – cultural heritage law, humanitarian law, criminal law, and State responsibility. At the same time, it has managed to strengthen the principle of international cooperation towards more inclusive participation of the various heritage stakeholders[216].

[211] Memorandum of Understanding between UNESCO and the Government of the Italian Republic on the Italian National "Task Force in the framework of UNESCO's Global Coalition Unite4Heritage".
[212] See INTERPOL Stolen Works of Art Database, viewed 1 February 2021, available at < https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database>.
[213] See UNESCO Database of National Cultural Heritage Laws, viewed 1 February 2021, available at <https://en.unesco.org/news/unesco-database-national-cultural-heritage-laws-updated>.
[214] See World Customs Organization (WCO) ARCHEO brochure, viewed 1 February 2021, available at <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/cultural-heritage/archeo_brochure_en.pdf>.
[215] See UNODC SHERLOC Portal, viewed 1 February 2021, avaiable at <https://sherloc.unodc.org/cld/v3/sherloc>.
[216] See JAKUBOWSKI A., 'Resolution 2347: Mainstreaming the protection of cultural heritage at the global level', (2018) in Questions of International Law, para. 5.

5.3 Further Developments

The objectives of Resolution 2347 have been later embraced by the G7 Ministers of Culture in the 2017 Florence Declaration, which has recognized the distinctive role of culture as an instrument for dialogue among peoples as well as the importance of a coordinated action to strengthen the safeguarding of cultural heritage. The declaration strongly reaffirmed the belief that cultural heritage in all its forms - whether tangible or intangible, movable or immovable - represents an extraordinary link between past, present and future of mankind. It further recognized that the 'growth and sustainable development of all societis, including in terms of economic prosperity, are dependent on the protection of cultural heritage, particularly in the event of armed conflicts'. This is why the declaration called upon all States to take steps to increase their safeguarding and preservation of cultural heritage, as well as to identify and share appropriate best practices for fighting every form of illegal activity in this field. These commitments have also been approved by the G20 Leaders in the following 'Statement on Countering Terrorism[217]'.

Significantly, the activity of the UN Security Council has also been critical for the advancement of a specific European framework regarding the protection of cultural heritage. Adopted at the level of the Council of Europe and not yet in force, the new Nicosia Convention on Offences Relating to Cultural Property[218] is considered to be a manifestation of hopes regarding the protection of cultural heritage, obliging its State Parties to apply common standards for criminal offences relating to cultural property. It will be the only international treaty specifically dealing with the criminalization of the illicit trafficking of cultural property and it will establish a number of criminal offences, shifting from

[217] See 'G20 Leaders' Statement on Countering Terrorism', 7 July 2017, viewed 1 February 2021, available at <http://europa.eu/rapid/ press-release_STATEMENT-17-1955_en.htm>.
[218] Council of Europe Convention on Offences relating to Cultural Property, 19 May 2017, CETS n. 221

intentional destruction, theft and illegal trafficking to illegal acquisition and placing on the market.

This joint international action also led to the implementation of a new policy at the EU level in the shared commitment to pursue the fight against the destruction of cultural heritage in armed conflict zones and against terrorism. On September 21, 2017, international diplomats, experts and NGO representative convened at the UN for an event called 'Protecting Cultural Heritage from Terrorism and Mass Atrocities: Links and Common Responsibilities[219]'. After having commented the implementation of UN Security Council Resolution 2347, the event hosts have commonly recognized the concrete danger of gross violation of human rights when the response of the international community against the destruction of cultural heritage is irresolute and weak. Later on, in the occasion of the 39th Session of UNESCO's General Conference in November 2017, Irina Bokova - ex Director-General of UNESCO - and Fatou Bensouda - Prosecutor of the International Criminal Court (ICC) -, decided to formalize the spirit of a renewed international cooperation in a Letter of Intent[220]. In the general aim of further strengthening their collaboration, the document has declared the mutual interest in establishing a comprehensive cooperation agreement in the near future. Meaningfully, the signing of the Letter of Intent occurred in parallel with a high-level international panel on 'Responding to Cultural Cleansing, Preventing Violent Extremism' at the UNESCO Headquarters, where both petitioners took part. On the occasion, Mr. Bokova recognized that the deliberate destruction of cultural heritage not only affects peoples' historical identity, but also fuels sectarian violence and hampers post-conflict recovery and peacebuilding[221]. This is why UNESCO and the ICC

[219] Event 'Protecting Cultural Heritage from Terrorism and Mass Atrocities: Links and Common Responsibilities', Rome, 21 September 2017, viewed 1 February 2021, available at <https://www.esteri.it/mae/en/sala_stampa/interventi/2017/10/discorso-dell-on-ministro-all-evento_8.html>.

[220] 'International Criminal Court and UNESCO Strenghten Cooperation on the Protection of Cultural Heritage', 6 November 2017, viewed 1 February 2021, available at <https://en.unesco.org/news/international-criminal-court-and-unesco-strengthen-cooperation-protection-cultural-heritage>.

[221] UNESCO High-Level panel 'Responding to Cultural Cleansing, Preventing Violent Extremism', 6 November 2017, viewed 1 February 2021, available at < https://en.unesco.org/events/responding-cultural-cleansing-preventing-violent-extremism>.

must strengthen their cooperation for the preservation of cultural property in armed conflicts, as a humanitarian imperative and a security issue. In light of this, Prosecutor Bensouda stressed that only through a multi-faceted and collaborative approach is it possible to appropriately address the destruction of cultural heritage. It this regard, it is worth recalling that a synergic collaboration has already taken place in the context of the *Al Mahdi* case, in which UNESCO helped the ICC providing its expertise.

The latest developments in the international arena seem to have assigned an increasing role to cultural heritage, as the embodiment of the preservation of human history. The recognized interconnection between culture, peace and security has resulted in the crucial need to integrate the cultural dimension in conflict prevention and resolution. To meet that challenge, it is undoubtedly necessary for the international community to carry the responsibiliy to protect the people affected when acts of intentional destruction of cultural property result in the perpetration of gross violation of human rights. This is not only a political and security imperative. It is first and foremost a moral obligation.

CONCLUSIONS

The dramatic images of damage and outright destruction of cultural heritage in Syria, Iraq, Afghanistan and Mali have caused shock and condemnation within the entire international community. A wave of devastating human suffering has accompanied the irreparable loss of precious monuments, sites and sacred places. Iconoclasm seems to have become an ordinary feature of contemporary warfare: radical groups resorted to heritage destruction as part of a planned strategy to inflict physical and moral annihilation, in the attempt to assert their absolute supremacy over the population. This is why cultural losses are inevitably embedded in the narrative of a real human tragedy, in which attack on cultural heritage is most likely intended as an assault on the very identity of the targeted people and its right of existence. An intolerable offence that is inextricably intertwined with the violation of the dignity and fundamental human rights of its members. If so, what is the alleged connection between cultural heritage and mass atrocities?

The analysis has tried to demonstrate that the deliberate destruction of cultural heritage is often accompanied by other grave assaults on human rights. Acts of intentional destruction of cultural heritage can thus amount to war crimes, crimes against humanity, genocide and ethnic cleansing. To get to the heart of the matter, it was first essential to review the various legal definitions of ‘cultural heritage’ contained in the specialist culture conventions. What has emerged is that the term has acquired as many meanings as the parameters of what is encompassed by international cultural heritage law have expanded over the last century. A faithful summary of the development of its definition can be summarized by stating that

culture constitutes an intrinsic and essential part of the very identity of a population. But what lies behind the destruction of cultural heritage? Behind the threats occurring from collateral damage, forced neglect, and the illicit trafficking of cultural objects connected with terrorism, it was found that the intentional destruction of cultural heritage carried out with absolute discriminatory intent, is the one inextricably linked with the perpetration of mass atrocity crimes. Whatever the reasons behind this deliberate destruction, the human costs cannot be disregarded. Less simply quantifiable than material loss but definitely more resonant, they are countless and, unfortunately, hardly repairable.

In the face of such an ungodly crime, what are the legal consequences under international law? The research has addressed the criminalization of acts against cultural heritage in both the contexts of armed conflict and peacetime, by analyzing one at a time each of the mass atrocity crimes. Alongside the two qualifications of war crime and crime against humanity, fundamental was the analysis of the destruction of cultural heritage as an intent to commit genocide. Indeed, the research has shown that genocide does not necessarily refer to physical destruction alone, but - as wisely pointed out by the Jewish jurist Lemkin – to a coordinated plan aimed at the eradication of essential foundations of the life of a targeted community. This can result in the 'destruction' of culture, political and social institutions, language, national feelings and religion, as well as liberty and dignitiy. The eradication of historical traces and symbols underlying the identity of a specif group is what is called 'cultural genocide' or 'cultural cleansing'. Regretfully, this is what is happening with the ethnical Muslim group of the Rohinga in Myanmar, which have been systematically discriminated through the government's genocidal policies, including, among a series of terrible practices, the destruction of their tangible and intangible cultural heritage. The assessment of the case was essential to answer a fundamental question: what are the differences between the prohibition of destruction of cultural heritage in the two distinct contexts of armed conflict and peacetime? The analysis has tried to insist on the fact that - although criminalization under international law is much more uncertain - it would be

simply illogical to ensure greater protection during an armed conflict rather than in peacetime. Indeed, as in the case of the Rohingya, the overall genocidal acts have been silently perpetrated since the 1970s. Significantly, international criminal law is progressively prohibiting the deliberate destruction of cultural heritage during periods of peacetime when it has been targeted for discriminatory reasons. In this regard, the International Criminal Court has recently authorized an investigation in relation to any of the crimes within its jurisdiction committed across the Myanmar-Bangladesh border, thus recognizing the existence of a reasonable basis to believe the widespread and systematic acts of violence have been committed. If the final judgment will comprehensively succeed in prosecuting the criminal conducts, it will constitute a valid starting point in equating the two protection regimes of armed conflict and peacetime.

The thesis proceeded with the analysis of the individual criminal responsibility for deliberate destruction of cultural heritage. The question sought to be answered was: what are the conditions for prosecuting individuals under international criminal law when destroying cultural heritage? It has been shown – as highlighted by Francioni and Lenzerini – that two requirements need to be fulfilled. First, the conduct of the individual accused must have an 'objective' element, constituting the breach of an international obligation. Second, such conduct must be 'subjectively' correlated to the individual held responsible. The analysis has subsequently provided a brief overview of the ICTY case law, which showed that the tribunal has been effective in addressing individual criminal responsibility for the intentional destruction of cultural heritage. Special attention was paid to the *Al Mahdi* case brought before the ICC, in which, for the first time, the crime against cultural heritage alone was considered sufficient to trigger the individual's criminal responsibility. However, the Court's decision ignored the fact that the destruction of Timbuktu's cultural and religious heritage was part of a systematic and discriminatory attack directed against the people of Timbuktu and which resulted in the massive violation of their human rights. Taking this into account would

obviously have led to an aggravation of Al Mahdi's position.

While there exist recent cultural heritage international treaties regulating individual criminal responsibility, when responding to the question of how the regime of State responsibility for cultural crimes has been implemented under international humanitarian law, the research revealed an evident *vacuum* in its articulation. Indeed, the only provisions can be found in Article 91 of Protocol I to the 1949 Geneva Convention and Article VI of the 2003 Unesco Declaration – of course not legally binding. Subsequently, the State responsibility has been increasingly articulated in the case-law of the ICJ, through the analysis of the two *Genocide* cases *Bosnia and Herzegovina v Yugoslavia and Croatia v Serbia.* Indeed, they both confirmed the State responsibility not only for perpetrating genocide, but also for the violation of other obligations under the Genocide Convention such as failing to prevent or punish genocide. Regretfully, they failed to hold accountable States for cultural cleansing. Finally, State responsibility has also been

envisioned in connection with the doctrine of *responsibility to protect* (R2P), outlined in the 2005 World Summit Outcome, which assigned each individual State the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

When examing the progress made within the framework of the United Nations on the theme of cultural heritage and mass atrocities, the overview of the role of the UN Security Council has highlighted a progressive interest in addressing the unlawful destruction of cultural heritage as part of its mandate, and thus as a threat to the maintenance of international peace and security. This growing concern has resulted in the adoption of several resolutions addressing the destruction and theft of cultural heritage in situations of armed conflict in country-specific situations, such as Iraq, Afghanistan, Syria and Mali. However, even if the UNSC interventions had succeeded in instilling a kind of collective discipline in the general interest to humanity of the protection of cultural heritage, it remained questionable whether the Security Council has considered the destruction of

cultural heritage in relation to human rights violations and not only as a threat to the international peace and security. This consideration was later confirmed in the course of the analysis of Resolution 2347. Indeed, while representing a milestone in the common protection of cultural heritage as the first resolution committed exclusively to the protection of cultural property, it seems to present some inconsistencies in the way the Security Council has identified the link between destruction of cultural heritage and gross human rights violations. Despite having clearly recognized already in the past that cultural losses may result in human rights abuses, its overall intervention ignored the human dimension of cultural crimes, viewing the problem only through the lens of manteinance of international peace and security. At the same time, however, the resolution was extremely important as it managed to establish a 'global cultural heritage governance' built around the principle of international cooperation between a variety of heritage stakeholders, tools and mechanisms. But what have been the developments since Resolution 2347? Significantly, the international community is increasingly assigning a pivotal role to cultural heritage protection. With regard to the specific topic of our research, at the recent UN event 'Protecting Cultural Heritage from Terrorism and Mass Atrocities: Links and Common Responsibilities', it has finally been explicitly recognized the interconnection between assaults on cultural heritage and human suffering.

It is difficult not to react to the disavowal of the courageous achievements of culture without immense scorn and sadness. When in 2015 ISIS released a video showing the triumphant destruction of the Mosul Museum with hammers and drills, the world was shocked. Horror, humiliation and barbarism have been accompanied by the sudden fear of losing everything. Our history. Our roots. Our sense of life. What is clear is that such a shameful destruction will survive as a reminder of how low humanity can sink. Once again, it has been impossible to ignore the link between the outrageous destruction of cultural heritage and human rights violations.

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SUMMARY

This thesis explores the connection between the destruction of cultural heritage and the perpetration of mass atrocity crimes in the attempt to develop a conceptual framework for meeting the challenge of protecting cultural property against war crimes, crimes against humanity, genocide and ethnic cleansing.

The practice of intentional destruction of cultural heritage has represented a scourge of humanity throughout all of its history. As early as 391 AD, Theophilus, the patriarch of Alexandria, was encouraged to oppress paganism on the orders of the Christian Emperor Constantine during the persecution of pagans in the late Roman Empire. When the pagans took refuge in the *Temple of Serapis* in Alexandria, the Christians stormed the sanctuary destroying it. In China, during Mao Zedong's Cultural Revolution, everything related to traditional Chinese culture was destroyed. It was more than just a revolt to instill an ultra-left-party-system in China: thousand of historical sites, scrolls, relics and books were damaged as part of the communist campaign's agenda. It seemed that the more permanent solution to rid the country of traditionalist influences was through the removal of their symbols and the destruction of old customs, habits and ideas. During the 1991-1999 Wars of Yugoslav Succession, the systematic destruction of religious structures and historical monuments in Bosnia-Herzegovina, Croatia and Kosovo was one of the largest demolition of cultural heritage in Europe since WWII. In March 2001, the military and para-military forces of the Taliban Government of Afghanistan destroyed the two Buddhas of Bamiyan moved by the fanatic conviction that the 'real God is only Allah, and all other false gods should be removed'. What is clear is that the unlawful destruction of the world's most cherished antiquities has rarely been an end in itself. There are different reasons why cultural property has been deliberately targeted and they all underlie the existing link between the destruction of cultural heritage and commission of mass atrocity crimes. Indeed, the unifying feature of the examples provided is the discriminatory intent of the perpetrators, who deliberately destroy cultural heritage

intending to erase the distinctiveness of a given human community. In this way, they attempt to annihilate communities by destroying those cultural touchstones that define their identity and memory. Therefore, when perpetrators destroy cultural heritage, 'they demolish much more than an outstanding and irreplaceable object. They destroy the special – often spiritual – connection between that object and a human community. As pointed out by the United Nations Special Rapporteur on cultural rights, Karima Bennoune, it 'is impossible to separate a people's cultural heritage from the people itself and the people's rights[222]'. When talking about the intentional destruction of cultural heritage, it is precisely such spiritual and social meaning the real target of perpetrators.

Any exploration of the topic had to start with the question: what is "cultural heritage"? This is why the first chapter addressed the various legal definitions of 'cultural heritage' contained in the specialist culture conventions. Significantly, it was only with the Consitution of the United Nations Educational, Scientific and Cultural Organization ('UNESCO Constitution') in 1945 that cultural heritage has developed into a specific subject of international law. The treaty - primarily aimed at preventing new widespread destruction of cultural heritage after World War II - was the first one implementing UNESCO's cultural mandate as well as the first international treaty of universal application focusing exclusively on the protection of cultural property in armed conflict. But most importantly, for the first time it set out specific criteria for the definition of 'cultural property' and recognized that 'damage to cultural property belonging to any people whatsoever means damage to cultural heritage of all mankind, since each people makes its contribution to the culture of the world[223]'. Since the adoption of the 1954 Convention, international law on the protection of cultural property has constantly been evolving and transforming. In this sense, the evolving definitions contained in the subsequent cultural conventions – such as the 1970 UNESCO Convention, the 1972 World

[222] See 'Report of the Special Rapporteur in the field of cultural rights', UN Doc A/71/317, 9 August 2016, para. 53.
[223] Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240, art. 1 ('1954 Hague Convention').

Heritage Convention, the 2001 Convention on the Protection of the Underwater Cultural Heritage – are proof that the term has acquired as many meanings as the parameters of what is encompassed by international cultural heritage law have expanded over the last century. In addition, they have also reflected the historical contexts in which the documents were drafted as well as the expanding and diversifying membership of UNESCO and priorities of its Director-General at the relevant times.

Undoubtedly, the increasing complexity in the ways of thinking about 'cultural property' has led to an extraordinary expansion of the scope of protection. Indeed, the latest cultural conventions have grown from immovable and movable heritage to include 'intangible heritage', which refers to practices, expressions, skills and knowledge that do not necessarily require a specific place or material objects, but are still capable of providing a sense of identity and continuity among the generations. What has emerged from this short overview is that there is no universal legal definition of cultural property. Each UNESCO convention, recommendation and declaration has tried to define the subject in accordance with the specific purpose and scope of application. A faithful summary of the development of its definition can be summarized by stating that culture constitutes an intrinsic and essential part of the very identity of a population, forming an integral part of its collective dignity, history and civilization. But what lies behind the destruction of cultural heritage? The final section of chapter one tried to explain that behind the threats occurring from collateral damage, forced neglect, and the illicit trafficking of cultural objects connected with terrorism, the intentional destruction of cultural heritage carried out with absolute discriminatory intent, is the one inextricably linked with the perpetration of mass atrocity crimes. Whatever the reasons behind this deliberate destruction, the human costs cannot be disregarded. Less simply quantifiable than material loss but definitely more resonant, they are countless and, unfortunately, hardly repairable.

In the face of such an ungodly crime, chapter two discussed the legal consequences deriving from the deliberate destruction of cultural heritage under

international law. The research has addressed the criminalization of acts against cultural heritage in both the contexts of armed conflict and peacetime, by analyzing one at a time each of the mass atrocity crimes. We can generally say that two different relevant approaches have been followed to criminalize acts against cultural property in times of war, and therefore prosecutable as war crimes. The first one, the *civilian-use* rationale, incorporates a traditional international humanitarian law orientation and reflects the idea of prioritizing the safeguarding of the civilian population and those who are not involved in the hostilities from deliberate attacks. As a corollary of this approach, protection is afforded primarily only to buildings such as hospitals, churches and schools given that their devastation involves the killing of many civilians and affects potential use by other civilians in the course of a conflict. The second rationale, the *cultural-value* approach, is aimed at directly criminalizing acts against cultural heritage with the specific aim of protecting the property for its intrinsic and universal value. In addition to these two orientations, a third rationale is represented by the *human dimension* approach, which can be mainly inferred from the jurisprudence of international criminal tribunals and qualify acts against cultural property as crimes against humanity. Indeed, in the majority of cases involving the intentional destruction of cultural heritage, the real target of perpetrators is not the 'heritage in itself but, rather, the communities and persons for whom the heritage is of special significance[224]'. This unequivocal discriminatory persecutory intent is of course better reflected in the notion of crimes against humanity. In this regard, in May 2015, the UN General Assembly, condemning the barbaric acts of destruction and looting of the cultural heritage of Iraq carried out by ISIL, stated that 'the destruction of cultural heritage, which is representative of the diversity of human culture, erases the collective memories of a nation, destabilizes communities and threatens their cultural identity [225] '. By doing so, the General Assembly 'emphasized that the principal value affected by destruction of cultural goods is

[224] F.FRANCIONI, & A.F.VRDOLJAK, '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, p.81.
[225] UNGA Resolution 69 (281) (28 May 2015) UN Doc A/RES/69/281.

the cultural and spiritual significance of cultural heritage[226]'. Regrettably, the analysis showed that the current legal regime has usually failed to focus on the human dimension, which generally remains hidden when attacks against cultural property are identified only as war crimes and not as a crime against humanity. Criminalization would therefore benefit from a more nuanced approach placing 'such crimes at the intersection between crimes against property and crimes against people[227]' and where the three different existing dimensions underlying the preservation of cultural heritage are contemplated as complementary rather than contradictory. Alongside the two qualifications of war crime and crime against humanity, fundamental was the analysis of the destruction of cultural heritage as an intent to commit genocide. Indeed, the research has shown that genocide does not necessarily refer to physical destruction alone, but - as wisely pointed out by the Jewish jurist Lemkin – to a coordinated plan aimed at the eradication of essential foundations of the life of a targeted community. This can result in the 'destruction' of culture, political and social institutions, language, national feelings and religion, as well as liberty and dignity. The eradication of historical traces and symbols underlying the identity of a specif group is what is called 'cultural genocide' or 'cultural cleansing'. Regretfully, this is what is happening with the ethnical Muslim group of the Rohinga in Myanmar, which has been systematically discriminated through the government's genocidal policies, including - among a series of terrible practices - the destruction of their tangible and intangible cultural heritage. The assessment of the case was essential to answer a fundamental question: what are the differences between the prohibition of destruction of cultural heritage in the two distinct contexts of armed conflict and peacetime? The analysis has tried to insist on the fact that - although criminalization under international law is much more uncertain - it would be simply illogical to ensure greater protection during an armed conflict rather than in peacetime. Indeed, as in the case of the Rohingya, the overall genocidal acts have been silently perpetrated

[226] See *supranote* 53.
[227] Y.GOTTLIEB, '*Attack Against Cultural Heritage as a Crime Against Humanity'*, 52 (2020) in Case Western Reserve Journal of International Law, p. 289.

since the 1970s. Significantly, international criminal law is progressively prohibiting the deliberate destruction of cultural heritage during periods of peacetime when it has been targeted for discriminatory reasons. In this regard, the International Criminal Court has recently authorized an investigation in relation to any of the crimes within its jurisdiction committed across the Myanmar-Bangladesh border, thus recognizing the existence of a reasonable basis to believe the widespread and systematic acts of violence have been committed. If the final judgment will comprehensively succeed in prosecuting the criminal conducts, it will constitute a valid starting point in equating the two protection regimes of armed conflict and peacetime.

The third chapter proceeded with the analysis of the individual criminal responsibility for deliberate destruction of cultural heritage. The question sought to be answered was: what are the conditions for prosecuting individuals under international criminal law when destroying cultural heritage? It has been shown – as highlighted by Francioni and Lenzerini – that two requirements need to be fulfilled. First, the conduct of the individual accused must have an 'objective' element, constituting the breach of an international obligation. Second, such conduct must be 'subjectively' correlated to the individual held responsible. The analysis has subsequently provided a brief overview of the ICTY case law on cultural persecution through the review of four case studies: *Jokić, Strugar, Hadzihasanovic and Kubura, Prlić et al*. The overall picture suggested that that the tribunal has been effective in establishing and implementing the individual criminal responsibility for the deliberate destruction of cultural heritage. Regarding the material elements (*actus reus*) of war crimes against cultural heritage, the case-law has shown the criminalization of attacks against cultural heritage would apply as long as the damaged or destroyed property is not used for military purposes at the time of hostility. As to the requisite intent (*mens rea*), the perpetrators must act with the intent – direct or indirect - to damage or destroy the property in question. Although *Prlić et al* represented a failure in denying that destruction of cultural heritage can amount to a crime against humanity of

persecution, the hope is that in determining the individual criminal responsibility for deliberate destruction of cultural heritage, the *cultural-value* and the *human-dimension* rationales could mutually reinforce and do not exclude each other[228]. Special attention was subsequently paid to the *Al Mahdi* case brought before the ICC, in which - for the first time - the crime against cultural heritage alone was considered sufficient to trigger the individual criminal responsibility. Specifically, the ruling concerned *Ahmad Al Faqi Al Mahdi*, who was sentenced to nine years' imprisonment for the war of crime of intentionally razing to the ground ten religious and historic buildings between June and July 2012 in Timbuktu, Mali. Disappointingly, the Court's decision ignored the fact that the destruction of Timbuktu's cultural and religious heritage was part of a systematic and discriminatory attack directed against the people of Timbuktu and which resulted in the massive violation of their human rights. Taking this into account would obviously have led to an aggravation of Al Mahdi's position, guilty of both war crimes and crimes against humanity.

Chapter four analyzed States responsibility for their breach of cultural heritage obligations. The regime of State responsibility for acts of intentional destruction of cultural heritage is regulated under customary international law and it is extensively codified by the Draft Articles on State Responsibility for Internationally Wrongful Acts, which formulate the general conditions under international law in the case of wrongful actions or omissions by the State, and the legal consequences which flow therefrom. The Draft Articles were adopted in 2001 by the International Law Commission (ILC) and even though they have never become a legally binding multilateral instrument, they are commonly recognized as 'a document reflecting general principles of international law on the responsibility of States for wrongful acts[229]'. Whereas it is not possible to find a specific responsibility regime in cultural heritage treaties, the Draft Articles can be invoked in the case of wrongful conducts originating from the violations of the

[228] See F.FRANCIONI, & A.F.VRDOLJAK, *'The Oxford Handbook of International Cultural Heritage Law',* Oxford University Press, 2020, p.114.
[229] *Ibid*., p.60.

obligations established by these treaties. Indeed, while there exist recent cultural heritage international treaties regulating individual criminal responsibility, an evident *vacuum* is noticeable in the articulation of State responsibility for cultural crimes under international humanitarian law. Indeed, the only provisions can be found in Article 91 of Protocol I to the 1949 Geneva Convention and Article VI of the 2003 Unesco Declaration – of course not legally binding. This evident lacuna of provisions regarding State responsibility is even more inconsistent considering that most of the provisions of cultural heritage treaties have recognized that the duty of protection and management of cultural heritage belongs primarily to the States. In the second section of Chapter four, the concept of State responsibility has been increasingly articulated through the analysis of the International Court of Justice (ICJ) case-law. In the two *Genocide* cases *Bosnia and Herzegovina v Yugoslavia and Croatia v Serbia,* the Court confirmed the State responsibility not only for perpetrating genocide, but also for the violation of other 'accessory' obligations under the Genocide Convention, such as failing to prevent or punish genocide. Regretfully, they failed to hold accountable States for cultural cleansing. Finally, State responsibility has also been envisioned in connection with the doctrine of *responsibility to protect* (R2P) such heritage. The International Commission on Intervention and State Sovereignty (ICISS) has been the first one to articulate the doctrine in its report entitled 'The Responsibility to Protect'. The document - in addition to recognize a residual responsibility to the international community when States fail to safeguard their people's rights - found that sovereign States have not only the right to regulate their own affairs, but also the primary 'responsibility' to protect their populations from avoidable catastrophe. Later on, in September 2005, at the high-level UN World Summit meeting, Member States formally accepted the principle of the responsibility to protect. As outlined in the 2005 World Summit Outcome, 'each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity[230]'. In this framework, the meaning of the

[230] UNGA Resolution 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138.

term ‘atrocitity crimes’ has been expanded to the point of including the relatively new expression ‘ethnic cleansing’ which - while not being recognized as an independent crime under international law - ‘includes acts that are serious violations of international human rights and humanitarian law that may themselves amount to one of the recognized atrocity crimes, in particular crimes against humanity[231]’. From its side, the international community - through the United Nations - has committed to encourage and help States in building adequate capacity to protect their populations from mass atrocities crime. It also accepted ‘the responsibility to use appropriate diplomatic, humanitarian and other peaceful means[232]’ and to take collective action, in a timely and decisive manner, when peaceful means are ‘inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity[233]’.

When examing the progress made within the framework of the United Nations on the theme of cultural heritage and mass atrocities in chapter five, the overview of the role of the UN Security Council has highlighted a progressive interest in addressing the unlawful destruction of cultural heritage as part of its mandate, and thus as a threat to the maintenance of international peace and security. This growing concern has resulted in the adoption of several resolutions addressing the destruction and theft of cultural heritage in situations of armed conflict in country-specific situations, such as Iraq, Afghanistan, Syria and Mali. However, even if the UNSC interventions had succeeded in instilling a kind of collective discipline in the general interest to humanity of the protection of cultural heritage, it remained questionable whether the Security Council has considered the destruction of cultural heritage in relation to human rights violations and not only as a threat to the international peace and security. This consideration was later confirmed in the course of the analysis of Resolution 2347. Indeed, while representing a milestone

[231] United Nations ‘Framework for Analysis for Atrocity Crimes – A Tool for Prevention’, July 2014, p. 1, viewed 1 February 2021, available at < https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf>.
[232] *Ibid.*
[233] *Ibid.*

in the common protection of cultural heritage as the first resolution committed exclusively to the protection of cultural property, it seems to present some inconsistencies in the way the Security Council has identified the link between destruction of cultural heritage and gross human rights violations. Despite having clearly recognized already in the past that cultural losses may result in human rights abuses, its overall intervention ignored the human dimension of cultural crimes, viewing the problem only through the lens of manteinance of international peace and security. At the same time, however, the resolution was extremely important as it managed to establish a 'global cultural heritage governance' built around the principle of international cooperation between a variety of heritage stakeholders, tools and mechanisms. But what have been the developments since Resolution 2347? Significantly, the international community is increasingly assigning a pivotal role to cultural heritage protection. With regard to the specific topic of our research, at the recent UN event 'Protecting Cultural Heritage from Terrorism and Mass Atrocities: Links and Common Responsibilities', it has finally been explicitly recognized the interconnection between assaults on cultural heritage and human suffering.

The attempt to develop a conceptual framework for meeting the challenge of protecting cultural heritage against mass atrocity crimes has certainly not proven easy. The terrain was fraught and complex but the subject has absolutely been worthy of a great deal of discussion, not only because cultural heritage represents 'the rich and diverse legacy of human artistic and engineering ingenuity, but also because it is intertwined with the very survival of a people as a source of collective identity[234]'. This is why 'defending cultural heritage is more than a cultural issue; it is a security imperative that cannot be separated from the protection of human lives'[235]. The deliberate destruction and theft of cultural heritage perpetrated by the Islamic State of Iraq and the Levant (ISIL, or sometimes ISIS or Da'esh) in

[234] T.G.WEISS & N.CONNELLY, '*Cultural Cleansing and Mass Atrocities: Protecting Cultural Heritage in Armed Conflict Zones*', J.Paul Getty Trust 2017, p. 4. See also J.NAFZIGER in '*The Oxford Handbook of International Cultural Heritage Law'*, Oxford University Press, 2020, Chap. 6.
[235] UNSC Resolution 2347 (24 March 2017) UN Doc S/RES/2347.

Middle East and North-West Africa since 2014 has been devastating. Nothing has been spared from this unbridled destruction: from Sufi cultural sites, mosques and historic Muslim tombs to prized historical sites such as Palmyra, Nimrud and Hatra. Individual states, international organizations, religious authorities, and people worldwide have strongly reacted against such acts of inhumanity and intolerance. It is difficult not to react to the disavowal of the courageous achievements of culture without immense scorn and sadness. When in 2015 ISIS released a video showing the triumphant destruction of the Mosul Museum with hammers and drills, the world was shocked. Horror, humiliation and barbarism have been accompanied by the sudden fear of losing everything. Our history. Our roots. Our sense of life. What is clear is that such a shameful destruction will survive as a reminder of how low humanity can sink. Once again, it has been impossible to ignore the link between the outrageous destruction of cultural heritage and human rights violations.