

# LUISS



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## **The War Crime of Destruction of Cultural Heritage: Recent Developments in the Light of the Ukraine War**

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## Introduction:

The destruction of monuments, buildings, places of worship and culturally significant sites during armed conflict is as old as the idea of war itself. As epitomized by Cato the Elder's notorious exhortation: "*Carthago delenda est*", "*Carthage must be destroyed*", in ancient times the obliteration of the adversaries' territories and cultural properties served as evidence of victory and, as such, was often practised. Carthage, for example, met such fate and, after Rome won the conflict<sup>1</sup>, the city was indeed destroyed: no monument, temple, or tomb was spared. According to legend, salt was even spread over the ruins so that not even grass could regrow, and Carthage's cultural heritage and value would remain forever in ancient history<sup>2</sup>. The eradication of cultural sites continued in more recent history, and similar tragedies followed that of Carthage, like the devastation of the city of Warsaw at the end of the Second World War<sup>3</sup>, the destruction of Dubrovnik's Old Town during the conflicts in the former Yugoslavia<sup>4</sup>, up to the damage to the cathedral of Odesa in 2023 during the Russia-Ukraine war. Yet, amidst these calamities, international law tools have emerged to protect cultural heritage, recognizing its dual significance: as a custodian of a people's identity and self-determination, and as a protector of the heritage of all humankind<sup>5</sup>.

This paper aims to provide a comprehensive analysis of the war crime of the destruction of cultural heritage, with a specific focus on the recent developments in the Ukraine war. Indeed, it will apply the means of protection of cultural heritage in international law to the context of the Ukraine war to identify Russia's actions towards Ukrainian cultural heritage as a war crime. The structure of the paper is as follows:

Chapter 1 will explore the protection of cultural heritage in international criminal law, beginning with an overview of the non-penal modes of protection of cultural heritage in international law, which include conventions and declarations, norms of customary international law, UN Security Council resolutions, and the role of international organizations. It will follow with an in-depth

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<sup>1</sup> The Third Punic War (149-146 BC).

<sup>2</sup> Ridley, Ronald T. "To Be Taken with a Pinch of Salt: The Destruction of Carthage." *Classical Philology* 81, no. 2 (1986), page 140. <http://www.jstor.org/stable/269786>.

<sup>3</sup> Bugnion, François. "La Genesi della Protezione Giuridica dei Beni Culturali in Caso di Conflitto Armato". *The International Review of the Red Cross*, Vol. 86 (2004), page 2.

<sup>4</sup> Vrdoljak, Ana Filipa. "The Criminalisation of the Intentional Destruction of Cultural Heritage". *Routledge EBooks*, June 14, 2017, page 8. <https://doi.org/10.4324/9781315676715-12>.

<sup>5</sup> Merryman, John Henry. "Two Ways of Thinking About Cultural Property". *The American Journal of International Law*, Vol. 80, no. 4, October 1986, pages 831 and 832. <https://doi.org/10.2307/2202065>.

historical analysis of international criminal law, exploring the Nuremberg and Tokyo trials and their legacy, focusing on the trial of Alfred Rosenberg, which is the first case to establish individual criminal responsibility for the destruction of cultural property. Chapter 1 will proceed to analyse international crimes related to the destruction of cultural heritage, namely: genocide, crimes against humanity and war crimes. While the first two will be dealt with briefly, as their extensive analysis goes beyond the purpose of this paper, which is centred on war crimes, the latter will be analysed extensively. Indeed, the whole Chapter 2 will be dedicated to the legal analysis of the war crime of destruction of cultural heritage. This will be achieved through a definition of war crime, an extensive study of Article 8 (2) of the Rome Statute for the International Criminal Court and an analysis of the relevant jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court. Chapter 2 will end with an analysis of the International Criminal Court's Policy on Cultural Heritage of 2021. Chapter 3 will focus on Ukraine, by applying the theoretical frameworks of international criminal and humanitarian law to a concrete reality. It will provide an up-to-date list of the damaged cultural sites during the 2022 Ukrainian War, it will explain how Russia's destruction of Ukraine's cultural heritage falls within the category of war crimes, and it will analyse the response of both the international community and the International Criminal Court to Russia's actions. The paper will end with a Conclusion, summarizing the points made.

## Chapter 1: The Protection of Cultural Heritage in International Criminal Law:

### *Introduction:*

The focus of this chapter is on how cultural heritage is protected within international criminal law. Indeed, the chapter analyses conventions, declarations, norms of international customary law, UN Security Council resolutions, and works of international organizations with this purpose. It then explores extensively the Nuremberg and Tokyo trials, explaining their relevance in the development of modern international criminal law. The chapter continues by analysing international crimes related to the destruction of cultural heritage, focusing on war crimes. The structure of the chapter follows the same order as the information just presented: the first subparagraph will, indeed, be dedicated to the analysis of the non-penal modes of protection of cultural heritage in international law (conventions, declarations, norms of international customary law, UN Security Council resolutions, and works of international organizations); the second subparagraph will provide an historical analysis of the Nuremberg and Tokyo trials and their legacy; the third and fourth subparagraphs will briefly analyse the destruction of cultural heritage as intent to commit genocide and the destruction of cultural heritage as crimes against humanity, respectively. The last subparagraph will analyse the destruction of cultural heritage as a war crime, and it serves as a transitional element to the subsequent chapter.

### *1.1: Brief Description of the non-penal modes of protection of cultural heritage in International Law*

The first legal attempt to implement rules during a time of war with the intent to protect cultural goods comes from the “Lieber Code<sup>6</sup>”, which was published during the American Civil War in 1863 and consisted of a set of instructions for the Union Army on how to act during the conflict<sup>7</sup>. Being a directive issued by President Abraham Lincoln towards the Union soldiers, and being therefore binding only on the latter, the Lieber Code was not an international agreement<sup>8</sup>. Nevertheless, its significance reverberates in international law, as its principles inspired the 1899 and 1907 Hague

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<sup>6</sup> The Lieber Code of 1863, Article 34, Article 35, Article 36, Article 38. In “*Avalon Project - General Orders No. 100 : The Lieber Code*”, Yale.edu, Avalon Project at Yale Law School (2019). [https://avalon.law.yale.edu/19th\\_century/lieber.asp#sec1](https://avalon.law.yale.edu/19th_century/lieber.asp#sec1).

<sup>7</sup> Zhang, Yue. “Customary International Law and the Rule against Taking Cultural Property as Spoils of War,” *Chinese Journal of International Law* 17, no. 4, December 1, 2018, page 952. <https://doi.org/10.1093/chinesejil/jmy030>.

<sup>8</sup> *Ibidem*.

Conventions<sup>9</sup>, which are the first formal binding international obligations for the protection of cultural heritage in times of war<sup>10</sup>. Particularly relevant are Articles 27 and 56 of the 1907 Hague Convention. The former article says that: “in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes<sup>11</sup>”. In this way, the article expresses the necessity to protect culturally significant goods and outlines broad categories of goods that follow within this concept. The protection of these goods is, however, contingent upon them not being used for military purposes. Nevertheless, the emphasis of the article is on sparing them “as far as possible”, indeed acknowledging that cultural heritage must be preserved even during military operations. Article 56 of the 1907 Hague Convention, in turn, asserts that culturally significant properties, even when belonging to a State, should be treated as private property, and, as such, their destruction or damage is forbidden<sup>12</sup>. This article follows the definition of cultural heritage that recognizes its value in maintaining the identity of a people, and indeed, it states that the necessity to protect cultural property comes directly from identifying the latter as civilian property. Cultural property must, therefore, be spared during war precisely because it is considered civilian property and wars should target military objectives rather than civilian ones<sup>13</sup>. However, during the First World War, incidents such as the torching down of the Leuven University Library and the bombing of the Cathedral of Rheims proved the insufficiency and inefficiency of protective measures guaranteed by the existing provisions<sup>14</sup>.

After WW1, the intent to better protect cultural goods reminisced, and in 1935 the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, or Roerich Pact, proposed by the Russian philosopher Nicholas Roerich, was ratified by the United States and nine

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<sup>9</sup> The formal name of what is referred to in the paper as “1899 Hague Convention” is: “Convention (II) with Respect to the Laws and Customs of War on Land”, while the formal legal name of what is referred to as “1907 Hague Convention” is: “Convention (IV) respecting the Laws and Customs of War on Land”.

<sup>10</sup> Vrdoljak, Ana Filipa. “The Criminalisation of the Intentional Destruction of Cultural Heritage”. *Routledge EBooks*, June 14, 2017, page 3. <https://doi.org/10.4324/9781315676715-12>.

<sup>11</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land. The Hague, October 18, 1907, Article 27.

<sup>12</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land. The Hague, October 18, 1907, Article 56.

<sup>13</sup> Rüdiger, Wolfrum. “Cultural Property, Protection in Armed Conflict”. *Max Planck Encyclopedia of Public International Law*, July 2010, page 1. <https://doi.org/10.1093/law:epil/9780199231690/e278>.

<sup>14</sup> Forrest, Craig. “Cultural Heritage and Armed Conflicts.” In *International Law and the Protection of Cultural Heritage*, Chapter 3. Routledge (2009), pages 69 and 70.

Latin American<sup>15</sup> nations<sup>16</sup>, with the intent to protect and safeguard cultural heritage<sup>17</sup>. The pact extends, in Article 1, the need to protect historic monuments, museums, and scientific, artistic, educational, and cultural institutions not only in times of war but also in times of peace<sup>18</sup>, and is the first international treaty dedicated to the protection of cultural heritage to do so. Moreover, differently from the 1907 Hague Conventions, the Roerich Pact identifies these culturally relevant sites not as civilian property but as neutral<sup>19</sup>. It is precisely their neutrality that entitles them to be respected and protected both in times of war and peace. However, as specified in Article 5, when their neutrality is lost, meaning when they are made use of for military purposes, they cease to enjoy privileges<sup>20</sup>. Another difference with the 1907 Hague Convention is that the Roerich Pact, contrary to the latter, does not perceive cultural property as a heritage to a specific people, but, instead, it presents, for the first time, the idea that cultural objects should be safeguarded as part of the common heritage of all humanity<sup>21</sup>. This concept of cultural heritage belonging to all mankind reminisced after the Second World War, and, in 1954, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was signed. This Convention, also known as the 1954 Hague Convention, was the first international treaty dedicated entirely to the protection of cultural heritage. Its primary focus is on safeguarding cultural heritage during times of war<sup>22</sup>. The Convention is, indeed, an instrument of international humanitarian law —a body of international law that specifically applies in times of armed conflicts. As a matter of fact, in the years following the Second World War, a clearer distinction emerged between provisions for the safeguarding of cultural heritage in times of war and those for times of peace. While the 1954 Hague Convention is the key reference text for protecting cultural

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<sup>15</sup> Namely, Brazil, Chile, Colombia, Cuba, the Dominican Republic, El Salvador, Guatemala, Mexico, the United States of America, and Venezuela.

<sup>16</sup> “Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, April 15, 1935”, Icrc.org (International Committee of the Red Cross (ICRC), (2024). <https://ihl-databases.icrc.org/en/ihl-treaties/roerich-pact-1935/state-parties#footnote-1>.

<sup>17</sup> Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). Washington, April 15, 1935.

<sup>18</sup> *Ibidem*, Article 1.

<sup>19</sup> *Ibidem*.

<sup>20</sup> *Ibidem*, Article 5.

<sup>21</sup> Francioni, Francesco. “The Evolving Framework for the Protection of Cultural Heritage in International Law”. In *Cultural Heritage, Cultural Rights, Cultural Diversity : New Developments in International Law*, Chapter 1. Boston: Martinus Nijhoff Publishers (2012), page 9.

<sup>22</sup> As stated in Article 18 of the 1954 Hague Convention, “*Apart from the provision which shall take effect in time of peace, the present Convention shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them*”.

heritage during armed conflicts, two UNESCO Conventions, namely the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) focus on the safeguarding of cultural heritage in times of peace. The 1970 UNESCO Convention emphasizes the idea that culturally relevant objects constitute the cultural heritage of a people<sup>23</sup>. In fact, considering the State as the legal entity of a people, the Convention often refers to the concept of "State cultural heritage". Recognizing the impoverishment caused on the cultural heritage of a country and its people when its cultural property is being illicitly traded and transferred, the Convention focuses on preventing the loot, plunder, theft, and illegal import, export, and transfer of cultural property<sup>24</sup>. To do so, the Convention incumbents even the State itself to "*protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export*"<sup>25</sup>. A way for the State to achieve this purpose is to set up, within its borders, one or more national services entitled to actively protect the State's cultural heritage<sup>26</sup>. It is also the State's duty to prevent museums within its territory from acquiring illegally exported cultural property of another state<sup>27</sup>. In any case, any stolen or illegally traded object found by the authorities of a State must be returned immediately to the State of origin<sup>28</sup>. Furthermore, if an individual is found guilty of illegally importing or exporting cultural property, namely infringing the provisions of articles 6 (b) and 7 (b) of the Convention, States Parties are encouraged to impose sanctions or penalties on that individual<sup>29</sup>.

The 1972 UNESCO World Heritage Convention, like the 1970 UNESCO Convention, serves as an instrument for the protection of cultural heritage in times of peace. The specific focus of the former is on the protection and conservation of cultural and natural heritage with exceptional and universal value<sup>30</sup>. Contrary to the 1970 Convention, the 1972 Convention, while recognizing that the cultural property situated within the borders of a state belongs primarily to that State, emphasizes the idea of

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<sup>23</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, November 14, 1970.

<sup>24</sup> *Ibidem*.

<sup>25</sup> *Ibidem*, Preamble.

<sup>26</sup> *Ibidem*, Article 5.

<sup>27</sup> *Ibidem*, Article 7.

<sup>28</sup> *Ibidem*, Article 7 (b) (ii).

<sup>29</sup> *Ibidem*, Article 8.

<sup>30</sup> UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention). Paris, November 16, 1972.



international cultural heritage<sup>31</sup>. Specifically, the Convention recognizes any harm to the cultural property of a State as a detriment to the global cultural heritage, the “*world heritage*”, which belongs to all the nations of the world, and, indeed, it states<sup>32</sup> that the international community has a duty to cooperate to protect it. The main purpose of the Convention is to ensure the protection and conservation of the cultural and natural heritage that falls within the categories presented in articles 1 and 2 of the Convention. Like the 1970 UNESCO Convention, the 1972 World Heritage Convention also invites the States parties to take measures to protect the cultural and natural property situated within their territories. Specifically, it exhorts them to adopt a general policy which gives the cultural and natural property a function in the life of the community, to set up services for the protection and conservation of such heritage, to develop scientific and technical research to foster methods for the State to counteract the threats to its cultural or natural heritage, and to take relevant legal, scientific, technical, administrative and financial measures necessary to protect, conserve and rehabilitate that heritage<sup>33</sup>. The Convention also urges States to not take any measure that could cause harm to the cultural and natural heritage of other States<sup>34</sup>. Additionally, Section III of the Convention establishes within UNESCO an intergovernmental committee, the “World Heritage Committee”, whose main purpose is to protect and preserve cultural and natural world heritage<sup>35</sup>. As stated in article 11 (2), the Committee has the duty to establish and keep up to date a “World Heritage List” made of cultural and natural properties that have an exceptional and universal value<sup>36</sup>. The Committee shall also establish and update a “list of World Heritage in Danger”, a list of cultural and natural properties that are present in the “World Heritage List” and are threatened by serious dangers and for the protection of which assistance has been requested under the Convention<sup>37</sup>. If a cultural or natural property is damaged, the World Heritage Committee provides aid in the form of training, scientific expertise, and financial support for rehabilitation<sup>38</sup>. The financial assistance is administered through the World Heritage Fund, established by Article 15 of the 1972 World Heritage Convention, and managed by

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<sup>31</sup> *Ibidem*.

<sup>32</sup> *Ibidem*, Article 6 (1).

<sup>33</sup> *Ibidem*, Article 5.

<sup>34</sup> *Ibidem*, Article 6 (3).

<sup>35</sup> *Ibidem*, Article 8 (1).

<sup>36</sup> *Ibidem*, Article 11 (2).

<sup>37</sup> *Ibidem*, Article 11 (4).

<sup>38</sup> *Ibidem*, Article 22.

UNESCO. All states party to the Convention contribute to finance the Fund but they are not its only funding source<sup>39</sup>.

In line with the 1970 UNESCO Convention, an instrument of international private law was adopted in 1995, the UNIDROIT<sup>40</sup> Convention on Stolen or Illegally Exported Cultural Objects, which also addresses the restitution of stolen or illegally traded cultural objects to their countries of origin. The UNIDROIT Convention, however, has a distinct scope compared to the 1970 UNESCO Convention. While the scope of application of the latter is limited to transactions involving museums and “*similar institutions*”<sup>41</sup>, the UNIDROIT Convention applies to all the cases of stolen or illegally exported cultural properties, encompassing transactions between private parties, dealers, galleries, and other entities engaged in the trade of cultural objects<sup>42</sup>. Additionally, the UNIDROIT Convention establishes universal guidelines for the acquisition of property titles over cultural artefacts, therefore imposing more sophisticated norms of collaboration and coordination across various legal systems<sup>43</sup>.

An important shift in the protection of cultural heritage in international law occurred in 2003, when the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage was adopted, becoming the first legally binding document to widen the definition of international protection of cultural heritage and broadening it to consider also intangible and oral heritage<sup>44</sup>. The Convention provides a definition of intangible cultural heritage in Article 2, and it states that, to be considered such, intangible cultural heritage must be recognized by communities, groups, or even individuals as part of their cultural heritage<sup>45</sup>. The Article also highlights the generational aspect of such heritage,

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<sup>39</sup> *Ibidem*, Article 15 (3).

<sup>40</sup> The UNIDROIT, or International Institute for the Unification of Private Law, is an independent intergovernmental organization whose purpose is to harmonize and coordinate international private law across different jurisdictions.

<sup>41</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Paris, November 14, 1970, Article 7 (b) (i).

<sup>42</sup> Lehman, Jennifer. “The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the Unidroit Draft Convention”. *Arizona Journal of International and Comparative Law* 14 (1997), pages 529–31 and page 545.

<sup>43</sup> Francioni, Francesco. “The Evolving Framework for the Protection of Cultural Heritage in International Law.” In *Cultural Heritage, Cultural Rights, Cultural Diversity : New Developments in International Law*, Chapter 1. Boston: Martinus Nijhoff Publishers (2012), page 17.

<sup>44</sup> Francioni, Francesco. “The Human Dimension of International Cultural Heritage Law: An Introduction,” *European Journal of International Law* 22, no. 1. February 1, 2011, page 14. <https://doi.org/10.1093/ejil/chr018>.

<sup>45</sup> Convention for the Safeguarding of Intangible Cultural Heritage. Paris, October 17, 2003, Article 2 (1).

as well as its relationship with the community's environment and history<sup>46</sup>. The transformative character of this convention lies in redirecting attention from the safeguarding of cultural objects to the social frameworks and cultural dynamics responsible for shaping and maintaining intangible heritage. While States continue to serve as the Convention's contracting parties, the primary recipients of its provisions are cultural communities and human groups, including minorities<sup>47</sup>. What is emphasized in this Convention is a "human dimension" of cultural heritage<sup>48</sup>.

In the same year as the adoption of the Convention for the Safeguarding of Intangible Cultural Heritage, UNESCO Member States unanimously adopted another means of protecting cultural heritage: the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. This Declaration, applicable in both times of war and peace, is not legally binding<sup>49</sup>. Its effectiveness relies on the states' willingness to implement the declaration's principles and give them a binding character by incorporating them through their domestic legal frameworks<sup>50</sup>. A crucial and innovative aspect of the Declaration is that it acknowledges the responsibility of both States and individuals in relation to the deliberate destruction of cultural heritage. State responsibility is expressed in Article VI, while individual criminal responsibility is outlined in Article VII. Importantly, the responsibility of the States is not only applicable in the case of its intentional destruction of cultural heritage but instead it applies also when the state intentionally fails to take measures within its power to prevent, stop, and punish any intentional destruction of cultural heritage<sup>51</sup>. Articles VI and Article VII of the Declaration also specify that the 'cultural heritage' to which they refer is not exclusively limited to items present in lists by UNESCO or other international organizations, instead, it generally refers to all cultural heritage "*of great importance for humanity*<sup>52</sup>", whether they are or not inscribed on a UNESCO or another international organization list.

Conventions and Declarations are not the only means of protection of cultural heritage in international law. If they were, then states not party to any convention would not be bound to protect

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<sup>46</sup> *Ibidem*.

<sup>47</sup> Francioni, Francesco. "The Human Dimension of International Cultural Heritage Law: An Introduction," *European Journal of International Law* 22, no. 1. February 1, 2011, page 14. <https://doi.org/10.1093/ejil/chr018>.

<sup>48</sup> *Ibidem*.

<sup>49</sup> Vadi, Valentina. "Cultural Heritage in International Law". In "*Cultural Heritage in International Economic Law*", Chapter 1. Martinus Nijhoff Publishers (2023), pages 65 and 67.

<sup>50</sup> *Ibidem*, page 58.

<sup>51</sup> UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. Paris, March 17, 2003, Article VI for state responsibility, and Article VII for individual responsibility.

<sup>52</sup> *Ibidem*.

cultural heritage and could, potentially, intentionally destroy another state's cultural heritage without violating international law. This is not the case. Indeed, protecting cultural heritage, particularly in the context of armed conflicts, is often considered a rule of customary international law. Therefore, the destruction and damage to cultural heritage is a violation of the latter. The most prominent example of this regards the destruction of the *Stela de Matara*, a 2500-year-old obelisk of enormous cultural and historical significance for Eritrea and Ethiopia, damaged during the 1998-2000 conflict between the two countries<sup>53</sup>. As neither Ethiopia nor Eritrea were parties to the 1954 Hague Convention, the Eritrea/Ethiopia Claims Commission relied on customary international law to declare Ethiopia responsible for the damage to the Stela de Matara and the consequential loss of cultural heritage<sup>54</sup>. Ethiopia's damage to the Stela was indeed considered a violation of customary international humanitarian law<sup>55</sup>.

Another way cultural heritage is protected in international law is through the United Nations Security Council's resolutions. Article 25 of the United Nations Charter states that: "*The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter*"<sup>56</sup> Professor Steven Ratner has explained that this article is to be understood as stating that UN Security Council's resolutions do not require additional grounds in international law to be binding as they are binding by nature<sup>57</sup>. Three UN Security Council resolutions are relevant for the protection of cultural heritage: Resolution 1483 of 2003, Resolution 2199 of 2015, and Resolution 2347 of 2017. The context of the 1483 resolution is to be found in the aftermath of the 2003 invasion of Iraq by a coalition spearheaded by the United States and the United Kingdom,

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<sup>53</sup> Eritrea-Ethiopia Claims Commission, "Partial Award: Central Front, Eritrea's Claims 2,4,6,7,8, and 22". Permanent Court of Arbitration; Eritrea-Ethiopia Claims Commission, April 28, 2004, [https://legal.un.org/riaa/cases/vol\\_XXVI/115-153.pdf](https://legal.un.org/riaa/cases/vol_XXVI/115-153.pdf).

<sup>54</sup> Francioni, Francesco. "The Human Dimension of International Cultural Heritage Law: An Introduction." *European Journal of International Law* 22, no. 1. February 1, 2011, page 13. <https://doi.org/10.1093/ejil/chr018>.

<sup>55</sup> *Ibidem*.

<sup>56</sup> Charter of the United Nations. San Francisco, June 26, 1945, Article 25.

<sup>57</sup> Ratner, Steven. "The Security Council and International Law". In Malone, David, "The UN Security Council- From the Cold War to the 21<sup>st</sup> Century". In Roman, Erez. "The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: Rosenberg to Al-Mahdi." *Groningen Journal of International Law* 7, no. 1, August 26, 2019, page 116. <https://doi.org/10.21827/5d5141dfbdcfbf>.

which resulted in the ousting of Saddam Hussein's regime<sup>58</sup>. The resolution stipulates that all Member States of the United Nations should take appropriate measures to facilitate the return of cultural properties illicitly taken during the invasion from Iraqi institutions such as the National Museum, the National Library, and other sites<sup>59</sup>. In this way, the Security Council has contributed to the recognition, at the level of general international law, of the occupying powers' obligation to refrain from unlawfully seizing and transferring cultural properties from the occupied territory to their own territory. Additionally, it has highlighted the necessity of returning such property in the event that it is illegally transferred and appropriated by the occupying power<sup>60</sup>.

Resolution 2199 was part of the broader international efforts to counter the financing of terrorist groups, including the Islamic State in Iraq and Syria (ISIS), which had been generating revenue through the looting and trafficking of cultural artifacts<sup>61</sup>. The resolution aimed to disrupt the sources of funding for terrorist groups, including those derived from the illegal trade of cultural property<sup>62</sup>. It recommended all UN Security Council Member States to undertake appropriate measures to prevent the illicit trade of Syrian and Iraqi cultural property<sup>63</sup>. For instance, it recommended that Member States enforced measures to prohibit and report such trade within their borders<sup>64</sup>. Consequently, the resolution also mandated the deployment of forces by UN member states in Iraq and Syria to hinder the illicit movement of Iraqi and Syrian cultural property across borders<sup>65</sup>. In this manner it would be possible to protect Iraqi and Syrian cultural property from being illegally traded, smuggled, or removed from its original place<sup>66</sup>.

Resolution 2347, adopted on 24 March 2017, reiterated the stance expressed in the two Resolutions previously mentioned<sup>67</sup>. It condemned the destruction of cultural heritage in the context

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<sup>58</sup> Qureshi, Waseem. "The Protection of Cultural Heritage by International Law in Armed Conflict". *Loyola University Chicago International Law Review* 15, no. 1 (2017), page 81. <https://lawcommons.luc.edu/lucilr/vol15/iss1/3>.

<sup>59</sup> *Ibidem*.

<sup>60</sup> *Ibidem*.

<sup>61</sup> *Ibidem*.

<sup>62</sup> *Ibidem*.

<sup>63</sup> *Ibidem*.

<sup>64</sup> *Ibidem*.

<sup>65</sup> *Ibidem*.

<sup>66</sup> *Ibidem*.

<sup>67</sup> Lenzerini Federico. "Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law". *Europa Ethnica* 74, no. 3-4 (2017), page 67. <https://doi.org/10.24989/0014-2492-2017-34-66>.

of armed conflicts, especially by terrorist groups<sup>68</sup>. It asserted that conducting unlawful attacks on historic monuments, buildings, and sites dedicated to culture, education, religion, and charitable purposes can potentially amount to a war crime under international law. It also emphasized the importance of imposing accountable legal consequences on the perpetrators of such crimes<sup>69</sup>. Additionally, the Resolution stressed that each Member State has a primary responsibility in protecting its cultural heritage (in paragraph 5), and it encouraged members who have not done so to ratify the 1954 Hague Convention and other relevant international conventions related to the protection of cultural heritage (paragraph 7)<sup>70</sup>. Furthermore, on a similar note to Resolution 1487, Resolution 2347 requested Member States to take relevant steps to stop and challenge the illicit trade and trafficking of cultural property originating from armed conflict contexts, particularly from terrorist groups<sup>71</sup>. This included prohibiting cross-border trade in items lacking clearly documented and certified provenance, thereby allowing their eventual safe return<sup>72</sup>.

Finally, cultural heritage is also protected by international organizations like UNESCO, the International Council of Museums and Sites (ICOMOS), the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) and the Blue Shield International, all of which share a common goal of preserving and protecting cultural heritage. UNESCO, or the United Nations Educational, Scientific and Cultural Organization, aims to advance international cooperation in education, research, and culture, with the intent to promote universal respect for justice, the rule of law, human rights, and basic freedoms, and contribute, in this way, to the maintenance of peace and security in the world<sup>73</sup>. To achieve this purpose, UNESCO is dedicated to promoting, expanding, and disseminating knowledge, which involves protecting and safeguarding the world's cultural heritage<sup>74</sup>. Indeed, UNESCO recommends to nations international conventions with this purpose and serves as an institutional neutral forum within the United Nations for negotiations. Moreover, the UNESCO Secretariat can, if requested by the Member States after negotiations at the Paris Headquarters, draft

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<sup>68</sup> *Ibidem*.

<sup>69</sup> *Ibidem*.

<sup>70</sup> UN Security Council Resolution 2347. March 24, 2017, page 4.

<sup>71</sup> *Ibidem*.

<sup>72</sup> *Ibidem*.

<sup>73</sup> Constitution of the United Nations Educational, Scientific and Cultural Organization. London, November 16, 1945, Article 1.

<sup>74</sup> Carducci, Guido. 'The role of UNESCO in the elaboration and implementation of international art, Cultural Property, and Heritage Law'. In *Intersections in International Cultural Heritage Law*, edited by Anne-Marie Carstens and Elizabeth Varner. Oxford: Oxford University Press, 14 May 2020, Chapter 7, page 187. doi:10.1093/oso/9780198846291.003.0008.

an initial legal instrument addressing the identified issues<sup>75</sup>. If Member States find the concerns and the Secretariat's initial draft worthy of further consideration, UNESCO initiates intergovernmental negotiations for a new legal instrument, which can take the form of hard law, such as a convention or protocol, or of soft law, as a recommendation or declaration<sup>76</sup>. Examples of UNESCO's hard law legal instruments for the protection of cultural heritage include the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention), and the 2003 Convention for the Safeguarding of Intangible Cultural Heritage. The instrument is adopted if the Member States are satisfied with the product of the negotiations<sup>77</sup>. The adopted instrument obtains its legal character and effects under international law based on its typology<sup>78</sup>. For instance, a UNESCO Convention is binding upon its Parties under the law of treaties and must, therefore, be performed in good faith only when in force and only by its Parties<sup>79</sup>. Furthermore, unless otherwise stated in the treaty, it is non-retroactive, meaning that it does not apply to actions or events that took place prior to its entrance into force<sup>80</sup>.

UNESCO works hand in hand with the International Council of Museums and Sites (ICOMOS), a non-governmental organization established in 1965 with the goal of protecting and preserving, at the international level, elements of relevant archaeological heritage<sup>81</sup>. The concern of ICOMOS are monuments and sites in a broad sense, including a variety of immovable cultural properties, such as archaeological sites, historic areas, archives, and even cultural landscapes<sup>82</sup>. ICOMOS is primarily an advisory body and, as such, one of its main functions is the research and the monitoring of cultural heritage sites<sup>83</sup>. It is important to mention that, as an NGO, ICOMOS lacks the legal authority to mandate the protection of cultural heritage, indeed the formal legal power to enact concrete protection measures for endangered culturally relevant monuments and sites lies with national governments and

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<sup>75</sup> *Ibidem*.

<sup>76</sup> *Ibidem*.

<sup>77</sup> *Ibidem*.

<sup>78</sup> *Ibidem*.

<sup>79</sup> *Ibidem*.

<sup>80</sup> *Ibidem*.

<sup>81</sup> Yurinets, Julia Leonidovna. "The Role and Impact of the ICOMOS Activity and Statutes as a Contributor to the Public Governance of the World Heritage Protection" (2014), pages 119 and 120. <https://journals.indexcopernicus.com/api/file/viewByFileId/74541.pdf>.

<sup>82</sup> *Ibidem*.

<sup>83</sup> ICOMOS Official Website "ICOMOS Mission - International Council on Monuments and Sites," n.d. <https://www.icomos.org/en/about-icomos/mission-and-vision/icomos-mission>

international entities such as UNESCO<sup>84</sup>. A specific committee within ICOMOS, the Committee on Risk Preparedness, addresses risk prevention and strategies to limit damages to cultural heritage during accidents<sup>85</sup>. Being a non-governmental organization, ICOMOS has the power to identify in-danger monuments and sites from a solely preservation-based standpoint, in spite of political considerations<sup>86</sup>. The threats to cultural heritage identified and addressed by ICOMOS are of various character: from natural disasters, like earthquakes and floods, to armed conflicts<sup>87</sup>. Additionally, another element of risk for the preservation of culturally relevant monuments and sites is man-made disasters, including the consequences of air, water, and land pollution, the rise of which has significantly increased the time of deterioration of monuments and sites in respect to the previous centuries<sup>88</sup>.

ICOMOS, together with three other organizations<sup>89</sup> concerned with the protection of cultural heritage, founded the Blue Shield International in 1996<sup>90</sup>. Blue Shield International is a non-governmental organization as well as an advisory body to UNESCO, committed to safeguarding the world's cultural and natural heritage during armed conflicts or in case of natural or man-made disasters<sup>91</sup>. The Blue Shield currently has 32 national committees operating worldwide and 7 under construction<sup>92</sup> and its duties as an NGO consist in advocating for the ratification and observance of the 1954 Hague Convention and its Protocols, increasing awareness on the significance of safeguarding cultural heritage during emergencies, and offering training to both personnel involved in *“preventing, mitigating or responding”*<sup>93</sup> to cultural heritage damage during emergencies, and to

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<sup>84</sup> *Ibidem*.

<sup>85</sup> Petzet, Michaël, and Jacques Perot. “The Role of Non-governmental Organizations in International Emergency Action.” *Museum International* 55, no. 3–4, December 2003, page 122. <https://doi.org/10.1111/j.1350-0775.2003.00447.x>.

<sup>86</sup> *Ibidem*.

<sup>87</sup> *Ibidem*.

<sup>88</sup> *Ibidem*.

<sup>89</sup> Namely, the International Council on Archives (ICA), the International Council of Museums (ICOM), and the International Federation of Library and Information Associations and Institutions (IFLA).

<sup>90</sup> “About the Blue Shield: Factsheet”. Blue Shield International, November 19, 2020 [https://theblueshield.org/wp-content/uploads/2021/12/Blue-Shield\\_International-Fact-Sheet-May-2021.pdf](https://theblueshield.org/wp-content/uploads/2021/12/Blue-Shield_International-Fact-Sheet-May-2021.pdf).

<sup>91</sup> *Ibidem*.

<sup>92</sup> “National Committees around the Globe.” Blue Shield International, January 17, 2024. <https://theblueshield.org/what-we-do/national-committees-around-the-globe/>. (Accessed 9 March 2024).

<sup>93</sup> “About the Blue Shield: Factsheet”. Blue Shield International, November 19, 2020 [https://theblueshield.org/wp-content/uploads/2021/12/Blue-Shield\\_International-Fact-Sheet-May-2021.pdf](https://theblueshield.org/wp-content/uploads/2021/12/Blue-Shield_International-Fact-Sheet-May-2021.pdf).



those countering the illicit trafficking of looted cultural properties<sup>94</sup>. Finally, Blue Shields International also promotes engagement and encourages cooperation in protecting cultural property<sup>95</sup>.

Another relevant organization is the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), which, unlike ICOMOS and the Blue Shields International, is an intergovernmental organization. Its purpose is “*to promote the conservation of all forms of cultural heritage in every region of the world*”<sup>96</sup>, operating in accordance with the 2001 UNESCO Universal Declaration on Cultural Diversity. ICCROM’s work includes training professionals in the conservation and restoration of cultural property, spreading information through its conservation libraries and website, coordinating knowledge, and enhancing collaboration between institutions dedicated to cultural conservation<sup>97</sup>. ICCROM also fosters cooperation by bringing together a variety of institutions and specialists from across the globe to provide site visits, technical assistance, and training<sup>98</sup>. Finally, it aims to increase awareness on the conservation and restoration of cultural property both in its Member States’ governments and communities<sup>99</sup>.

## *1.2: International Criminal Law*

As the purpose of this paper is to analyze the war crime of the destruction of cultural heritage, it is necessary, after a brief summary of the non-penal modes of protection of cultural heritage in international law, to start from a historical analysis of international criminal law, as the category of “war crimes” falls within the purview of the latter. The first milestone in the development of modern international criminal law comes from the Nuremberg and Tokyo Trials. In the aftermath of the Second World War, the atrocities committed, including the genocide of the Jewish people, led the Allied powers<sup>100</sup> to establish the International Military Tribunal (‘IMT’) and International Military Tribunal for the Far East (‘IMTFE’), with the intent to prosecute those responsible for a series of severe crimes. Specifically, the IMT and the IMTFE had jurisdiction to prosecute war criminals for three types of crimes: crimes against peace, war crimes, and crimes against humanity<sup>101</sup>. The IMT

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<sup>94</sup> *Ibidem*.

<sup>95</sup> *Ibidem*.

<sup>96</sup> “What Is ICCROM.” ICCROM, January 20, 1970. <https://www.iccrom.org/about/what-iccrom>.

<sup>97</sup> *Ibidem*.

<sup>98</sup> *Ibidem*.

<sup>99</sup> *Ibidem*.

<sup>100</sup> the United States, the United Kingdom, the Soviet Union, China, and France.

<sup>101</sup> Futamura, Madoka. “The Nuremberg Legacy: Ideas and Practices”. In “*War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*”, Chapter 2. Florence: Taylor and Francis (2013), page 31.

operated in Nuremberg and prosecuted Nazi generals during the Nuremberg Trials, while the IMTFE operated in Tokyo prosecuting Japanese generals during the Tokyo trials.

The IMT was established during the London Agreement of 1945 to which the Charter of the International Military Tribunal was attached<sup>102</sup>. The charter provided for the composition of the IMT, consisting of one judge and one alternate from each of the four Allied powers: the United States, the United Kingdom, the Soviet Union, and France<sup>103</sup>. It established the jurisdiction<sup>104</sup> of the Tribunal and defined the three crimes prosecutable by the latter. Moreover, the Charter empowered a committee comprised of the chief prosecutors from each nation to draft the indictment and present supporting evidence in accordance with the legal provisions outlined in the Charter<sup>105</sup>. Initially twenty-four Nazi leaders were indicated, but only twenty-one defendants were present in person during the trial<sup>106</sup>, which begun on the 20<sup>th</sup> of November 1945, and ended on the 1<sup>st</sup> of October 1946<sup>107</sup>. During the process, the four Allied powers rotated in presiding over the proceedings, and decisions were made collectively<sup>108</sup>. All the defendants were accused of having committed war crimes, sixteen were accused of the “*planning, preparing, initiating or waging aggressive*<sup>109</sup>” war, nineteen were charged with violations of laws and customs of war, and the same number of defendants was charged with crimes against humanity<sup>110</sup>. The Court’s judgements sentenced twelve defendants to death, convicted seven to imprisonment, and found three not guilty on any court<sup>111</sup>. One of the

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<sup>102</sup> *Ibidem*, page 32.

<sup>103</sup> *Ibidem*, page 34.

<sup>104</sup> “*the Tribunal shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes: a) crimes against peace [...] b) war crimes [...] c) crimes against humanity*”. Source: Charter and Judgment of the Nürnberg Tribunal History and Analysis, (Memorandum submitted by the United Nations Secretary-General), November 20, 1945, page 4, <https://digitallibrary.un.org/record/160809>.

<sup>105</sup> Wright, Quincy. “The Law of the Nuremberg Trial.” *Perspectives on the Nuremberg Trial*, January 1947, page 40. <https://doi.org/10.1093/oso/9780199232338.003.0014>.

<sup>106</sup> before the trial, the Tribunal had decided that Gustav Krupp von Bohlen could not be tried due to his sickness; that Rudolph Hess and Julius Streicher were in no mental condition to prevent their trial, and, while Martin Bormann who was not been found, was tried *in absentia*, Robert Ley could not be tried as he killed himself while in custody. Source: Wright, Quincy. “The Law of the Nuremberg Trial.” *Perspectives on the Nuremberg Trial*, January 1947, page 40. <https://doi.org/10.1093/oso/9780199232338.003.0014>.

<sup>107</sup> *Ibidem*.

<sup>108</sup> *Ibidem*.

<sup>109</sup> *Ibidem*, page 41.

<sup>110</sup> *Ibidem*.

<sup>111</sup> *Ibidem*.

novelties of the Nuremberg trial is the fact that it prosecuted individuals, who were considered responsible for having violated international law, giving rise, for the first time, to international individual crime responsibility<sup>112</sup>. Indeed, before the Nuremberg trials, individuals were often not the direct recipients of international rules<sup>113</sup>. Consequently, they could not be held accountable for any violations of such regulations on a global scale. Pre-Nuremberg, if individuals violated international law in their personal or professional capacity, they may have faced legal action and punishment from the relevant foreign authorities through that state's domestic legal system but only under specific conditions<sup>114</sup>. There was no international tribunal judging individuals for violation of international law. Nuremberg is the first such entity<sup>115</sup>. Such change influenced the whole development of international criminal law, creating the fundamentals for the development of a permanent international court having jurisdiction on individuals and prosecuting them for severe violations of international law, the International Criminal Court (ICC), which, however, was established years after Nuremberg, in 2002. Individual crime responsibility established at Nuremberg for the atrocities committed by the Nazi made sure that Nazi's crimes were not associated with the whole German population, therefore preventing the collectivization of responsibility and the victim's hostilities towards a whole people, which could foster the idea of "collective revenge" endangering any attempt at creating an everlasting peace<sup>116</sup>.

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<sup>112</sup> Futamura, Madoka. "The Nuremberg Legacy: Ideas and Practices". In *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*, Chapter 2. Florence: Taylor and Francis (2013), page 32.

<sup>113</sup> Gaeta, Paola, Jorge E. Viñuales, and Salvatore Zappalà. "Cassese's International Law". 3rd ed. Oxford: Oxford University Press (2020), page 427.

<sup>114</sup> i) the international role violated by the incriminated individual was implemented by the forum State domestic order, therefore becoming part of its criminal legislation. ii) the national court had jurisdiction on the case, therefore the individual prosecuted must have not enjoyed immunity under international law. iii) a connection was present between the offense and the forum State. Source: Gaeta, Paola, Jorge E. Viñuales, and Salvatore Zappalà. "Cassese's International Law". 3rd ed. Oxford: Oxford University Press (2020), page 427.

<sup>115</sup> It is important to specify that the internationality of the Nuremberg tribunal is often contested, as it was made exclusively of judges who were nationals of the four World War 2 winning powers. Nevertheless, the IMT and, later, the IMTFE, is the first tribunal whose judges are not from a single country and who prosecutes considering international law not domestic one. Source: Futamura, Madoka. "The Nuremberg Legacy: Ideas and Practices". In *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*, Chapter 2. Florence: Taylor and Francis (2013), page 34.

<sup>116</sup> Futamura, Madoka. "The Nuremberg Legacy: Ideas and Practices". In *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*, Chapter 2. Florence: Taylor and Francis (2013), page 44.

The second novelty introduced by the Nuremberg trials is the category of “crimes against humanity”, which is one of the three crimes on which the IMT had jurisdiction, as stated in Article 6 of the IMT Charter<sup>117</sup>. The latter defines crimes against humanity in Article 6 (c) as follows: “*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 or not in violation of the domestic law of the country where perpetrated*”<sup>118</sup>. The International Law Commission (ILC), an organ created by the United Nations General Assembly with the purpose of achieving progressive development and codification of international law, noted that the definition present in Article 6 (c) defines two types of crimes against humanity<sup>119</sup>: on one hand “*murder [...] and “other inhumane acts*”<sup>120</sup>, and on the other “*persecution on political, racial or religious grounds*”<sup>121</sup>. A relevant restriction on the scope of “crimes against humanity” present in the definition of the latter in Article 6 (c) of the IMT Charter consist in the sentence “*in execution of or in connection with any crime within the jurisdiction of the Tribunal*”<sup>122</sup>, which applies to the whole paragraph 6 (c) and states that to be such, a crime against humanity must be committed alongside a war crime or crime against peace<sup>123</sup>. Because of this limitation of the scope of Article 6 (c), all the crimes committed by Nazi generals against Jews prior to the beginning of the war were excluded from the definition of “crimes against humanity”<sup>124</sup>. The legacy of the IMT Charter and the Nuremberg trials regarding crime against humanity influenced subsequent legal developments of international criminal law. It shaped the development of international criminal law as it served as a starting point for the ILC to codify Article 18 of the “Draft Code of Crimes Against the Peace and Security of Mankind”, which provides a new enlarged definition of “crimes against humanity” that does not require a link

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<sup>117</sup> Charter of the International Military Tribunal. London, August 8, 1945, Article 6 (c).

<sup>118</sup> *Ibidem*.

<sup>119</sup> Badar, Mohamed E. “From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity”. *San Diego International Law Journal* 5, no. 73 (2004), page 81. <https://doi.org/https://digital.sandiego.edu/ilj/vol5/iss1/4>.

<sup>120</sup> Charter of the International Military Tribunal. London, August 8, 1945, Article 6 (c).

<sup>121</sup> *Ibidem*.

<sup>122</sup> *Ibidem*.

<sup>123</sup> Badar, Mohamed E. “From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity”. *San Diego International Law Journal* 5, no. 73 (2004), page 81. <https://doi.org/https://digital.sandiego.edu/ilj/vol5/iss1/4>.

<sup>124</sup> *Ibidem*, page 82.

between the latter and war crimes or crimes against peace<sup>125</sup>. Moreover, the Nuremberg legacy influenced the development of the International Criminal Court Statute or Rome Statute, adopted in 1998, whose Article 7 defines “crimes against humanity” generally considering them as “*part of a widespread or systematic attack directed against any civilian population with knowledge of the attack*”<sup>126</sup> and providing a specific list of crimes against humanity, enlarging their scope to include, apart from murder extermination, enslavement, deportation, and persecution, which were present also in Article 6 (c) of the IMT Charter, also imprisonment or severe deprivation of physical liberty<sup>127</sup>, torture<sup>128</sup>, rape and sexual violence, including forced pregnancy and enforced sterilization<sup>129</sup>, enforced disappearance<sup>130</sup>, apartheid<sup>131</sup> and, “*other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*”<sup>132</sup>. These definitional differences of “crimes against humanity” from the IMT Charter to the ICC Statute significantly enlarge the scope of the latter and detach it from remaining exclusively related to the context of war.

Finally, the Nuremberg trial introduced a new milestone in international law by condemning, under “crimes against humanity”, also inhumane acts<sup>133</sup> committed by a state against its own citizens before or during the war<sup>134</sup>. The enlargement of the scope of “crimes against humanity” to include acts committed by the State towards its citizens is visible in the specific words “*against any civilian population*”<sup>135</sup> of Article 6 (c) of the IMT Charter, used to define crimes against humanity as “*inhumane acts committed against any civilian population*”<sup>136</sup>. The use of these words expresses a no limitation of crimes against humanity to nationality and, in this way, it includes crimes against humanity committed by a state against its own citizens, like those committed by the Nazi against

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<sup>125</sup> Sironi De Gregorio, Francesca. “Attacking Cultural Property to Destroy a Community: Heritage Destruction as a Crime against Humanity and Genocide.” *Rivista Semestrale Di Diritto* 1, April 2020, page 275.

<sup>126</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 7.

<sup>127</sup> *Ibidem*, Article 7 (1) (e).

<sup>128</sup> *Ibidem*, Article 7 (1) (f).

<sup>129</sup> *Ibidem*, Article 7 (1) (g).

<sup>130</sup> *Ibidem*, Article 7 (1) (i).

<sup>131</sup> *Ibidem*, Article 7 (1) (j).

<sup>132</sup> *Ibidem*, Article 7 (1) (k).

<sup>133</sup> Meaning acts that follow within the category of “crimes against humanity” mentioned in the IMT Charter.

<sup>134</sup> Futamura, Madoka. “The Nuremberg Legacy: Ideas and Practices”. In “*War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*”, Chapter 2. Florence: Taylor and Francis (2013), pages 32 and 33.

<sup>135</sup> Charter of the International Military Tribunal. London, August 8, 1945, Article 6 (c).

<sup>136</sup> *Ibidem*.

German Jews. This definition of crimes against humanity is revolutionary as, in the past, classical international law left states generally free in their actions towards their own citizens, having no obligations towards them except for two towards foreign citizens: the obligation to protect foreigners (which is substantially an obligation of non-discrimination) and the obligation to not demand anything from the foreigner unless there is a relevant connection between the latter and the state<sup>137</sup>. Violations of these obligations resulted in denials of justice. With the Nuremberg trial, instead, states' atrocious actions<sup>138</sup> committed towards their own citizens before or during the war were criminalized for the first time, concretely limiting the state's omnipotence with regard to its own citizens<sup>139</sup>. This idea signifies a shift in international law from a "state-protection" focus to an "individual-protection" one, establishing the foundation for the development of international human rights law<sup>140</sup>.

The effects of the Nuremberg trials were strengthened and complemented by the Tokyo trial, which began on the 3<sup>rd</sup> of May 1946 and lasted until the 24<sup>th</sup> of January 1947<sup>141</sup>. During this time, the International Military Tribunal for the Far East (IMTFE), established based on the Charter of the International Military Tribunal for the Far East issued on the 19<sup>th</sup> of January 1946, prosecuted twenty-five defendants, all of whom were found guilty<sup>142</sup>. Its jurisdiction, as stated in its Charter, was on crimes against peace, conventional war crimes, and crimes against humanity<sup>143</sup>. The IMFTE has an incredible relevance in international criminal law as it was the only international tribunal to follow immediately after Nuremberg, the others will come half a century later. Even if the Tokyo and Nuremberg trials are often considered as "twin trials" there are relevant differences between the two, which must be assessed<sup>144</sup>. First, in the Tokyo trial, the defense had the opportunity to put forward a

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<sup>137</sup> Oppenheim, Lassa. *International Law. A Treatise*. Vol. 1. 1905. Reprint, 39 Paternoster Road, London, New York, and Bombay: Longmans, Green & Co. (1905), pages 342-347, pages 371, 373 and 376.

<sup>138</sup> Namely crimes against humanity.

<sup>139</sup> Futamura, Madoka. "The Nuremberg Legacy: Ideas and Practices". In *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremburg Legacy*", Chapter 2. Florence: Taylor and Francis (2013), page 33.

<sup>140</sup> *Ibidem*, page 39.

<sup>141</sup> Futamura, Madoka. "The Tokyo Trial: An overview and purpose of the trial". In *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremburg Legacy*", Chapter 3. Florence: Taylor and Francis (2013), page 53.

<sup>142</sup> *Ibidem*, page 54.

<sup>143</sup> Charter of the International Military Tribunal for the Far East. Tokyo, January 19, 1946, Article 5.

<sup>144</sup> Futamura, Madoka. "The Tokyo Trial: An overview and purpose of the trial". In *War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremburg Legacy*", Chapter 3. Florence: Taylor and Francis (2013), page 52.

motion to challenge the jurisdiction of the tribunal<sup>145</sup>. This same opportunity was not given to the defense during the Nuremberg trial<sup>146</sup>. Second, from Nuremberg to Tokyo the focus shifted from “crimes against humanity” to “crimes against peace”. Of the fifty-five counts of the Tokyo trial, thirty-six dealt with crimes against peace (Group I: counts 1 to 36), while only three (counts 53 to 55) with crimes against humanity, which were not considered independently but were only dealt with in combination with conventional war crimes<sup>147</sup>. The relevance of crimes against peace in the Tokyo Trial is evident also in Article 5 of the IMTFE Charter which gives the Tribunal the power to prosecute “*war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace*”<sup>148</sup>. This, in other words, means that all the defendants prosecuted were charged with committing crimes against peace. A last important difference regards the higher American influence in the IMFTE compared to the IMT<sup>149</sup>. Indeed, while the Charter of the IMT was issued as a joint declaration of the Allies by the London Agreement, the one of the IMFTE is an executive edict issued by the American General MacArthur<sup>150</sup>. Moreover, the Charter of the IMFTE was drafted by the International Prosecution Section which was composed exclusively of American prosecutors<sup>151</sup>. Furthermore, while in Nuremberg the judges were decided by the four signing nations of the London Agreement, in Tokyo, General MacArthur had the power to appoint both the judges and the Tribunal’s president<sup>152</sup>. He was also authorized to review their rulings<sup>153</sup>. The United States’ dominance in the Tokyo trial was also reflected in the Tribunal’s organization, indeed, the prosecution team consisted of a chief prosecutor from the United States and ten associate prosecutors from other nations<sup>154</sup>. This structure is significantly different from that of Nuremberg, where the chief prosecutors were four, one from each of the Allied powers<sup>155</sup>.

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<sup>145</sup> *Ibidem*, page 53.

<sup>146</sup> *Ibidem*.

<sup>147</sup> *Ibidem*, page 64.

<sup>148</sup> Charter of the International Military Tribunal for the Far East. Tokyo, January 19, 1946, Article 5.

<sup>149</sup> Futamura, Madoka. “The Tokyo Trial: An overview and purpose of the trial”. In “*War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremburg Legacy*”, Chapter 3. Florence: Taylor and Francis (2013), page 62.

<sup>150</sup> *Ibidem*.

<sup>151</sup> *Ibidem*.

<sup>152</sup> *Ibidem*.

<sup>153</sup> *Ibidem*.

<sup>154</sup> *Ibidem*, page 63.

<sup>155</sup> *Ibidem*.

Nevertheless, despite their difference, both trials shaped the future of international criminal law. However, the Tokyo and Nuremberg principles and the legacy of the trials initially faced some difficulties in the process of implementation by the international community. Indeed, states were threatened by the introduction of individual criminal responsibility and feared an entity that could overcome the role of the state and limit its sovereignty by prosecuting crimes committed against a State's own citizens<sup>156</sup>. All of this appeared extremely dangerous to states especially as the “*iron curtain*”<sup>157</sup> started falling on the major World Powers. As a result, no other international tribunal was established right after Nuremberg and Tokyo. Indeed, the first “second attempt” comes after the fall of the Berlin Wall, in a moment of more political stability, with the establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively<sup>158</sup>. Differently from the Nuremberg and Tokyo tribunals, the ICTY and the ICTR were composed of judges of all nationalities and were created by the United Nations Security Council, being therefore formally UN organs<sup>159</sup>. However, despite the importance of both tribunals in the shaping of international criminal law through their case law, the ICTY and the ICTR were limited by their nature of temporal international tribunals. They were established with the intent to solve an *ad hoc* situation and, once they had reached their scope, they ceased to exist and were closed in 2017 and 2015, respectively<sup>160</sup>. The real change in international criminal law occurred with the establishment of the International Criminal Court (ICC) with the Rome Statute of 1998 which is the first permanent international criminal court<sup>161</sup>. The ICC, differently from the ICTY and the ICTR is a separate organization from the United Nations. It prosecutes “*individuals rather than states*”<sup>162</sup> and has jurisdiction over four crimes: genocide, crimes against humanity, war

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<sup>156</sup> Futamura, Madoka. “The Nuremberg Legacy: Ideas and Practices”. In “*War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*”, Chapter 2. Florence: Taylor and Francis (2013), pages 33 and 36.

<sup>157</sup> Winston Churchill’s speech delivered on the 5th of March 1946, at Westminster College in Fulton, Missouri.

<sup>158</sup> Futamura, Madoka. “Introduction”. In “*War Crimes Tribunals and Transitional Justice, the Tokyo Trial and the Nuremberg Legacy*”. Florence: Taylor and Francis (2013), pages 1 and 2.

<sup>159</sup> *Ibidem*.

<sup>160</sup> Duson, Nuleera A., and Amadi, Felix C. “Prosecuting Core International Crimes in Ad Hoc International Criminal Tribunals: Assessment of the End of an Era in International Criminal Justice.” *International Journal of Business & Law Research* 8, no. 2, April-June 2020, page 8. <https://seahipaj.org/journals-ci/june-2020/IJBLR/full/IJBLR-J-1-2020.pdf>.

<sup>161</sup> Barria, Lilian A., and Roper, Steven D. “How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR.” *The International Journal of Human Rights* 9, no. 3, September 2005, page 364. <https://doi.org/10.1080=13642980500170782>.

<sup>162</sup> International Criminal Court. *Understanding the International Criminal Court* (2020), page 11. <https://doi.org/https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.



crimes and the crime of aggression<sup>163</sup>. While the other three categories are present also in the IMT Charter, the first is a novelty of the ICC. Indeed, drawing from the tragic experience of the Holocaust, the ICC has the jurisdiction to also prosecute crimes of genocide, a word coined by the Polish lawyer Raphaël Lemkin in 1944 which literally means “*the act of killing a race*”, from the Latin word “*caedo*” (“act of killing”) and the Ancient Greek word “*γένος*” (*génos*) (“race”)<sup>164</sup>.

The Nuremberg and Tokyo trials had indeed a fundamental role in the development of modern international criminal law. Relevant for the purpose of this paper is also the consideration of one case within the Nuremberg trials which prosecuted as a war crime the pillage of cultural heritage: the Rosenberg Trial, which is the first case of international criminal responsibility for the pillage of cultural property. The Trial prosecuted Alfred Rosenberg, who was the Nazi general at the head of the Einsatzstab Reichsleiter Rosenberg or Task Force Rosenberg, a programme which had the purpose of confiscating cultural objects during the Second World War from both private collections and the territories occupied by German troops<sup>165</sup>. Rosenberg was accused of having committed war crimes, which, under the IMT Charter, included the “*plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity*”<sup>166</sup>. The IMT found him guilty and sentenced him to death<sup>167</sup>.

### *1.3: Destruction of cultural heritage as an intent to commit genocide*

The legacy of the Nuremberg trials and the newly comprehended horror of the extermination of the Jewish people during the Second World War, led the international community to actively prevent a new genocide and perpetuate the rhetoric of the “*never again*”. It is with this intent that the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948. Although in some precedent drafts of the Convention the scope of genocide included the concept of “*cultural genocide*” meaning the eradication of a people’s cultural heritage, the final draft of the Convention, adopted in 1948, limited the definition of genocide to the physical destruction of a

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<sup>163</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 5.

<sup>164</sup> Lemkin, Raphael. “Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress”. Washington, D.C.: Carnegie Endowment for International Peace (1944), page 79.

<sup>165</sup> Vrdoljak, Ana Filipa. “The Criminalisation of the Intentional Destruction of Cultural Heritage”. *Routledge EBooks*, June 14, 2017, pages 4 and 5. <https://doi.org/10.4324/9781315676715-12>.

<sup>166</sup> Charter of the International Military Tribunal. London, August 8, 1945, Article 6 (b).

<sup>167</sup> Vrdoljak, Ana Filipa. “The Criminalisation of the Intentional Destruction of Cultural Heritage”. *Routledge EBooks*, June 14, 2017, page 5. <https://doi.org/10.4324/9781315676715-12>.

“national, ethnical, racial, or religious group<sup>168</sup>”. Specifically, as stated in the Convention, genocide can occur through the killing<sup>169</sup> or serious physical or psychological harm<sup>170</sup> to the group members, the imposing of living conditions on the group calculated to cause its physical destruction, either entirely or in part<sup>171</sup>, the enforcing of measures to prevent births within the group<sup>172</sup>; and the compelling the relocation of children from the group to another one<sup>173</sup>. As specified by the same Article II of the Convention, for one or more of the following acts to constitute genocide, it must be committed “with intent to destroy<sup>174</sup>.” The *dolus specialis* in this case is the *mens rea*, meaning that to commit genocide there must be a “guilty mind<sup>175</sup>”, a specific and intentional intent to destroy, in addition to the physical act itself<sup>176</sup>. The focus on the intent to destroy the group can lead to the consideration of acts of intentional destruction of cultural heritage as evidence of genocide, even if cultural genocide is not included in the limited scope of the 1948 Genocide Convention<sup>177</sup>. Indeed, the physical destruction of a group is often accompanied by assaults and destruction of the group’s cultural and religious heritage, which may demonstrate the intent to physically eliminate the targeted group<sup>178</sup>. This has been demonstrated by the International Court of Justice (ICJ) jurisprudence in the *Kristić* case in which the court stated that attacks to a targeted group’s cultural and religious property “may legitimate be considered as evidence of an intent to physically destroy the group<sup>179</sup>”, meaning as an intent to commit genocide. To summarize, even if in the 1948 Convention on the Prevention

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<sup>168</sup> Convention on the Prevention and Punishment of the Crime of Genocide. New York City, December 9, 1948, Article II.

<sup>169</sup> *Ibidem*, Article II (a).

<sup>170</sup> *Ibidem*, Article II (b).

<sup>171</sup> *Ibidem*, Article II (c).

<sup>172</sup> *Ibidem*, Article II (d).

<sup>173</sup> *Ibidem*, Article II (e).

<sup>174</sup> *Ibidem*, Article II.

<sup>175</sup> Literal translation of “*mens rea*” conventionally used. Source: Sayre, “Mens Rea”, in *The Harvard Law Review* (1932)

<sup>176</sup> Lenzerini, Federico. “Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law.” *Europa Ethnica* 74, no. 3–4 (2017), page 70. <https://doi.org/10.24989/0014-2492-2017-34-66>.

<sup>177</sup> *Ibidem*.

<sup>178</sup> *Ibidem*, page 71.

<sup>179</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Judgment of February 26 (2007), *I.C.J. Reports* 2007, p. 43, para. 344. See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of February 3, 2015. In Lenzerini, Federico. “Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law.” *Europa Ethnica* 74, no. 3–4 (2017), page 71. <https://doi.org/10.24989/0014-2492-2017-34-66>.

and Punishment of the Crime of Genocide acts of destruction of cultural heritage do not qualify as genocide, it has been recognized that intentionally destroying a group's culture can show evidence of the intent to commit genocide towards that targeted group if the latter is also subject to physical or biological destruction through one or more ways listed in Article II of the 1948 Genocide Convention<sup>180</sup>.

#### *1.4: Destruction of cultural heritage as crimes against humanity*

Highlighting the discriminatory intent behind the destruction of a group's cultural heritage and understanding how the perpetrators of such act usually intended to target the communities whose heritage they want to destroy, rather than the material or immaterial symbol of the heritage itself, has led to considering the intentional destruction of cultural heritage as a crime against people rather than a crime against property<sup>181</sup>. The effect that the destruction of cultural property has on people is essential in order to consider the latter as a crime against humanity<sup>182</sup>. This consideration of intentional destruction of cultural heritage as a crime against humanity is visible in the jurisprudence of the International Tribunal for the Former Yugoslavia (ICTY), in the *Kordić & Cerkez Case*, in which the ICTY, focusing on the discriminatory intent and on the *mens rea* beyond the destruction of cultural heritage, has claimed that such crime, especially in relation to religious heritage, is an attack on the very identity of people and can fall within the notion of crimes against humanity, as a crime of persecution<sup>183</sup>, if done with a discriminatory intent<sup>184</sup>. The *conditio sine qua non* for the consideration of the destruction of cultural heritage as a crime of persecution and, therefore, a crime against humanity lies in the discriminatory intent towards a group whose cultural heritage has been destroyed. The focus is indeed on people. An analogous consideration was made previously by the

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<sup>180</sup> Lenzerini, Federico. "Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law." *Europa Ethnica* 74, no. 3–4 (2017), pages 70 and 71. <https://doi.org/10.24989/0014-2492-2017-34-66>.

<sup>181</sup> *Ibidem*, page 68.

<sup>182</sup> *Ibidem*.

<sup>183</sup> crimes of persecution are included in the concept of crimes against humanity according to Article 5(h) of the ICTY Statute.

<sup>184</sup> See *Prosecutor v. Kordić & Cerkez*, Case IT-95-14/2-T, Trial Chamber, Judgment of February 26, 2001, para. 207. In Lenzerini, Federico. "Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law." *Europa Ethnica* 74, no. 3–4 (2017), page 69. <https://doi.org/10.24989/0014-2492-2017-34-66>.

International Law Commission which in a Report of 1991 has included the “*systematic destruction of buildings or monuments representative of a particular social, religious, cultural or other group*”<sup>185</sup> as one of the forms that the persecution can take<sup>186</sup>. The identification of the destruction of cultural and religious monuments and sites as a form of persecution and, therefore, a crime against humanity, strictly relies on going beyond the concept of property itself and considering instead the social and cultural value of the property for the individuals. However, as of today, there is no international threshold to assess when the destruction of cultural heritage constitutes a crime against humanity and when it constitutes only another type of international crime<sup>187</sup>; it depends on the single case and the single court judging the case. For example, in *Al Mahdi* case, which will be analyzed later in the paper, the International Criminal Court considered the intentional destruction of a group’s cultural heritage as a war crime rather than a crime against humanity, causing debates within the international community<sup>188</sup>. To summarize, the destruction of cultural heritage can and has been considered a crime against humanity falling within the category of crime of persecution. In such cases, the precondition was the intentionality to target a specific group and the effect that the destruction of that property had on the group’s people. However, the intentional destruction of cultural heritage does not inherently constitute a crime against humanity, but it depends on the specific case. Up to now, the ICC had never considered the intentional destruction of cultural heritage as a crime against humanity, however, this does not preclude the court from doing so in the future<sup>189</sup>.

### 1.5: Destruction of cultural heritage as a war crime

The last international crime associated with the destruction of cultural heritage is war crimes. The destruction of culturally relevant monuments, objects or immaterial heritage during armed conflict is indeed considered a severe breach of the law of war and is therefore protected within

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<sup>185</sup> See “Report of the International Law Commission on the Work of Its 43rd Session”, April 29 – July 19, 1991, para. 268. In Lenzerini, Federico. “*Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law.*” *Europa Ethnica* 74, no. 3–4 (2017), page 69. <https://doi.org/10.24989/0014-2492-2017-34-66>.

<sup>186</sup> Lenzerini, Federico. “*Intentional Destruction of Cultural Heritage, Crimes against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law.*” *Europa Ethnica* 74, no. 3–4 (2017), page 69. <https://doi.org/10.24989/0014-2492-2017-34-66>.

<sup>187</sup> For example, a war crime, if carried out during an armed conflict.

<sup>188</sup> Curci, Alice. “The Prosecutor V. Al Mahdi and the Destruction of Cultural Heritage: Property Crime or Crime Against Humanity?” *UCLA Journal of International Law and Foreign Affairs* 23, no. 1 (2019): 159–82. <https://www.jstor.org/stable/48610706>.

<sup>189</sup> *Ibidem*, page 182.

international humanitarian law<sup>190</sup>. It is precisely the recognition of the destruction of cultural heritage as a war crime that allows for the latter to be protected under international humanitarian law. A fundamental instrument regulating the laws of war are the Four Geneva Conventions<sup>191</sup> with the two Additional Protocols. The general purpose of the Geneva Conventions and the Additional Protocols is the establishment of minimum standards of humane treatment to be respected during armed conflicts, focusing specifically on the protection of individuals<sup>192</sup>. Nevertheless, Article 85 of the First Additional Protocol of 1977 talks also about cultural property protection, identifying its intentional destruction as a war crime<sup>193</sup>. Indeed, Paragraph 4 (d) of Article 85 states that wilful damages to cultural heritage sites, monuments, places of worship, works of art, and property with a relevant cultural or spiritual value are considered a grave breach of the First Additional Protocol and an infringement of the Geneva Conventions<sup>194</sup>. The following paragraph of the article specifies that the violations mentioned in paragraphs 3 and 4 are considered war crimes<sup>195</sup>. The recognition of the destruction of cultural heritage as a war crime gives further protection to cultural heritage in international law, as it will be analysed in the following chapter.

Another article within the First Additional Protocol is related to the protection of cultural heritage, Article 53, which prohibits committing hostilities against cultural heritage sites, monuments, places of worship, works of art, and property with a relevant cultural or spiritual value<sup>196</sup>. It also prevents such objects from being used in assisting military efforts or as targets for reprisals<sup>197</sup>. It is important to notice that the First Additional Protocol applies to international armed conflicts, while the Second Additional Protocol applies solely to non-international armed conflicts, extending the

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<sup>190</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Article 53 and Article 85 (4) (d). See also Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, Article 4.

<sup>191</sup> Namely, the First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864), the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1906), the Third Geneva Convention Relative to the Treatment of Prisoners of War (1929), the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

<sup>192</sup> Forrest, Craig. "Cultural Heritage and Armed Conflicts." In *International Law and the Protection of Cultural Heritage*, Chapter 3. Routledge (2009), page 76.

<sup>193</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts" (Protocol I), Geneva, June 8, 1977, Article 85.

<sup>194</sup> *Ibidem*, Article 85 (4) (d).

<sup>195</sup> *Ibidem*, Article 85 (5).

<sup>196</sup> *Ibidem*, Article 53 (a).

<sup>197</sup> *Ibidem*, Article 53 (b) and (c).

scope of the Geneva Conventions to the latter<sup>198</sup>. As Article 16 of the Second Additional Protocol prohibits damage to culturally relevant monuments, objects, and sites, cultural heritage becomes protected in every armed conflict, whether international (between states) or non-international (between states and non-state actors or among the non-state actors)<sup>199</sup>.

A milestone in the protection of cultural heritage in international humanitarian law is given by the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed in The Hague in 1954 and therefore informally known also as the 1954 Hague Convention. Such Convention, with its First Protocol, later updated by the Second Protocol in 1999, is the first international treaty specifically dedicated to the protection of cultural heritage during armed conflict, and, as such, it provides the first legal definition of the latter, conceptualizing “cultural property” as an autonomous legal category in need of international protection due to its inherent cultural value rather than being contingent upon property rights or state sovereignty protection<sup>200</sup>. Moreover, the Convention expresses the idea that cultural property should be safeguarded during wars not for its material value but rather for its importance in contributing to the diverse cultural heritage of humanity<sup>201</sup>. Indeed, the Preamble of the Convention is also the first time in which a legal document precisely used the words “cultural heritage<sup>202</sup>” in relation to cultural properties<sup>203</sup>.

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<sup>198</sup> Forrest, Craig. “Cultural Heritage and Armed Conflicts.” In *International Law and the Protection of Cultural Heritage*, Chapter 3. Routledge (2009), page 108.

<sup>199</sup> Qureshi, Waseem. “The Protection of Cultural Heritage by International Law in Armed Conflict”. *Loyola University Chicago International Law Review* 15, no. 1 (2017), page 76. <https://lawcommons.luc.edu/lucilr/vol15/iss1/3>.

<sup>200</sup> Roman, Erez. “The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: Rosenberg to Al-Mahdi.” *Groningen Journal of International Law* 7, no. 1: August 26, 2019, page 114. <https://doi.org/10.21827/5d5141dfbdcbf>.

<sup>201</sup> Francioni, Francesco. “The Evolving Framework for the Protection of Cultural Heritage in International Law.” In *Cultural Heritage, Cultural Rights, Cultural Diversity : New Developments in International Law*, Chapter 1. Boston: Martinus Nijhoff Publishers (2012), page 9.

<sup>202</sup> “*Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contributions to the culture of the world*”, Preamble of the Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954.

<sup>203</sup> Vrdoljak, Ana Filipa. “The Criminalisation of the Intentional Destruction of Cultural Heritage”. *Routledge EBooks*, June 14, 2017, page 5. <https://doi.org/10.4324/9781315676715-12>.

The Convention prohibits the intentional destruction, theft, pillaging, or misappropriation of cultural property during armed conflict<sup>204</sup>, including its use for purposes that would put it at risk of damage or destruction<sup>205</sup>, when not justified by military necessity<sup>206</sup>. In this way, the Convention inexpressively argues against the use of cultural properties for military purposes. Furthermore, it requires State Parties to protect cultural heritage both at the national level, meaning within their territories, and at the international level, through collaboration with each other and international organizations like UNESCO<sup>207</sup>.

However, the rise of the Gulf War and the conflicts sparked after the dissolution of Yugoslavia, showed the limits of the 1954 Hague Convention, and urged the need for a new instrument to implement the latter. With this intent and with the help of UNESCO, a Second Protocol to the Hague Convention was adopted in 1999. One of the novelties introduced by the Protocol was the category of “enhanced protection”, which refers to the cultural properties with the highest relevance for humanity<sup>208</sup>. For a property to be considered such, and be registered in the list, the party in whose territory the property is situated must make a declaration stating that it will refrain from using such property for military purposes<sup>209</sup>. Once the property enters such list it has immunity, meaning that it cannot be made the object of an attack nor it can be used, together with its closest surroundings, to sustain military action<sup>210</sup>. However, as expressed by Article 13, the property loses its immunity when it is turned into a military objective<sup>211</sup>. Nevertheless, even in such scenario, the

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<sup>204</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, Article 4 (3).

<sup>205</sup> *Ibidem*, Article 4 (1).

<sup>206</sup> “*The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver*”, Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, Article 4 (2).

<sup>207</sup> *Ibidem*, Article 4, and Article 23.

<sup>208</sup> Roman, Erez. “The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: Rosenberg to Al-Mahdi.” *Groningen Journal of International Law* 7, no. 1: August 26, 2019, page 115. <https://doi.org/10.21827/5d5141dfbdcfbf>.

<sup>209</sup> *Ibidem*.

<sup>210</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, March 26, 1999, Article 12.

<sup>211</sup> *Ibidem*, Article 13 (1) (b).



attacking party is required to make every effort to avoid causing damage to the property<sup>212</sup>. Should this prove to be impractical, the decision to proceed with the attack must be made at the highest level of command<sup>213</sup>. Furthermore, the Protocol enhances the responsiveness of the Convention by specifying the penalties to be applied for grave breaches of protection of cultural property and the circumstances under which individual criminal responsibility applies<sup>214</sup>. Additionally, it states that such offenses will fall under universal criminal jurisdiction, which means that a member state where an accused criminal is found must either extradite or prosecute them<sup>215</sup>. Finally, to assure the implementation of the Second Protocol and *de facto*, of the Hague Convention, the Second Protocol establishes a twelve-member Intergovernmental Committee with this purpose<sup>216</sup>.

### *Conclusions:*

In conclusion, as presented in this chapter, international law offers numerous non-penal modes of protection of cultural heritage. Conventions and Declarations exist to safeguard both material and immaterial cultural property during times of war and peace, recognising their value in preserving the heritage of specific peoples and the broader heritage of all humanity. Moreover, the protection of cultural heritage is considered to have a strong *opinio iuris* and to be a widely accepted general practice<sup>217</sup> as law, thus constituting a norm of customary international law, as demonstrated in the Eritrea/Ethiopia case involving the destruction of the *Stela de Matara*, discussed earlier in this chapter. The United Nations Security Council also acknowledges the importance of protecting cultural property and preventing its illicit trade, to the point that it has issued three binding resolutions with this purpose (Resolution 1483, Resolution 2199, and Resolution 2347). Additionally,

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<sup>212</sup> Roman, Erez. "The Journey of Cultural Heritage Protection as a Common Goal for Human Kind: Rosenberg to Al-Mahdi." *Groningen Journal of International Law* 7, no. 1: August 26, 2019, page 115. <https://doi.org/10.21827/5d5141dfbdcfbf>.

<sup>213</sup> *Ibidem*.

<sup>214</sup> *Ibidem*.

<sup>215</sup> *Ibidem*.

<sup>216</sup> Qureshi, Waseem. "The Protection of Cultural Heritage by International Law in Armed Conflict". *Loyola University Chicago International Law Review* 15, no. 1 (2017), pages 90 and 91. <https://lawcommons.luc.edu/lucilr/vol15/iss1/3>.

<sup>217</sup> "General practice" means that states must follow a certain behaviour, and this practice must be generalized to all states. In this context, "general" does not mean that unanimity is required, but it rather refers to a representative criterion, that is the fact that a custom, to be such, must be familiar to states situated in different parts of the world, having, therefore, different legal and cultural traditions.



international organizations such as UNESCO, ICOMOS, ICCROM, and the Blue Shield International also play pivotal roles in safeguarding cultural heritage.

Considering that international law provides both hard and soft law instruments for protecting cultural heritage, any intentional destruction or illicit trade of such heritage is deemed a violation of international law. Such actions may qualify as war crimes, crimes against humanity, or even intent to commit genocide, as explained in this chapter. To comprehend the meaning and legal implications of these crimes, the chapter has analysed the Nuremberg and Tokyo trials and their legacy. Indeed, these trials played a pivotal role in establishing the concepts of crimes against humanity and genocide. Moreover, as explained in the second subparagraph of this chapter, the Nuremberg and Tokyo trials were fundamental steps in the development of modern international criminal law by being also the first time in which individual criminal responsibility was applied to international crimes and the first time in which such crimes were prosecuted by an international court rather than a national one.

In this way, Chapter One has laid the groundwork for Chapter Two, which will delve into the legal analysis of the war crime of the destruction of cultural heritage, and further explore the concept of individual criminal responsibility related to the intentional destruction of cultural heritage.

## Chapter 2: Legal Analysis of the War Crime of Destruction of Cultural Heritage:

### *Introduction:*

The focus of this chapter is on the war crime of destruction of cultural heritage. Indeed, the chapter begins with defining war crimes, explaining the ongoing debate within the international community on the minimum requirements needed for an act to fall within this concept, and analyses a *stricto sensu* definition of war crime. The chapter continues by providing an extensive analysis of Article 8 (2) of the Rome Statute of the International Criminal Court, focusing specifically on Article 8 (2) (b) (ix) and Article 8 (2) (e) (iv) as both provisions deal with the war crime of directing attacks towards cultural heritage, thus explicitly falling within the scope of this paper. The Chapter later examines the relevant jurisprudence of the International Criminal Tribunal for the former Yugoslavia, focusing on the analysis of the *Kordić and Čerkez* case (2001), the *Strugar* case (2005) and the *Jokić* case. It then examines the *Al Mahdi* case and its relevance in the prosecution of the war crime of destruction of cultural heritage. The chapter ends with a brief analysis of the International Criminal Court's Policy on Cultural Heritage of June 2021.

### *2.1: Definition of war crime*

In international law, the term and concept of “war crimes” are not consistently defined across various treaties, conventions, statutes of tribunals, and jurisdictions<sup>218</sup>. The definition of a war crime can vary depending on the specific legal framework. From a *stricto sensu* definition, which usually applies, for an act to be identifiable as a war crime it must respect at least two fundamental conditions: first, the act must constitute a violation of international humanitarian law; secondly, it must be criminalized under treaty or customary international law<sup>219</sup>.

Moreover, the applicability of the rules of international humanitarian law requires the existence of a nexus between the act and a conflict, meaning that the act must have been committed in relation to a conflict, whether of international or non-international character is irrelevant for the purpose of defying a war crime, as war crimes can be committed during both

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<sup>218</sup> Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 1. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>219</sup> *Ibidem*.

international and non-international armed conflicts<sup>220</sup>. Notably, it is not necessary for the crime to have been committed during the conflict or in the geographical area of the latter, what is at stake is the presence of a “*functional relationship*”<sup>221</sup> between the crime and the armed conflict. Indeed, as stated by the Appeals Chamber of the ICTY in the *Kunarac, Kovač and Vuković* case, for the nexus to exist the conflict must have significantly contributed to either the perpetrator’s capacity to commit the act, the way in which the act was carried out, or the intention behind committing it<sup>222</sup>. Additionally, the applicability of the rules of international humanitarian law requires that the customary or treaty law violated must provide legal norms holding individuals criminally responsible for committing such violations<sup>223</sup>. Therefore, war crimes are defined based on both primary rules concerning the prohibition of the act in question under international humanitarian law, and secondary rules referring to the punishment<sup>224</sup>. It is worth noting that the concept of war crimes extends beyond classical international law, which primarily focused on state responsibility, and imposes liabilities on individuals<sup>225</sup>. Such liabilities are reflected in the secondary rules on individual criminal responsibility. On this matter, the four Geneva Conventions restrict individual criminal responsibility only to serious violations of the laws and customs of war<sup>226</sup>. According to what was previously said, this means that only a serious violation of the Geneva Conventions qualifies as a war crime. Therefore, the seriousness of the violation is also at stake when defying war crimes. This, indeed, is reflected also in the application of Article 3 of the ICTY Statute in the *Tadić* case<sup>227</sup>, and in Article 8 of the Rome Statute<sup>228</sup>, as it will be examined further on in this chapter.

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<sup>220</sup> *Ibidem*.

<sup>221</sup> *Ibidem*, page 8.

<sup>222</sup> ICTY *Sentencing Judgement in the Kunarac, Kovac and Vukovic (Foca) Case*, International Criminal Tribunal for the Former Yugoslavia. The Hague, June 12, 2002. <https://www.icty.org/en/sid/8095>.

<sup>223</sup> Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 1. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>224</sup> *Ibidem*.

<sup>225</sup> Gaeta, Paola, Jorge E. Viñuales, and Salvatore Zappalà. “Cassese’s International Law”. 3rd ed. *Oxford: Oxford University Press* (2020), page 428.

<sup>226</sup> Dinstein, Yoram, and Tabory, Mala. “War Crimes in International Law”. In Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 3. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>227</sup> *Prosecutor v Tadić (Judgment)* ICTY-94-1, July 15, 1999.

<sup>228</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (b).

An additional element to consider in relation to a *stricto sensu* definition of war crime is the mental element. Indeed, as expressed in the Elements of War Crimes of the Rome Statute, it is necessary that the perpetrator of the war crime is aware of the context in which the crime is committed<sup>229</sup>: the perpetrator must have knowledge, at the time of committing the crime, of the “*factual circumstances*<sup>230</sup>” determining the existence of an armed conflict<sup>231</sup>. Moreover, in some cases, the intent of the perpetrator may also be essential to establish the perpetrator’s individual criminal responsibility<sup>232</sup>. Summarizing what has been said up to now, for an act to be considered a war crime *stricto sensu* it must be a serious violation of international humanitarian law committed in relation to a conflict by a perpetrator who was aware of the existence of such conflict, and this act must be criminalized by treaty or customary international law. To have a comprehensive understanding of what a war crime is, it is worth mentioning that some scholars have argued against this *stricto sensu* definition of war crime, expressing the need for a more general one.

Hathaway, Strauch, Walton and Weinberg claim that the issue of retroactivity concerning war crimes —whether such crimes should be punishable before they were specifically covered by a treaty or customary international law — should be addressed on a case-to-case basis<sup>233</sup>. They, therefore, argue against the incorporation of retroactivity in the definition of war crimes, as done by the *stricto sensu* definition previously analysed. The latter definition, indeed, requires that an act must be criminalized to be identified as a war crime<sup>234</sup>, thus preventing retroactive prosecution because a perpetrator cannot be accused of having committed a war crime previously to the time in which such war crime was criminalized by a treaty or norm of customary international law if a

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<sup>229</sup> Dörmann, Knut. "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Planck Yearbook of United Nations Law Online* 7, 1 (2003), pages 356 and 357. doi: <https://doi.org/10.1163/187574103X00077>.

<sup>230</sup> *Ibidem*, page 357.

<sup>231</sup> However, there is no need for the perpetrator to make a legal assessment of these circumstances, such as determining whether the conflict is international or non-international, nor is there a requirement for the perpetrator to be aware of the specific facts that confirm the existence of the armed conflict.

<sup>232</sup> Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 7. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>233</sup> Hathaway, Oona A. et al., “What Is a War Crime?,” *Yale Journal of International Law* 44, no. 1, January 1, 2019, page 55. <http://hdl.handle.net/20.500.13051/6731>.

<sup>234</sup> The criminalization of the act is a *conditio sine qua non* for the identification of such act as a war crime.

war crime is such only if it has been criminalized. Hence, Hathaway, Strauch, Walton and Weinberg propose an even more generic definition of war crime as a serious violation of international humanitarian law, arguing for an identification of war crimes based exclusively on the presence of two substantive elements: the identification of the act in question as a violation of international humanitarian law, and the recognition of such violation as that of a serious character<sup>235</sup>. This simpler definition of war crimes untied from criminalization allows to address issues of retroactivity in context, determining in each case whether the defendant can be criminally prosecuted for an act that was considered subject to criminal liability at the time<sup>236</sup>. Additionally, by untying the definition of war crimes from legal statutes, decisions of international tribunals and other sources of criminalization, the authors solve problems derived from the “criminalization approach”. Such problems include the fact that jurisdiction over potential war crimes could be limited to a particular geographical area, periods of time, set of actors or set of crimes, considering how, for example, even the Rome Statute of the ICC recognizes the possibility of war crimes developing outside of its jurisdictional reach<sup>237</sup>. Determining whether issues of retroactivity of war crimes should be solved on a case-to-case basis or should be decided *a priori* by incorporating them in the definition of war crimes falls out of the purpose of this paper; however, it was necessary to mention Hathaway, Strauch, Walton and Weinberg’s view to comprehend the complexity of defining war crimes and to have a more general definition of the latter.

For the purpose of this chapter, which will analyse cases concerning the war crime of destruction of cultural heritage prosecuted by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the *Al Mahdi* case prosecuted by the International Criminal Court (ICC), it is relevant to take into consideration the specific definitions of war crime provided by the ICTY Statute and by the Rome Statute. As the latter will be the focus of the following paragraph, this paragraph will deal only with the former. Interestingly, the ICTY Statute does not explicitly use the term “war crime”, instead, it divides violations identifiable as such into two categories in Article 2 and Article 3<sup>238</sup>. In the former article, the ICTY Statute addresses severe breaches of the Geneva Conventions against protected persons and property committed in international armed

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<sup>235</sup> *Ibidem*.

<sup>236</sup> *Ibidem*.

<sup>237</sup> *Ibidem*, page 82.

<sup>238</sup> Statute of the International Criminal Tribunal for the former Yugoslavia. New York City, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, Article 2 and Article 3.

conflicts. In contrast, Article 3 penalizes, more generally, “*violations of the laws or customs of war*”<sup>239</sup>, and it refers to specific elements from the Hague Rules of Land Warfare and certain provisions of Additional Protocol I of the Geneva Conventions. According to interpretations by the ICTY, Article 3 serves as a “*general provision covering all violations of humanitarian law*”<sup>240</sup> that do not qualify as grave breaches, acts of genocide, or crimes against humanity<sup>241</sup>. This provision, as demonstrated by the *Tadić Jurisdiction Decision*, applies regardless of whether the violation occurs in an international or non-international armed conflict, demonstrating how it is not necessary for an act to be committed in relation to an international armed conflict for it to be considered as a war crime, since crimes committed in relation to non-international armed conflict also fall within the category of war crimes under this Article<sup>242</sup>. Moreover, Article 3 presents a list of possible violations of international humanitarian law, which include, relevantly for this paper, “*the 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*”<sup>243</sup>. However, as specified in the Article, the list is not exhaustive<sup>244</sup>. This allows for a broader category of acts falling within the concept of “war crimes” under the Statute. Nevertheless, it is important to notice that, despite the broad scope of application of Article 3 of the ICTY Statute, not all violations of international humanitarian law amount to a war crime under the latter. Indeed, in the *Tadić Jurisdiction Decision*, the Appeals Chamber of the ICTY established specific conditions that must be fulfilled for an act to constitute a war crime under Article 3 of the ICTY Statute<sup>245</sup>. The requirements reflect the “criminalization” approach of the *stricto sensu* definition of war crime presented at the beginning of the chapter. Indeed, the *Tadić*

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<sup>239</sup> *Ibidem*, Article 3.

<sup>240</sup> Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 6. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>241</sup> *Ibidem*.

<sup>242</sup> *Prosecutor v Tadić (Judgment)* ICTY-94-1, 15 July 1999. In Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>243</sup> Statute of the International Criminal Tribunal for the former Yugoslavia. New York City, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, Article 3 (d).

<sup>244</sup> “*The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to...*” Source: Statute of the International Criminal Tribunal for the former Yugoslavia. New York City, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, Article 3.

<sup>245</sup> *Prosecutor v Tadić (Judgment)* ICTY-94-1, July 15, 1999.

*Jurisdiction Decisions* requires that, to be considered a war crime, an act must be a serious violation of a rule of international humanitarian law of either customary nature or based on applicable treaty law<sup>246</sup> that must give rise to individual criminal responsibility<sup>247</sup>. Therefore, essential to the ICTY's determination of war crimes is the requirement that the violation of international humanitarian law (primary rule) must be defined as criminal under treaty or customary international law (secondary rule)<sup>248</sup>. Only under these circumstances can individual criminal liability for the prohibited conduct be established, and the specific act be classified as a war crime. Moreover, in line with the Geneva Conventions, the emphasis is put also on the seriousness of the violation. As a matter of fact, the *Tadić Jurisdiction Decision*, in accordance with Articles 1 and 2 of the Statute<sup>249</sup>, stresses how not all violations of international humanitarian law are to be considered a war crime under the ICTY Statute, but only those of a serious character<sup>250</sup>. This same emphasis is present also in Article 8 (2) of the Rome Statute of the International Criminal Court.

## 2.2: *The notion of war crime in the Rome Statute of the International Criminal Court*

The International Criminal Court (ICC) is the first and only permanent international criminal tribunal with jurisdiction over individuals<sup>251</sup>. Unlike the *ad hoc* nature of the ICTY and the ICTR, the ICC's scope is not limited to a specific geographic area or timeframe<sup>252</sup>. Additionally, while the ICTY and ICTR were established by Security Council resolutions, formalizing them as UN organs, the ICC

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<sup>246</sup> If the rule belongs to treaty law, then the conditions required by the treaty must be satisfied.

<sup>247</sup> *Ibidem*.

<sup>248</sup> Schwarz, Alexander. "War Crimes," Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 5. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>249</sup> Both articles refer to the seriousness of the violation of international humanitarian law. Specifically, Article 1 regards the competences of the Tribunal, stating that "*International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute*". Source: Statute of the International Criminal Tribunal for the former Yugoslavia. New York City, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, Article 1. Article 2, as previously mentioned, refers to severe breaches of the 1949 Geneva Conventions.

<sup>250</sup> *Prosecutor v Tadić (Judgment)* ICTY-94-1, July 15, 1999.

<sup>251</sup> International Criminal Court. *Understanding the International Criminal Court* (2020), page 9. <https://doi.org/https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

<sup>252</sup> *Ibidem*, page 10.

is an independent organization separate from the United Nations, with its own distinct membership<sup>253</sup>. The ICC was established by the Rome Statute of the International Criminal Court, adopted in July 1998 by 120 states, and entered into force on the 1<sup>st</sup> of July 2002<sup>254</sup>. As of April 2024, 124 states have adopted the Rome Statute<sup>255</sup>. As enunciated in Article 5 of the Statute, the ICC has jurisdiction over four crimes: the crime of genocide<sup>256</sup>, crimes against humanity<sup>257</sup>, war crimes<sup>258</sup> and crimes of aggression<sup>259</sup>. For the purpose of this paper, this chapter will deal exclusively with war crimes, and, specifically, with the war crime of destruction of cultural heritage. However, to have a comprehensive understanding of the Statute it is necessary to briefly discuss its drafting process.

When preparing the draft Statute of the International Criminal Court (ICC), the International Law Commission (ILC) opted not to provide detailed definitions of crimes, and, instead, decided to reference established legal precedents<sup>260</sup>. In its commentary on the laws and customs applicable in armed conflict, the ILC specifically cited grave breaches outlined in the Geneva Conventions and Additional Protocol I<sup>261</sup>. The commentary also incorporated norms from the Hague Regulations<sup>262</sup>. However, the ILC excluded any references to either Common Article 3 of the Geneva Conventions of 1949 or the Additional Protocol II of the Geneva Conventions, both of which refer to non-international armed conflicts<sup>263</sup>.

In 1995 an *Ad Hoc* Committee reviewed the draft Statute prepared by the ILC<sup>264</sup>. The Committee's findings highlighted the need for a clearer definition of crimes within the Statute to

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<sup>253</sup> *Ibidem*.

<sup>254</sup> "Joining the International Criminal Court Why Does It Matter?," (2018). <https://www.icc-cpi.int/sites/default/files/Joining-Rome-Statute-Matters.pdf>.

<sup>255</sup> International Criminal Court Official Site. "The States Parties to the Rome Statute | International Criminal Court." [asp.icc-cpi.int](https://asp.icc-cpi.int/states-parties). *International Criminal Court* (2024). <https://asp.icc-cpi.int/states-parties>.

<sup>256</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 5 (a).

<sup>257</sup> *Ibidem*, Article 5 (b).

<sup>258</sup> *Ibidem*, Article 5 (c).

<sup>259</sup> *Ibidem*, Article 5 (d).

<sup>260</sup> Robinson, Darryl, and Herman von Hebel. "War Crimes in Internal Conflicts: Article 8 of the ICC Statute." *Yearbook of International Humanitarian Law* 2, December 1999, page 197. <https://doi.org/10.1017/s138913590000428>.

<sup>261</sup> *Ibidem*, page 198.

<sup>262</sup> *Ibidem*.

<sup>263</sup> *Ibidem*.

<sup>264</sup> Byron, Christine, and Inc Ebrary. "War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court". "Introduction". Manchester, U.K. ; New York: *Manchester University Press* (2009), page 3.



uphold the principle of legality<sup>265</sup>. This task of defining crimes was undertaken, in the following years, by a Preparatory Committee, leading to the Rome Conference held in June and July 1998<sup>266</sup>. Given the high number of precedents related to war crimes, great attention was taken in this process to choose which norms to include in the Statute. When it came to norms that applied in the context of international armed conflicts, agreement was reached rather quickly, and it was unanimously recognized that the Hague Conventions and Regulations, along with the grave breaches of provisions of the 1949 Geneva Conventions, established individual criminal responsibility under customary international law<sup>267</sup>. Noticeably, the customary law status of Additional Protocol I gave rise to debate because of its fewer adherences<sup>268</sup>. Furthermore, significant debate arose during negotiations regarding whether the ICC's jurisdiction should encompass war crimes committed during non-international armed conflicts<sup>269</sup>. Indeed, certain delegations held strong reservations against including norms related to internal armed conflicts in the ICC Statute, fearing that granting the ICC jurisdiction over these crimes could be viewed as an unwarranted infringement on states' sovereignty and might undermine the overall acceptance of the Statute<sup>270</sup>.

Despite these concerns, a significant majority of delegations supported the inclusion of war crimes committed in internal armed conflicts from the outset of the preparatory negotiations<sup>271</sup>. However, challenges arose due to the absence of specific treaty provisions exclusively addressing internal armed conflicts, leading to questions about the legal basis for holding individuals criminally responsible for violations in such conflicts<sup>272</sup>. However, it was soon recognized that treating perpetrators differently based on the nature of the conflict lacked both legal and moral justification<sup>273</sup>. This realization was reinforced by key contemporary events that significantly influenced the drafting process of the ICC Statute. The first event is the recognition, by the International Court of Justice (ICJ) of Article 3 of the Geneva Conventions as reflecting "*elementary considerations of*

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<sup>265</sup> Robinson, Darryl, and Herman von Hebel. "War Crimes in Internal Conflicts: Article 8 of the ICC Statute." *Yearbook of International Humanitarian Law* 2, December 1999, page 198. <https://doi.org/10.1017/s1389135900000428>.

<sup>266</sup> *Ibidem*.

<sup>267</sup> *Ibidem*.

<sup>268</sup> *Ibidem*.

<sup>269</sup> *Ibidem*.

<sup>270</sup> *Ibidem*.

<sup>271</sup> *Ibidem*, page 199.

<sup>272</sup> *Ibidem*, page 195.

<sup>273</sup> *Ibidem*, page 196.

*humanity*<sup>274</sup>” and serving as a “*minimum standard*<sup>275</sup>” applicable in all types of conflict<sup>276</sup>. Similarly, the International Law Commission (ILC) in its initial draft of the Code of Crimes against the Peace and Security of Mankind in 1991 encompassed “*exceptionally serious war crimes*<sup>277</sup>” equally applicable to all kinds of conflicts<sup>278</sup>. Additionally, the ICTY played a pivotal role in clarifying the scope of individual criminal responsibility, notably in the *Tadić* case, where it broadly interpreted Article 3 of the ICTY Statute to encompass violations of the laws or customs of war in both internal and international armed conflicts<sup>279</sup>. Consequently to these relevant events, at the end of the negotiations, the ICC was established to have jurisdiction over war crimes of both international and non-international character<sup>280</sup>.

The Article of the ICC Statute dealing with war crimes is Article 8. The latter is broken down into two paragraphs, the first paragraph generally regards the Court’s jurisdiction to prosecute war crimes, particularly when those crimes are committed as part of organized plans, policies, or large-scale crimes<sup>281</sup>, thus suggesting a jurisdictional threshold<sup>282</sup>. The second paragraph, instead, defines the meaning of war crimes for the purpose of the Statute, distinguishing between four categories of

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<sup>274</sup> International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Rep. (1986). In Robinson, Darryl, and Herman von Hebel. “War Crimes in Internal Conflicts: Article 8 of the ICC Statute.” *Yearbook of International Humanitarian Law* 2, December 1999, page 196. <https://doi.org/10.1017/s1389135900000428>.

<sup>275</sup> *Ibidem*.

<sup>276</sup> Robinson, Darryl, and Herman von Hebel. “War Crimes in Internal Conflicts: Article 8 of the ICC Statute.” *Yearbook of International Humanitarian Law* 2, December 1999, page 196. <https://doi.org/10.1017/s1389135900000428>.

<sup>277</sup> Report of the ILC (1991) UN Doc. A/46/10 at p. 270 (commentary on draft Art. 22). In Robinson, Darryl, and Herman von Hebel. “War Crimes in Internal Conflicts: Article 8 of the ICC Statute.” *Yearbook of International Humanitarian Law* 2, December 1999, page 196. <https://doi.org/10.1017/s1389135900000428>.

<sup>278</sup> *Ibidem*.

<sup>279</sup> *Prosecutor v Tadić (Judgment)* ICTY-94-1, July 15, 1999. In Robinson, Darryl, and Herman von Hebel. “War Crimes in Internal Conflicts: Article 8 of the ICC Statute.” *Yearbook of International Humanitarian Law* 2, December 1999, pages 196 and 197. <https://doi.org/10.1017/s1389135900000428>.

<sup>280</sup> *Ibidem*, pages 198-200.

<sup>281</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (1).

<sup>282</sup> Gaeta, Paola, Jorge E. Viñuales, and Salvatore Zappalà. “Cassese’s International Law”. 3rd ed. *Oxford: Oxford University Press* (2020), page 430.

war crimes, each of which is explained in a different subparagraph<sup>283</sup>. Furthermore, each subparagraph provides an exclusive list of war crimes following within that category<sup>284</sup>.

The first category is described in subparagraph (a) and covers grave breaches under the four 1949 Geneva Conventions<sup>285</sup>. Grave breaches are specific prohibited acts outlined in the Geneva Conventions, including wilful killing<sup>286</sup>, torture and inhuman treatment<sup>287</sup>, causing severe suffering to body or health<sup>288</sup>, significant destruction and appropriation of property without justification by military necessity<sup>289</sup>, hostage taking<sup>290</sup>, and denying protected persons a fair trial<sup>291</sup>. These grave breaches must occur in the context of an international armed conflict and must target persons or property protected under the Geneva Conventions<sup>292</sup>. Accordingly, grave breaches represent particularly serious violations of international humanitarian law. Apart from obligations under the Rome Statute, according to the Geneva Conventions, states are required to enact legislation to establish effective penal sanctions against individuals who commit or order these grave breaches<sup>293</sup>. States are also obligated to actively seek out such individuals, regardless of their nationality, and bring them before their own courts<sup>294</sup>. Alternatively, a state may choose to transfer these individuals to another High Contracting Party for trial<sup>295</sup>.

The second category of war crimes is outlined in subparagraph (b) and encompasses other serious violations of the laws and customs that apply in international armed conflicts<sup>296</sup>. These crimes are drawn from various sources, incorporating rules from the 1907 Hague Convention respecting the Laws and Customs of War on Land, the 1977 Protocol I Additional to the Geneva Conventions, the

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<sup>283</sup> Namely, Article 8 (2) (a), Article 8 (2) (b), Article 8 (2) (c), Article 8 (2) (e).

<sup>284</sup> *Ibidem*.

<sup>285</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (a).

<sup>286</sup> *Ibidem*, Article 8(2)(a)(i).

<sup>287</sup> *Ibidem*, Article 8(2)(a)(ii).

<sup>288</sup> *Ibidem*, Article 8(2)(a)(iii).

<sup>289</sup> *Ibidem*, Article 8(2)(a)(iv).

<sup>290</sup> *Ibidem*, Article 8(2)(a)(v).

<sup>291</sup> *Ibidem*, Article 8(2)(a)(vi).

<sup>292</sup> Dörmann, Knut. "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Planck Yearbook of United Nations Law Online* 7, 1 (2003), page 343. doi: <https://doi.org/10.1163/187574103X00077>.

<sup>293</sup> *Ibidem*, page 344.

<sup>294</sup> *Ibidem*.

<sup>295</sup> *Ibidem*.

<sup>296</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8(2)(b).

1899 Hague Declaration (IV,3) concerning Expanding Bullets, and the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare<sup>297</sup>.

The third category and fourth category refer to war crimes committed during non-international armed conflicts<sup>298</sup>. The third category, outlined in subparagraph (c), involves serious violations of Article 3 common to the Geneva Conventions<sup>299</sup>, which applies specifically to non-international armed conflicts and prohibits acts of violence towards persons taking no active part in the conflict, including members of armed forces who have ceased to engage in combat and individuals incapacitated due to sickness, wounds, or any other cause<sup>300</sup>. The fourth category is presented in Article 8 (2) (e) and mirrors the second category described in Article 8 (2) (b) but, contrary to it, its scope of applicability is non-international armed conflicts<sup>301</sup>. Indeed, Article 8 (2) (e) covers “*other serious violations of the laws and customs applicable in armed conflicts not of an international character*”<sup>302</sup>. These offences draw from various legal foundations, including the 1907 Hague Regulations and Additional Protocol II to the Geneva Conventions<sup>303</sup>.

Even if the Rome Statute outlines a comprehensive catalogue of war crimes, it is worth pointing out that not all serious breaches of international humanitarian law follow within the definition of “war crimes” under the latter. To be considered a war crime under Article 8 of the ICC Statute, an act must meet two distinct yet interconnected criteria: first, the act must violate a norm of customary international law, acknowledging that not all international humanitarian law treaties defining war crimes enjoy universal acceptance; and second, the breach of the norm must entail individual criminal liability under customary international law<sup>304</sup>. In accordance with the general

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<sup>297</sup> Dörmann, Knut. “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes”, *Max Planck Yearbook of United Nations Law Online* 7, 1 (2003), page 344. doi: <https://doi.org/10.1163/187574103X00077>.

<sup>298</sup> *Ibidem*.

<sup>299</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8(2)(c).

<sup>300</sup> Dörmann, Knut. “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes”, *Max Planck Yearbook of United Nations Law Online* 7, 1 (2003), page 396. doi: <https://doi.org/10.1163/187574103X00077>.

<sup>301</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (e).

<sup>302</sup> *Ibidem*.

<sup>303</sup> Dörmann, Knut. “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes”, *Max Planck Yearbook of United Nations Law Online* 7, 1 (2003), page 344. doi: <https://doi.org/10.1163/187574103X00077>.

<sup>304</sup> *Ibidem*, page 345.

definition of war crimes provided by paragraph 2.1 of this paper, the ICC Statute also emphasizes the seriousness of the violation<sup>305</sup>. Such emphasis is evident by noticing that every subparagraph of Article 8 (2) uses terms such as “*serious violations*<sup>306</sup>” or “*grave breaches*<sup>307</sup>” when defining war crimes for the purpose of the Statute. Moreover, again in accordance with what was previously said, two additional elements must be considered in the ICC Statute’s definition of war crimes. These elements were complemented by the Elements of Crimes and are the presence of a nexus between the act and an armed conflict, and the awareness of the “factual circumstances” by the perpetrator of the act<sup>308</sup>. Both elements are relevant for the applicability of the rules of international humanitarian law<sup>309</sup>.

### 2.3: *The war crime of the destruction of cultural heritage in the Rome Statute*

Regarding specifically the war crime of destruction of cultural heritage, which is the focus of this paper, it is worth mentioning that cultural properties enjoy double protection under the ICC Statute. Indeed, such properties are protected both for their statute of non-military property and for their specific cultural value<sup>310</sup>.

Recognizing specifically the latter character, this section of the chapter will analyse the two subparagraphs of the ICC Statute that define the destruction of cultural heritage as a war crime. These two subparagraphs are Article 8 (2) (b) (ix), which applies when such destruction occurs in the context of international armed conflicts, and Article 8 (2) (e) (iv), which applies to the context of non-international armed conflicts. The wording of the two provisions expressed in points (ix) and (iv) of the subparagraphs (b) and (e) are identical, the only difference between the two is in the general text of the subparagraph itself. Indeed, subparagraph (b) refers to “*other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law*<sup>311</sup>”, while subparagraph (e) presents the same sentence with one relevant

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<sup>305</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2).

<sup>306</sup> *Ibidem*, Article 8 (2) (b), (c), (e).

<sup>307</sup> *Ibidem*, Article 8 (2) (a).

<sup>308</sup> Dörmann, Knut. “War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes”, *Max Planck Yearbook of United Nations Law Online* 7, 1 (2003), page 360. doi: <https://doi.org/10.1163/187574103X00077>

<sup>309</sup> *Ibidem*.

<sup>310</sup> Bugnion, François. “La Genesi Della Protezione Giuridica Dei Beni Culturali in Caso Di Conflitto Armato.” *The International Review of the Red Cross*, Vol. 86 (2004), page 7.

<sup>311</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (b).

difference: the substitution of the words “*international armed conflict*<sup>312</sup>” with the expression “*armed conflicts not of an international character*<sup>313</sup>”.

Before presenting a detailed analysis of such provisions, it is worth mentioning that the meaning of the phrase “within the established framework of international law” present in both subparagraph (b) and subparagraph (e), has been subject to debate<sup>314</sup>. The most plausible meaning of such phrase is the one provided by Fenrick, which claims that this sentence is simply meant to confirm the identification of the listed acts as serious violations under existing international law<sup>315</sup>. However, it is important to mention that the United Kingdom’s statement on the Rome Statute interprets this phrase “*to include customary international law as by State practice and opinio iuris*<sup>316</sup>”, therefore putting the emphasis on Additional Protocol I and other pertinent international law instruments.<sup>317</sup>

The text of Article 8 (2) (b) (ix) is the following:

*“For the purpose of this Statute, “war crimes” means: [...] (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...] (ix) 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.”<sup>318</sup>*

The first relevant comment to make regards the scope of this provision. The Article, following under subparagraph (b), refers exclusively to the context of international armed conflict. It is Article 8 (2)

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<sup>312</sup> *Ibidem*.

<sup>313</sup> *Ibidem*, Article 8 (2) (e).

<sup>314</sup> Byron, Christine, and Inc Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), page 16 .

<sup>315</sup> Cottier, M., Fenrick, W., Visser Sellers, P., and Zimmermann, A. “Article 8, war crimes”. In Byron, Christine, and Inc Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), pages 16 and 17.

<sup>316</sup> UK interpretive declaration to the Rome Statute of the International Criminal Court. Source: Byron, Christine, and Inc Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), page 61.

<sup>317</sup> Byron, Christine, and Inc Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), page 20.

<sup>318</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (b) (ix).

(e) (iv) that will deal with the same crime committed in relation to non-international conflicts. As these two provisions are identical, except for the difference just mentioned, only Article 8 (2) (b) (ix) will be reported textually and will be extensively analysed in this paragraph. As noted by Christine Byron, this provision is strongly based on Article 27 of the IV Hague Regulation, with the difference of extending the protection to buildings dedicated to education<sup>319</sup>. It is also impacted by the protections afforded to cultural property under the 1954 Hague Convention, as well as by the provisions found in Articles 53 and 85(4)(d) of Additional Protocol (AP) I<sup>320</sup>. Despite the similarity with Article 54 of AP I, which protects property considered indispensable to the survival of the civilian population, including foodstuffs, agricultural areas, and installations for drinkable water, the emphasis of Article 8 (2) (b) (ix) is on the immense cultural value of the protected property<sup>321</sup>. Indeed, following Driver's explanation, what is at stake here is the moment in which refugees return to their home after the end of the conflict and struggle to rebuild their communities<sup>322</sup>. Preserving property of a relevant cultural value, such as religious, educational, or historical-artistic buildings, supports the reconstruction efforts by helping communities reconnect their past with their present and future, thus fostering the restoration of community identity<sup>323</sup>. The stress is put on the definition of cultural property that highlights the property's role in maintaining the cultural heritage of a specific people. As expressed in the EOC, Article 8 (2) (b) (ix) poses two thresholds for the protection of cultural property: first, the property must fall within the list of buildings and places defined by the article, as the list is exhaustive<sup>324</sup>. It must, therefore, be either dedicated to religion, education, art, science, or charitable purposes, be a monument of relevant historical character, or a hospital or a place where the sick and wounded are situated. The list of buildings is extremely similar to that provided by Article 3 (d) of the ICTY statute, with the addition of including hospitals and places where the sick and

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<sup>319</sup> Byron, Christine, and Inc, Ebrary. "War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court". Manchester, U.K. ; New York: *Manchester University Press* (2009), page 108.

<sup>320</sup> *Ibidem*.

<sup>321</sup> *Ibidem*.

<sup>322</sup> Driver, Mark. "The protection of cultural property during wartime". In Byron, Christine, and Inc, Ebrary. "War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court". Manchester, U.K. ; New York: *Manchester University Press* (2009), page 108.

<sup>323</sup> *Ibidem*.

<sup>324</sup> Byron, Christine, and Inc, Ebrary. "War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court". Manchester, U.K. ; New York: *Manchester University Press* (2009), page 108.



wounded are collected as cultural properties<sup>325</sup>. The second requirement is that to be protected, such buildings must not be military objectives<sup>326</sup>. This second requirement is in accordance with that of Article 27 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>327</sup> and Article 4 of the 1954 Hague Convention<sup>328</sup>. However, the threshold in Article 8 of the ICC Statute is stricter. Indeed, while the *conditio sine qua non* for the protection of cultural property under Article 27 of the Hague Convention (IV)<sup>329</sup> is that such property must not be used for military purposes and that the destruction of cultural property must not be justified by military necessity for Article 4 of the 1954 Hague Convention<sup>330</sup>, that of Article 8 (2) (ix) of the ICC Statute is that the property must not be a military objective<sup>331</sup>. The difference in phrases used is relevant because, while the words “military necessity” and “military purposes” may leave room for a broader interpretation of what follows within this category, the sense of “military objective” is stricter. This stricter prerequisite allows for a larger protection of cultural property under Article 8 (2) (ix), since, for the article to not apply it must be demonstrated that the item in question is contributing meaningfully and effectively to military activity and that destroying it would provide a clear military advantage<sup>332</sup>. The EOC highlighted an additional relevant element in the provision: the use of the word “intentionally<sup>333</sup>”. Indeed, the subparagraph protecting cultural property poses specific attention to the *mens rea*. For a war crime of destruction of cultural heritage to occur under Article 8 (2) it is not enough for the cultural property to have been destroyed, this destruction must have been intentional<sup>334</sup>. Therefore, the perpetrator must have intended, aware of their protected statute, for the buildings protected under Article 8 (2) (b) (ix) and under Article 8 (2) (e) (iv) to have been the object of the attack. Interestingly, the requirement of the intent trumps that of the physical damage. Indeed, neither the Statute nor the

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<sup>325</sup> Frulli, M. “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency.” *European Journal of International Law* 22, no. 1, February 1, 2011, page 207. <https://doi.org/10.1093/ejil/chr002>.

<sup>326</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (b) (ix), and Article 8 (2) (e) (iv).

<sup>327</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land. The Hague, October 18, 1907, Article 27.

<sup>328</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, Article 4 (2).

<sup>329</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land. The Hague, October 18, 1907, Article 27.

<sup>330</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, Article 4.

<sup>331</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (e) (iv).

<sup>332</sup> Byron, Christine, and Inc, Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), page 72.

<sup>333</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (b) (ix), and Article 8 (2) (e) (iv).

<sup>334</sup> *Ibidem*.



Elements require effective damage or destruction of the property resulting from the attack<sup>335</sup>. Consequently, an attack that failed due to a weapons failure but that was intentionally directed towards cultural property within the scope of the article, would nonetheless be considered a war crime under Article 8 (2) of the ICC Statute.<sup>336</sup>

An interesting criticism of the broad list of protected property present in the article is that made by Gottlieb<sup>337</sup>. His critique is based on two arguments: the first refers to the inclusion of hospitals and places where the wounded and sick are protected in the category of cultural property<sup>338</sup>. He emphasizes how what makes those sites worthy of protection is their “*human cargo*”<sup>339</sup> and the services offered. Consequently, their cultural relevance and protected status are lost in the moment in which humans are not within their borders or when the services are not provided<sup>340</sup>. He claims that cultural property should be safeguarded regardless of temporary factors such as human presence within their premises or the specific services they offer<sup>341</sup>. Moreover, Gottlieb convincingly criticizes the fact that protected buildings, like those dedicated to education or art “*sometimes contain... more significant heritage than the buildings themselves*”<sup>342</sup>, however, the content of the buildings is not listed in the Article, therefore its protection falls outside of the scope of the latter, which exclusively protects the building itself<sup>343</sup>.

As said before, the specific provisions of the Rome Statute that prohibit violations of international humanitarian law directed towards cultural property —specifically Article 8(2)(b)(ix) and 8(2)(e)(iv)— are identical for both international and non-international armed conflicts<sup>344</sup>. Indeed,

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<sup>335</sup> Byron, Christine, and Inc, Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), page 109.

<sup>336</sup> *Ibidem*.

<sup>337</sup> Y. Gottlieb, “Criminalizing destruction of cultural property: a proposal for defining new crimes under the Rome Statute of the ICC.” In Byron, Christine, and Inc Ebrary. “War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court”. Manchester, U.K. ; New York: *Manchester University Press* (2009), page 109.

<sup>338</sup> *Ibidem*.

<sup>339</sup> *Ibidem*, page 110.

<sup>340</sup> *Ibidem*.

<sup>341</sup> *Ibidem*.

<sup>342</sup> *Ibidem*, page 111.

<sup>343</sup> *Ibidem*.

<sup>344</sup> Frulli, M. “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency.” *European Journal of International Law* 22, no. 1, February 1, 2011, page 210. <https://doi.org/10.1093/ejil/chr002>.

the list of properties within the scope of these articles, as well as the pre-conditions and relevant elements mentioned before, apply equally to both provisions. Nevertheless, it is worth mentioning that this congruence lacks in regard to the crimes against civilian property<sup>345</sup>. Indeed, while the destruction of non-military property during international armed conflict is listed as a war crime under Article 8 (2) of the ICC Statute in three provisions<sup>346</sup>, only one provision<sup>347</sup> is dedicated to the same act occurring in relation to a conflict of non-international character. This difference may impact perpetrators of the war crime of destruction of cultural heritage in non-international armed conflicts, considering the dual protection of the latter under the Statute<sup>348</sup>.

*2.4: Relevant jurisprudence of the International Criminal Tribunal for the former Yugoslavia: analysis of the Kordić and Čerkez case (2001), the Strugar case (2005) and the Jokić case (2005)*

Departing from strictly definitional concerns, it is necessary, in order to achieve a comprehensive understanding of the war crime of destruction of cultural heritage, to examine relevant jurisprudence of international criminal tribunals. While the following paragraph will engage in an extensive analysis of the *Al Mahdi* case, this one will consider relevant cases from the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY).

The enormous loss of cultural heritage due to the extensive intentional attacks directed towards cultural and religious property during the Balkan wars, which occurred in the geographical area of the former Yugoslavia in the years between 1991 and 1995, amounts to the biggest destruction of cultural heritage in Europe since the Second World War<sup>349</sup>. This catastrophe could have not been ignored in the drafting process of the ICTY Statute which, indeed, prosecutes the war crime of intentionally destroying or damaging cultural institutions in Article 3 (d). As the article does not explicitly use the term “cultural property” nor does it specify if the provision is to be applicable in

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<sup>345</sup> *Ibidem*.

<sup>346</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (a) (iv), Article 8 (2) (b) (ii), and Article 8 (2) (b) (xiii).

<sup>347</sup> *Ibidem*, Article 8 (2) (e) (xii).

<sup>348</sup> Frulli, M. “The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency.” *European Journal of International Law* 22, no. 1, February 1, 2011, page 210. <https://doi.org/10.1093/ejil/chr002>.

<sup>349</sup> Capone, Francesca. “The International Criminal Law Aspects of the Protection of Global Commons: The Case of Cultural Heritage.” *Oxford University Press EBooks*, August 4, 2021, page 223. <https://doi.org/10.1093/oso/9780192846501.003.0010>.

the context of international or non-international armed conflicts, or both, the ICTY's Jurisdiction Decisions had a relevant role in specifying the scope and applicability of this article. Specifically, as previously mentioned, the ICTY's decision in the *Tadić* case clarified that Article 3 (d) of the ICTY Statute applies to both international and non-international armed conflicts<sup>350</sup>. Additionally, the decision of the *Blaškić* case emphasized the requirement of intentionality of the acts<sup>351</sup>. Indeed, it specified that to be punishable under Article 3 (d) of the ICTY Statute, the destruction or damage of the sites must have been committed intentionally, therefore establishing the *mens rea* of the act as a *conditio sine qua non* for the applicability of Article 3 (d) of the ICTY Statute<sup>352</sup>. The *Blaškić* decision imposed another limit to the applicability of this provision of the ICTY Statute, by stating that to be considered a violation of the relevant norms of international humanitarian law or customs of war, “*the institutions must not have been in the immediate vicinity of military objectives*”<sup>353</sup>. Even if the reasoning for this requirement was never explained by the Trial Chamber of the *Blaškić* case, it could be argued that the specific reference to “*military objectives*” served to limit when the destruction of cultural and religious buildings amounted to collateral damage by further restricting the threshold to the specific case of vicinity to military objective rather than to the more general concept of military purpose<sup>354</sup>.

The paragraph will now examine in detail three cases from the ICTY Jurisprudence particularly relevant to understand the war crime of destruction of cultural heritage in the context of the conflict in Yugoslavia. The first of these cases is the *Prosecutor versus Dario Kordić and Mario*

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<sup>350</sup> *Prosecutor v. Tadić (Judgment)* ICTY-94-1, July 15, 1999. <https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180>.

<sup>351</sup> *Prosecutor v. Blaškić (Judgment)* ICTY-95-14 T, March 3, 2000. <https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

<sup>352</sup> *Ibidem*.

<sup>353</sup> *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, March 3, 2000. In Meron, Theodor. “The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia.” *Museum International* 57, no. 4, December 2005, page 45. <https://doi.org/10.1111/j.1468-0033.2005.00540.x>.

<sup>354</sup> In Meron, Theodor. “The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia.” *Museum International* 57, no. 4, December 2005, pages 45 and 46. <https://doi.org/10.1111/j.1468-0033.2005.00540.x>.

Čerkez. The defendants, Kordić and Čerkez, were two leaders<sup>355</sup> of the Croatian Defence Council, a paramilitary armed force of the Croatian Republic of Herzeg-Bosnia<sup>356</sup>, conducting military operation in the area of Bosnia and Herzegovina in 1993<sup>357</sup>. Trial Chamber identified the acts committed by Kordić and Čerkez during their military campaign against Bosniak forces as intentionally targeting Muslim mosques and other places of worship and cultural sites<sup>358</sup>. This led to the Trial Judgment of February 2001, convicting both of the defendants to the war crime of intentionally targeting religious and educational sites under Article 3 (d) of the ICTY Statute, and to the crime of prosecution as a crime against humanity, under Article 5 (h) of the ICTY Statute<sup>359</sup>. For the topic of this paper, concerned with the war crime of destruction of cultural heritage, this paragraph will deal exclusively with the first crime. Differently from the *Blaškić* case, in the *Kordić and Čerkez* case, the Trial Chamber paid more emphasis on the damage to cultural property by expressively referring to the former Yugoslavia's ratification of the 1954 Hague Convention, stressing how the latter remained applicable to both the Republic of Croatia and the Republic of Bosnia-Herzegovina following their declarations of independence<sup>360</sup>. Emphasizing the cultural character of the properties damaged by the defendants, the *Kordić Appeal Judgement* referred specifically to Articles 52 and 53 of the Additional Protocol I<sup>361</sup>. The former expressively states that cultural properties, including educational institutions and places of worship, are protected under the Additional Protocol I and “cannot be destroyed unless they are turned into a military object<sup>362</sup>”. The latter article, instead, grants special protection to objects falling within the category of historic monuments, artworks or religious sites

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<sup>355</sup> Specifically, Dario Kordić was the political leader of the Croatian Defence Council, while Mario Čerkez was a military commander of the latter.

<sup>356</sup> The Croatian Republic of Herzeg-Bosnia is a self-declared republic in the Bosnian territories born in 1992. Source: Šedo Jakub. “The party system of Bosnia and Herzegovina”. In “*Party Politics in the Western Balkans*”, Chapter 6, Routledge (2013), page 85.

<sup>357</sup> Meron, Theodor. “The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia.” *Museum International* 57, no. 4, December 2005, page 47. <https://doi.org/10.1111/j.1468-0033.2005.00540.x>.

<sup>358</sup> *Ibidem*.

<sup>359</sup> *Ibidem*.

<sup>360</sup> *Ibidem*.

<sup>361</sup> *Ibidem*.

<sup>362</sup> *Kordić Appeal Judgement*. In Meron, Theodor. “The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia.” *Museum International* 57, no. 4, December 2005, page 47. <https://doi.org/10.1111/j.1468-0033.2005.00540.x>.

which constitute the cultural or spiritual heritage of peoples<sup>363</sup>". Furthermore, the Trial Chamber in the *Kordić and Čerkez* case had a relevant role in specifying the scope of Article 3 (d) of the ICTY statute. Indeed, it noticed that, while the war crime of destruction of cultural property partially overlaps with the broader one of directing offences against civilian objects in general, Article 3 (d) is more specifically concerned with the destruction or damage to institutions of relevant "cultural heritage", therefore stressing the more specific scope of the article in respect to the other provisions, like the ones in Article 52 of the Additional Protocol I, that protect civilian property in general.

The other two cases analysed in this paragraph are the *Prosecutor versus Pavle Strugar and the Prosecutor versus Miodrag Jokić*. Both these cases are particularly relevant because of the special nature of the cultural property destroyed. Indeed, both cases regard the attack of the 6<sup>th</sup> of December 1991 on Dubrovnik's Old Town, a 13-hectare area within the Croatian city of Dubrovnik, enclosed by medieval walls and encompassing significant cultural heritage dating back to the 13th century<sup>364</sup>. The cultural exceptionality of Dubrovnik's Old Town was recognized by UNESCO which listed it in its entirety as a UNESCO World Heritage Site<sup>365</sup>. To fully understand the nature of the crime committed by the defendants, it is important to generally outline the historical context in which such crimes were committed. Right after Croatia's declaration of independence on the 25<sup>th</sup> of June 1991, hostilities arose between the Yugoslav Federal Army (JNA) and the Croatian forces and quickly spread near the city of Dubrovnik, which was shelled first at the end of October and subsequently between the 10<sup>th</sup> and the 12<sup>th</sup> of November<sup>366</sup>. The crime at the centre of both the *Strugar* and the *Jokić* case occurred on the 6<sup>th</sup> of December, when, during negotiations for a permanent stop to the hostilities in the area of Dubrovnik, the JNA carried out a large-scale attack at Dubrovnik, including the Old Town "without disciplined direction and targeting correction<sup>367</sup>". As the Trial Chamber in the *Strugar* case noted, at the time of the attack there were no military objectives within the area of

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<sup>363</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts" (Protocol I), Geneva, June 8, 1977, Article 53.

<sup>364</sup> Brammertz, Serge, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich. "Attacks against Cultural Heritage as a Weapon of War." *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1157. <https://doi.org/10.1093/jicj/mqw066>.

<sup>365</sup> *Ibidem*.

<sup>366</sup> *Ibidem*.

<sup>367</sup> *Ibidem*.

the Old Town<sup>368</sup>. The damage suffered by the Old Town was significant, with at least 52 buildings within the medieval walls either damaged or completely destroyed, six of which were completely burned out<sup>369</sup>. This attack had a dramatic effect on cultural heritage as the buildings destroyed included places of worship like churches, monasteries, a mosque, and a synagogue. For the nature and significant cultural value of the sites destroyed, the attack fell within the scope of Article 3(d) ICTY Statute, and it is under this article that Jokić and Strugar were convicted<sup>370</sup>.

The particular character of Dubrovnik's Old Town as a UNESCO World Heritage Site gives rise to two relevant aspects of the judgements. The first regards the relevant role of *ex ante* protective measures in criminal prosecutions<sup>371</sup>. Indeed, the designation of the Old Town as a UNESCO World Heritage Site served as a clear indication to military and civilian authorities of its cultural value<sup>372</sup>. Consequently, the Trial Chamber referenced this special status of the Old Town to establish that the JNA forces had a deliberate intent to destroy cultural property<sup>373</sup>. Indeed, both the status of the Old Town as a UNESCO World Heritage Site and the UNESCO emblems with which the authorities of Dubrovnik had marked buildings and sites of the Old Town make it hard to believe that there was no intent to target cultural heritage<sup>374</sup>. The presence of UNESCO emblems has also been confirmed by a member of the JNA who testified having seen flags displayed over buildings in Dubrovnik and said to have been informed that these flags indicated that those areas must have not been attacked<sup>375</sup>. This testimony demonstrated that the protective emblems situated in the Old Town were visible by the JNA forces, therefore providing the Trial Chamber with a further proof to determine the presence of a deliberate intent to target protected cultural heritage<sup>376</sup>. The second relevant aspect of these cases regards the Trial Chamber's decision to interpret the entirety of Dubrovnik's Old Town, "*i.e. each*

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<sup>368</sup> Meron, Theodor. "The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia." *Museum International* 57, no. 4, December 2005, page 54. <https://doi.org/10.1111/j.1468-0033.2005.00540.x>.

<sup>369</sup> Brammertz, Serge, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich. "Attacks against Cultural Heritage as a Weapon of War." *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1158. <https://doi.org/10.1093/jicj/mqw066>.

<sup>370</sup> *Ibidem*.

<sup>371</sup> *Ibidem*, page 1159.

<sup>372</sup> *Ibidem*.

<sup>373</sup> *Ibidem*.

<sup>374</sup> *Ibidem*.

<sup>375</sup> *Ibidem*.

<sup>376</sup> *Ibidem*.

*structure or building*<sup>377</sup>” within the scope of Article 3(d) of the Statute. This decision was reached in part by taking into consideration the fact that the Old Town in its entirety was granted the statute of UNESCO World Heritage site. However, the Trial Chamber also endorsed the Prosecution’s consideration of the Old Town as a living city where the population’s existence was “*intimately intertwined*<sup>378</sup>” with the Town’s ancient cultural heritage, therefore extending the cultural significance also to residential buildings situated within the Old Town<sup>379</sup>. This decision contributed to the idea that the definition of cultural property by prosecutors should consider the subjective cultural relevance that such property has to its community rather than relying exclusively on objective and formalistic criteria<sup>380</sup>.

Analysing more in detail each case, it is worth noting that Jokić was accused under Article 3 (d) of the ICTY Statute for the acts committed against Dubrovnik’s Old Town because of its role of commander of the Ninth Naval Sector of the Bosnian Serb Army under which all the JNA forces involved in the crime were subject to<sup>381</sup>. Jokić pleaded guilty and he confessed that, during the military assault of December 6<sup>th</sup>, 1991, the Yugoslav forces he commanded had shelled extensively against Dubrovnik’s Old Town as a part of their military campaign<sup>382</sup>. What is extremely relevant is Jokić admission of awareness of the protected status of the Old Town as a UNESCO World Heritage Site, which the Trial Chamber emphasized applied to the entirety of the Old Town, including even the residential buildings. This underscores how the town’s life is intrinsic to that of the population.

Regarding the case of Pavle Strugar, his culpability arose from his role as the commander of the Second Operational Group, which was a component of the Ninth Military Naval Sector that

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<sup>377</sup> *Prosecutor v Jokić (Sentencing Trial Judgment)* ICTY-51. In Brammertz, Serge, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich. “Attacks against Cultural Heritage as a Weapon of War.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1159. <https://doi.org/10.1093/jicj/mqw066>.

<sup>378</sup> *Ibidem*.

<sup>379</sup> *Prosecutor v Jokić (Sentencing Trial Judgment)* ICTY-51. In Brammertz, Serge, Kevin C. Hughes, Alison Kipp, and William B. Tomljanovich. “Attacks against Cultural Heritage as a Weapon of War.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1159. <https://doi.org/10.1093/jicj/mqw066>.

<sup>380</sup> *Ibidem*, page 1160

<sup>381</sup> Meron, Theodor. “The Protection of Cultural Property in the Event of Armed Conflict within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia.” *Museum International* 57, no. 4, December 2005, page 50. <https://doi.org/10.1111/j.1468-0033.2005.00540.x>.

<sup>382</sup> *Ibidem*.



attacked the Old Town on the 6<sup>th</sup> of December<sup>383</sup>. Contrary to Jokić, Strugar, who was also accused under Article 3 (d) of the ICTY Statute, contested the jurisdiction of the Tribunal, claiming that the Additional Protocols forming the basis of the prosecution's charges were not applicable to the parties involved in the conflict at the relevant time<sup>384</sup>. However, the Appeals Chamber rejected this challenge, affirming that the principles prohibiting attacks against civilians and unlawful attacks against civilian objects, as outlined in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions, constituted customary international law at the time of the alleged conduct<sup>385</sup>. As such, the specific articles of the Additional Protocols did not constitute a new provision but a mere reformulation and codification of already-existing norms of customary international law. On the concern of whether Strugar had criminal responsibility for such crime, the Trial Chamber effectively argued that, because of his role in the Second Operational Group, Strugar had both legal and effective control over the JNA forces that fired against Dubrovnik's Old Town<sup>386</sup>. Moreover, the Trial Chamber noted that at around 7 am the morning of the 6<sup>th</sup> of December 1991, Strugar was noticed by a communication from Admiral Jokić that the JNA artillery over which he had command was firing at the Old Town; nevertheless, he failed to order the stop of the attacks as soon as he was noticed<sup>387</sup>. Instead, he did not take any action until 11.15 am, when he ordered some, not all, of his JNA artillery units to stop the attack<sup>388</sup>. His control over and awareness of the attack, combined with the fact that he did not order to stop it for 4 hours after receiving notice of the situation, constituted sufficient evidence for the Trial Chamber to find Strugar individually criminally responsible for the destruction of culturally relevant property, thereby convicting him under Article 3 (d) of the ICTY Statute<sup>389</sup>.

### 2.5: *The Al Mahdi Case*

Despite the relevance of the ICTY jurisprudence in prosecuting the war crime of destruction of cultural heritage, it is important to notice that the perpetrators convicted of such crime by the ICTY were always convicted also for other crimes they had committed, mostly war crimes against people

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<sup>383</sup> *Ibidem*, page 54.

<sup>384</sup> *Ibidem*, page 52.

<sup>385</sup> *Ibidem*.

<sup>386</sup> *Ibidem*, page 54.

<sup>387</sup> *Ibidem*.

<sup>388</sup> *Ibidem*.

<sup>389</sup> *Ibidem*.



or crimes against humanity<sup>390</sup>. The first case in which the defendant was convicted only for the war crime of destruction of cultural heritage is the *Al Mahdi* case<sup>391</sup>. This is also the first case in which reparations for such crime were adopted<sup>392</sup>.

Ahmad Al Faqi Al Mahdi was part of the Ansar Dine, an armed Islamist organization that sought to impose Sharia rule in Mali<sup>393</sup>. In the beginning of 2012, Ansar Dine took part in an uprising in Northern Mali led by the National Movement for the Liberation of Azawad (MNLA)<sup>394</sup>. The conflict led Ansar Dine, together with Al Qaeda in the Islamic Maghreb (AQIM) to take over control of Timbuktu in April of 2012<sup>395</sup>. Their military occupation lasted until January 2013 and, during that time, the Ansar Dine and AQIM created specific institutions with the purpose of enforcing Sharia Law<sup>396</sup>. Specifically, they set up the *Hisbah*, a morality brigade charged to suppress any morality vice, an Islamic tribunal, and a specific police force<sup>397</sup>. Al Mahdi was designated as the head of *Hisbah* and directed and managed its operation until September 2012<sup>398</sup>. However, his religious expertise led to his involvement also in other structures appointed by the Ansar Dine and AQIM, such as the Islamic Tribunal<sup>399</sup>.

In the period of occupation, specifically between the 30<sup>th</sup> of June and the 11<sup>th</sup> of July 2012, *Hisbah* members destroyed several historic and religious buildings in Timbuktu, identifying them as idolatrous or morally objectionable and as corresponding to a visible “morality vice” which *Hisbah*

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<sup>390</sup> *Prosecutor v. Blaškić (Judgment)* IT-95-14-T, March 3, 2000; *Prosecutor v Kordić and Čerkez (Judgment)* IT-95-14/2-T, February 26, 2001; *Prosecutor v Strugar (Judgment)* IT-01-42-T, January 31, 2005; *Prosecutor v Jokić (Sentencing Trial Judgment)* IT-01-42/1-S, March 18, 2004.

<sup>391</sup> Capone, Francesca. “The International Criminal Law Aspects of the Protection of Global Commons: The Case of Cultural Heritage.” *Oxford University Press EBooks*, August 4, 2021, page 230. <https://doi.org/10.1093/oso/9780192846501.003.0010>.

<sup>392</sup> *Ibidem*.

<sup>393</sup> Casaly, Paige. “Al Mahdi before the ICC.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1210. <https://doi.org/10.1093/jicj/mqw067>.

<sup>394</sup> *Ibidem*, page 1211.

<sup>395</sup> *Ibidem*.

<sup>396</sup> *Ibidem*.

<sup>397</sup> *Ibidem*.

<sup>398</sup> *Ibidem*.

<sup>399</sup> *Ibidem*.

had the duty to suppress<sup>400</sup>. Because of his role as the head of the *Hisbah*, evidence showed that Al Mahdi was consulted about and involved in the planning of these attacks<sup>401</sup>. He took part and supervised the attacks, personally going to the targeted sites with “*vehicles, weapons, and tools such as pickaxes and iron bars*”<sup>402</sup> to verify that the destruction was carried out as planned. Consequently to these events, and keeping in mind that Mali has been a party to the Rome Statute since 2000, Al Mahdi was charged with the war crime of having intentionally directed attacks towards religious and historical buildings that were not military objectives, under Article 8 (2) (e) (iv)<sup>403</sup>. The *Al Mahdi* case is the first time in which the ICC had applied Article (2) (e) (iv), being the first time in which the Court examined the war crime of destruction of cultural heritage in the context of non-international conflicts<sup>404</sup>. The prosecutor addressed whether Al Mahdi had individual criminal responsibility for the crime committed under Article 25 (3) of the ICC Statute and found him criminally responsible under Article 25 (3) (a) for his direct physical involvement in the attacks and his role of co-perpetrator; under Article 25 (3) (b) for calling for and instigating the commission of such crimes, and under Article 25 (3) (d) for adding, in any other way, to the commission of the crime carried out by a group of individuals acting towards a shared goal<sup>405</sup>.

On September 26, 2015, Al Mahdi, who had been arrested in Niger, was transferred to the ICC<sup>406</sup>. Nearly three months later, on December 17, The Prosecutor filed the charges against him, which consisted of a single charge for the war crime of intentionally directing attacks against religious

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<sup>400</sup> *Ibidem*.

<sup>401</sup> *Ibidem*.

<sup>402</sup> “Charge brought by the Prosecution against Ahmad Al Faqi Al Mahdi”, Al Mahdi (ICC-01/12-01/15-70-AnxA), Office of the Prosecutor, December 17, 2015. In Casaly, Paige. “Al Mahdi before the ICC.” *Journal of International Criminal Justice* 14, no. 5, December 2016, 1211. <https://doi.org/10.1093/jicj/mqw067>.

<sup>403</sup> Rossi, Pierfrancesco. “The al Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes against Humanity.” *Diritti Umani E Diritto Internazionale* 11, no. 1, January 1, 2017, page 89. <https://doi.org/10.12829/86205>.

<sup>404</sup> Capone, Francesca. “The International Criminal Law Aspects of the Protection of Global Commons: The Case of Cultural Heritage.” *Oxford University Press EBooks*, August 4, 2021, page 230. <https://doi.org/10.1093/oso/9780192846501.003.0010>.

<sup>405</sup> Casaly, Paige. “Al Mahdi before the ICC.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1211. <https://doi.org/10.1093/jicj/mqw067>.

<sup>406</sup> Rossi, Pierfrancesco. “The al Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes against Humanity.” *Diritti Umani E Diritto Internazionale* 11, no. 1, January 1, 2017, page 89. <https://doi.org/10.12829/86205>.

buildings and historic monuments under Article 8(2)(e)(iv) of the Rome Statute<sup>407</sup>. Al Mahdi's cooperation with the Court and the Prosecutor sped up the subsequent procedural stages<sup>408</sup>. Indeed, on February 18, 2016, he signed an agreement with the Office of the Prosecutor (OTP), confirming the charges and admitting guilt to the specified war crime<sup>409</sup>. By entering a guilty plea, he waived his right to provide defences, cross-examine witnesses or submit evidence, and agreed not to appeal the sentence proposed by the OTP, which was recommended by the latter to be ranged from nine to eleven years of imprisonment<sup>410</sup>. The agreement also included a detailed account of both the events in Timbuktu during the Islamist occupation and Al Mahdi's involvement in the destruction of cultural heritage sites<sup>411</sup>. While this agreement was not legally binding on the Court, it facilitated a more efficient judicial process<sup>412</sup>. Indeed, following a three-day trial, Trial Chamber VIII found Al Mahdi responsible for the war crime of attacking protected cultural sites and sentenced him to 9 years in prison<sup>413</sup>.

To achieve this conclusion, the Chamber used a mixed approach highlighting both the relevance of the buildings attacked for the culture of the population of Timbuktu and of Mali in general, and their importance in preserving the cultural heritage of the whole of humankind<sup>414</sup>. Regarding the first aspect, the Chamber stressed how the destruction of these buildings eradicates the cultural roots of the people of Timbuktu because without those buildings it was impossible for them to engage in their religious practice, which is deeply embodied in their community and culture and is a significant part of their day-to-day lives<sup>415</sup>. On the second aspect, the emphasis was put on the fact that all buildings targeted by the *Hisbah* during the occupation but one, the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, were UNESCO World Heritage sites<sup>416</sup>. Appealing to their special protection under UNESCO, The Prosecutor even said that those buildings “constituted a

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<sup>407</sup> *Ibidem*.

<sup>408</sup> *Ibidem*.

<sup>409</sup> *Ibidem*.

<sup>410</sup> *Ibidem*, page 90.

<sup>411</sup> *Ibidem*.

<sup>412</sup> *Ibidem*.

<sup>413</sup> *Ibidem*.

<sup>414</sup> Casaly, Paige. “Al Mahdi before the ICC.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1200. <https://doi.org/10.1093/jicj/mqw067>.

<sup>415</sup> *Ibidem*, page 1212.

<sup>416</sup> *Ibidem*.

chapter in the history of humanity<sup>417</sup>”, consequently, “such attacks [against cultural heritage] affect humanity as a whole<sup>418</sup>”. The usage of the World Heritage status under UNESCO as a proxy for gravity in the establishment of the war crime of directly targeting cultural and religious buildings is consistent with recent international criminal jurisprudence<sup>419</sup>. However, it is worth noting that the monument’s status as a UNESCO World Heritage Site is not a *conditio sine qua non* for convicting the prosecution of the war crime of destruction of cultural heritage under Article 8 (2) (e) (iv)<sup>420</sup>. This Article, indeed, refers to the purpose of the site in question and how it is used. There is no reference to the value of such a site to the contribution to the cultural heritage of humanity as a whole<sup>421</sup>. Ergo, the intentional destruction of a site not considered a UNESCO World Heritage Site can still be prosecuted as a war crime under Article 8 (2) (e) (iv) if the purpose of the site follows within the scope of the Article<sup>422</sup>. However, it is relevant to note that case law of war crime of destruction of cultural heritage has been largely limited to those sites that have a further protected status as UNESCO World Heritage Site<sup>423</sup>.

An important aspect to analyse when discussing the *Al Mahdi* case regards reparations. Indeed, as previously mentioned, this case is the first time in which the ICC adopted reparations solely for the war crime of destruction of cultural heritage<sup>424</sup>. Those reparations, established by the Trial Chamber, included both collective and individual reparations as well as guarantees of non-repetition<sup>425</sup>. Individual reparations were in the form of compensation directed to people whose

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<sup>417</sup> “Charge brought by the Prosecution against Ahmad Al Faqi Al Mahdi”, Al Mahdi (ICC-01/12-01/15-70-AnxA), Office of the Prosecutor, December 17, 2015. In Casaly, Paige. “Al Mahdi before the ICC.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1212. <https://doi.org/10.1093/jicj/mqw067>.

<sup>418</sup> *Ibidem*.

<sup>419</sup> See the *Jokić* and *Strugar* cases in Chapter 2.3.

<sup>420</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (e) (iv).

<sup>421</sup> *Ibidem*.

<sup>422</sup> Casaly, Paige. “Al Mahdi before the ICC.” *Journal of International Criminal Justice* 14, no. 5, December 2016, page 1216. <https://doi.org/10.1093/jicj/mqw067>.

<sup>423</sup> *Ibidem*, page 1212.

<sup>424</sup> Capone, Francesca. “The International Criminal Law Aspects of the Protection of Global Commons: The Case of Cultural Heritage.” *Oxford University Press eBooks*, August 4, 2021, page 213. <https://doi.org/10.1093/oso/9780192846501.003.0010>.

<sup>425</sup> *Ibidem*, page 235.

livelihoods depended exclusively on the buildings targeted by Al Mahdi<sup>426</sup>. The Chamber determined Al Mahdi's overall liability to amount to €2.7 million<sup>427</sup>.

The *Al Mahdi* case did not go unnoticed by the critics, who condemned the decision of the Court for two main reasons: the first regards the omission by the ICC of other atrocities committed during the occupation of Mali, including sexual and gender-based violence; the second regards a "missed opportunity" to charge the defendant also with crimes against humanity precisely for the destruction of those relevant cultural and religious buildings<sup>428</sup>. Indeed, critics have argued that the motive behind *Hisbah*'s targeting of those specific sites was religious discrimination, which could amount to a charge of crime against humanity under Article 7 (1) (h) of the Rome Statute<sup>429</sup>. However, in the *Al Mahdi* case, this crime was immediately excluded in the OTP Article 53 (1) Report, which stated that the available information at the time did not provide a sufficient basis to believe that the events occurring in Mali could constitute crimes against humanity<sup>430</sup>. However, the Report recognized that "*further analysis*<sup>431</sup>" was needed on this matter. Nevertheless, the establishment of whether the crimes committed by Al Mahdi could amount to crimes against humanity goes beyond the purpose of this paper.

## 2.6: *The International Criminal Court's Policy on Cultural Heritage (2021)*

After the *Al Mahdi* case, the Office of Prosecutor (OTP) of the International Criminal Court (ICC) formulated a Strategic Plan for the period between 2019 and 2021, which included a commitment to developing a comprehensive policy to protect cultural heritage within the legal framework established by the Rome Statute, thus offering more clearance on how the ICC would

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<sup>426</sup> *Ibidem*.

<sup>427</sup> *Ibidem*.

<sup>428</sup> *Ibidem*, page 231.

<sup>429</sup> Rossi, Pierfrancesco. "The al Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes against Humanity." *Diritti Umani E Diritto Internazionale* 11, no. 1, January 1, 2017, page 91. <https://doi.org/10.12829/86205>.

<sup>430</sup> *Ibidem*, page 92.

<sup>431</sup> "OTP Report, paras. 128-129". In Rossi, Pierfrancesco. "The al Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage between War Crimes and Crimes against Humanity." *Diritti Umani E Diritto Internazionale* 11, no. 1, January 1, 2017, page 92. <https://doi.org/10.12829/86205>.

address future crimes against cultural heritage under the latter<sup>432</sup>. The OTP finalized and adopted the Policy on Cultural Heritage in June 2021. The significance of this policy lies in the fact that it was developed from within the ICC, being crafted by experts involved in the Court’s legal processes<sup>433</sup>.

The connection between the Policy and the *Al Mahdi* case is explicitly articulated in paragraph 6<sup>434</sup>. This paragraph stresses how such case, and specifically the fact that it dealt exclusively with the war crime of directing attacks towards cultural properties, was of significant relevance in expressing the gravity of intentionally attacking cultural heritage, and in recognizing this act as a serious crime having relevant repercussion on both the targeted peoples and the international community<sup>435</sup>. The usage of the term “*international community*”<sup>436</sup> nears the definition of “cultural heritage” within the Policy to Merryman’s dual meaning of the term as both a custodian of a people’s identity and as a demonstrator of the heritage of all humankind<sup>437</sup>. This juxtaposition between the two concepts is visible in paragraphs 3 and 4, which specify how the ICC Policy considers a broader meaning of the term “cultural heritage”, as it recognises how it impacts “*shared sense of humanity and the daily lives of local populations*”<sup>438</sup>. Thus, acknowledging how the damage or destruction of cultural heritage affects the local as well as the international community<sup>439</sup>. This “double impact” of the destruction of cultural heritage presented in paragraph 4 appears again in paragraph 17 which goes so far as to say that “*crimes against or affecting cultural heritage often touch upon the very notion of what it means to be human*”<sup>440</sup>. The “human dimension” of cultural property, therefore, is significantly relevant to understanding the meaning of “cultural heritage” for both the Policy itself and future assessments of cultural heritage crimes by the ICC. This is reflected by paragraph 14 of the Policy which expressively cites Article 8 (2) (b) (ix) and Article 8 (2) (e) (iv) of the ICC Statute, clarifying the scope of these

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<sup>432</sup> Sadowski, Mirosław Michał. “Heritage Strikes Back: Al Mahdi Case, ICC’s Policy on Cultural Heritage and the Pushing of Law’s Boundaries.” *Undecidabilities and Law*, no. 2, December 15, 2022, page 111. [https://doi.org/10.14195/2184-9781\\_2\\_5](https://doi.org/10.14195/2184-9781_2_5).

<sup>433</sup> *Ibidem*.

<sup>434</sup> International Criminal Court’s “Policy on Cultural Heritage”. The Hague, June 2021, para. 6.

<sup>435</sup> *Ibidem*.

<sup>436</sup> *Ibidem*.

<sup>437</sup> Merryman, John Henry. “Two Ways of Thinking About Cultural Property”. *The American Journal of International Law*, Vol. 80, no. 4, October 1986, pages 831 and 832. <https://doi.org/10.2307/2202065>.

<sup>438</sup> International Criminal Court’s “Policy on Cultural Heritage”. The Hague, June 2021, para. 3.

<sup>439</sup> *Ibidem*, para. 4.

<sup>440</sup> *Ibidem*, para. 17.

provisions by giving more relevance to the “human aspect” of cultural heritage<sup>441</sup>. Indeed, paragraph 14 of the Policy states that the wording of Article 8 of the ICC Statute, which uses the term “cultural property”, is too narrowly related to tangible aspects of culture. Recognising the importance of both tangible and intangible aspects, the Policy will use the term “cultural heritage”, which is said to “*more properly reflects the rich corpus of human achievement that the Statute and international law seek to protect*”<sup>442</sup>. The use of the phrase “seek to protect” in reference to the Rome Statute’s provisions on cultural property can be understood as expressing that, although the Statute uses the term “property”, its underlying intention has always been to protect the broad spectrum of “human achievements” beyond the mere tangible objects that the term may refer to<sup>443</sup>. Therefore, the Policy does not propose a new interpretation of Article 8 or expand its scope but rather clarifies the inclusive scope that has always been inherent in the Statute<sup>444</sup>.

Despite falling out of the scope of this paper, it is worth mentioning that paragraph 14 also refers to “*diverse crimes within the jurisdiction of the Court*”<sup>445</sup> related to cultural heritage. This sentence stresses how the destruction of the cultural heritage is not necessarily limited to war crimes but can amount also to other crimes over which the Court has jurisdiction<sup>446</sup>. Indeed, in paragraph 61 the Policy expressively states that crimes related to cultural heritage may amount to crimes against humanity, and further elaborates this concept in paragraph 62<sup>447</sup>. Furthermore, the Policy analyses in paragraphs 78-88 how the destruction of cultural heritage could constitute evidence of the intent of committing genocide<sup>448</sup>.

### *Conclusions:*

In conclusion, as presented in this chapter, the term and concept of “war crimes” are not consistently defined in international law. This causes debate among scholars to find a general

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<sup>441</sup> *Ibidem*, para. 14

<sup>442</sup> *Ibidem*.

<sup>443</sup> *Ibidem*.

<sup>444</sup> *Ibidem*.

<sup>445</sup> *Ibidem*.

<sup>446</sup> Sadowski, Mirosław Michał. “Heritage Strikes Back: Al Mahdi Case, ICC’s Policy on Cultural Heritage and the Pushing of Law’s Boundaries.” *Undecidabilities and Law*, no. 2 (December 15, 2022), page 113. [https://doi.org/10.14195/2184-9781\\_2\\_5](https://doi.org/10.14195/2184-9781_2_5).

<sup>447</sup> International Criminal Court’s “Policy on Cultural Heritage”. The Hague, June 2021, para. 61-62.

<sup>448</sup> *Ibidem*, para. 78-88.

comprehensive definition and requires an extensive consideration of the meaning of the term in both relevant Statutes of international criminal courts and in their jurisprudence. From a *stricto sensu* definition of the term, for an act to be considered a war crime it must be a serious violation of international humanitarian law committed in relation to a conflict by a perpetrator who was aware of the existence of such conflict, and this act must be criminalized by treaty or customary international law. However, as discussed in the Chapter, Hathaway, Strauch, Walton and Weinberg have proposed an even more general definition of war crimes as serious violations of international humanitarian law. Important elements to consider when defining war crimes are the applicability of such concept to both international and non-international conflicts, the perpetrator's awareness of the "*factual circumstances*", and his intent, as emphasized by the EOC in regard to Article 8 (2) of the Rome Statute.

The Chapter has then analysed relevant cases within the ICTY and the ICC jurisprudences on the prosecution of the war crime of destruction of cultural heritage. Within the former, it has placed particular emphasis on the *Strugar and Jokić* case, stressing the use of the status of UNESCO World Heritage Site as a proxy of gravity for prosecuting such crime. Within the latter, attention has been put on the *Al Mahdi* case, emphasizing the relevance that cultural heritage has on both the local communities targeted and the international community. This point has been further analysed by taking into consideration the ICC's Policy on Cultural Heritage of June 2021, specifying how the latter serves to provide clear guidance on how to interpret the Rome Statute's provisions on cultural heritage, helping, in this way, the addresses of future cases by the ICC. Particular emphasis has been put on the Policy's definition of the term "cultural property" in Article 8 of the Statute, and on how it is to be interpreted to mean "cultural heritage" in general, therefore encompassing, within its scope, both tangible and intangible "human achievements".

By offering an extensive legal analysis of the war crime of destruction of cultural heritage, Chapter Two has laid the groundwork for Chapter Three, which will apply what has been said up to now to the current developments of the Ukraine war.



## Chapter 3: War Crimes of Destruction of Cultural Heritage in the Context of the Ukraine War

### *Introduction:*

This Chapter applies the laws of international humanitarian law and the previous considerations on cultural heritage to examine the ongoing conflict in Ukraine. The focus of this chapter is the destruction of Ukrainian cultural heritage in the 2022 Russia-Ukraine war. Subparagraph 3.1 analyses the cultural properties damaged or destroyed up to the time of writing (May 2024), focusing on Putin's intent to target Ukrainian culture, and on the damage to the Odesa Transfiguration Cathedral in July 2023. The following subparagraph aims to identify the damage and destruction to Ukrainian cultural heritage by the Russian army as a war crime under international humanitarian law, specifically referring to the 1954 Hague Convention to which both Russia and Ukraine are parties. Subparagraph 3.3 presents the responses of the international community to the Russian invasion of Ukraine, focusing on how international organizations and the European Union are currently addressing the problem of Ukrainian cultural loss. The chapter ends by putting the attention on the International Criminal Court (ICC), examining whether the latter has jurisdiction to prosecute war crimes of destruction of cultural heritage in the context of the Russia-Ukraine war, analysing the ICC Prosecutor, Karim A.A Khan, 's decision to open an investigation into the Situation in Ukraine, and the Pre-Trial Chamber's issue of arrest warrants for Putin and Lvova-Belova in March 2023.

### *3.1: Russian target of Ukrainian culture as a central aspect of the 2022 Russia-Ukraine war: up-to-date list and analysis of damaged cultural sites in Ukraine*

On the 24<sup>th</sup> of February 2022, Russia launched what it defined as a “*special military operation*”<sup>449</sup> in Ukraine, unlawfully breaching Ukraine's sovereignty, and *de iure* starting a war that persists at the time of writing (May 2024). *De facto*, Russian hostile actions against Ukraine began in March 2014 with the illegal annexation of Crimea, a peninsula located north of the Black Sea, which has been integrally part of Ukraine since the dissolution of the Soviet Union<sup>450</sup>. Indeed, some scholars argue

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<sup>449</sup> BBC News, 2022. “Ukraine: Putin Announces Special Military Operation in TV Declaration”. In Koscieljew, Marc. “Endangered Cultural Heritage in the Russia–Ukraine War: Comparing and Critiquing Interventions by International Cultural Heritage Organizations.” *International Journal of Heritage Studies* 29, no. 11, August 21, 2023, page 1160. <https://doi.org/10.1080/13527258.2023.2243457>.

<sup>450</sup> Siekiera, Joanna. “Between Genocide and War Crime – Legal-Cultural Analysis of the Russian Aggression in Ukraine.” *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 55.

that the 2022 Russia-Ukraine conflict began in 2014<sup>451</sup>. Going beyond the initial date of the conflict, what is at stake in this chapter is the effect of the ongoing war on Ukrainian cultural heritage. Since its beginning, the war has been causing severe damage to Ukrainian monuments, museums, archaeological and religious sites, and cultural properties, both tangible and intangible<sup>452</sup>. These events are coherent with Russian President Vladimir Putin's intent to erase Ukrainian identities<sup>453</sup>. Putin denies Ukraine's existence as an independent state, claiming it lacks its own history and must be seen exclusively in relation to that of Russia<sup>454</sup>. Moreover, he often refers to Ukraine's separation from Russia as a "tragedy"<sup>455</sup>, arguing that "Russia was robbed"<sup>456</sup>, following the rhetoric that the Ukrainian territory is Russian territory taken from the homeland<sup>457</sup>. As epitomized by Stepnisky, "the war seems not only to be about undermining Ukraine as a sovereign state but also about denying Ukraine's existence"<sup>458</sup>. Putin's attitude towards Ukraine and its people makes it hard to believe that the numerous destructions by the Russian army of places and sites representing Ukrainian culture are unintentional<sup>459</sup>. What appears more likely is a concrete target at Ukraine's symbols and culture to

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<https://doi.org/10.31743/recl.16472>. See also Krym, Krim. "Crimea | History, Map, Geography, & People | Britannica." In Encyclopædia Britannica (2019). <https://www.britannica.com/place/Crimea>.

<sup>451</sup> Siekiera, Joanna. "Between Genocide and War Crime – Legal-Cultural Analysis of the Russian Aggression in Ukraine." *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 55. <https://doi.org/10.31743/recl.16472>.

<sup>452</sup> KOÇAK BİLGİN, Yasemin, and HAZARHUN, Eda. "The Cultural Heritage Impact of the Russia-Ukrainian War." *Turizm Akademik Dergisi Tourism Academic Journal* 10, no. 2, December 2023, page 310 and 315 [https://www.researchgate.net/publication/376643367\\_The\\_Cultural\\_Heritage\\_Impact\\_of\\_The\\_Russia-Ukrainian\\_War](https://www.researchgate.net/publication/376643367_The_Cultural_Heritage_Impact_of_The_Russia-Ukrainian_War).

<sup>453</sup> Powderly, Joseph, and Strecker, Amy. "Afterword." *Brill | Nijhoff EBooks*, July 15, 2023, page 426. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).

<sup>454</sup> Jolicoeur, Kiley. "Saving Ukrainian Cultural Heritage Online and the Mission to Preserve Digital Cultural Heritage." *Museum and Society* 21, no. 2, July 24, 2023, page 58. <https://doi.org/10.29311/mas.v21i2.4302>.

<sup>455</sup> Powderly, Joseph, and Strecker, Amy. "Afterword." *Brill | Nijhoff EBooks*, July 15, 2023, page 426. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).

<sup>456</sup> *Ibidem*.

<sup>457</sup> *Ibidem*.

<sup>458</sup> Stepnisky, Jeffrey "We Should All Be Concerned That Putin is Trying to Destroy Ukrainian Culture". In Kosciejew, Marc. "Endangered Cultural Heritage in the Russia-Ukraine War: Comparing and Critiquing Interventions by International Cultural Heritage Organizations." *International Journal of Heritage Studies* 29, no. 11, August 21, 2023, page 1160. <https://doi.org/10.1080/13527258.2023.2243457>.

<sup>459</sup> Głowczewska, Aleksandra, and Zawacka-Klonowska, Dominika. "'Inter Arma Silent Musae'. Destroying Museums, Historical Buildings, and Monuments during the War in the Ukraine as War Crimes within the Meaning of International Law." *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 139. <https://doi.org/10.31743/recl.16610>.

destroy Ukraine's identity as a proper independent state<sup>460</sup>. As exemplified by Piotr Gliniski, the Polish Minister of National Heritage and Culture, “*this war is a war for culture [....]. The Russian goal in this war is not to destroy the nation that they do not see as a threat or enemy to their own civilization, but to simply regain power by reclaiming the territory*”<sup>461</sup>. Targeting Ukrainian national heritage is an effective way to erase culture and tradition, undermining and denying Ukrainian identity and nationalism to achieve, in Putin's eyes, a smoother reunion of the Ukrainian territory into a single Russian state<sup>462</sup>.

There are different ways in which Ukrainian cultural heritage has been damaged during the conflict<sup>463</sup>. Archaeological sites, museums, churches, and cultural properties have been destroyed by direct attacks of Russian artillery, as the “remote war” is the main mode in which this war is being conducted<sup>464</sup>. Cultural sites have also been destroyed due to the building of trenches, observation points, and modern military facilities in the Ukrainian territories where the war is being fought<sup>465</sup>. These kinds of activities have been carried on by both parties to the conflict, however, in the case of Ukraine, the accidental loss of cultural layers due to the building of trenches was a direct consequence of the concrete threat of Russian attack, which led no choice but to establish military facilities for self-defence purposes<sup>466</sup>. Therefore, it constituted a forced action. Consequently, the burden of Ukrainian cultural loss due to the establishment of military facilities in Ukrainian territories falls on the Russian Federation, which, as the attacking party, had no self-defense reason to build such facilities<sup>467</sup>. The destruction of Ukrainian cultural sites occurs not only due to artillery attacks but

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<sup>460</sup> Powderly, Joseph, and Strecker, Amy. “Afterword.” *Brill | Nijhoff EBooks*, July 15, 2023, page 426. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).

<sup>461</sup> Siekiera, Joanna. “Between Genocide and War Crime – Legal-Cultural Analysis of the Russian Aggression in Ukraine.” *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 63. <https://doi.org/10.31743/recl.16472>.

<sup>462</sup> Kosciejew, Marc. “Endangered Cultural Heritage in the Russia–Ukraine War: Comparing and Critiquing Interventions by International Cultural Heritage Organizations.” *International Journal of Heritage Studies* 29, no. 11, August 21, 2023, page 1160. <https://doi.org/10.1080/13527258.2023.2243457>.

<sup>463</sup> Shydlovskiy, Pavlo S., Telizhenko, Serhii A., and Ivakin, Vsevolod H. “Archaeological Monitoring in War-Torn Ukraine.” *The Historic Environment: Policy & Practice*, May 4, 2023, pages 160–66. <https://doi.org/10.1080/17567505.2023.2209835>.

<sup>464</sup> *Ibidem*, page 161.

<sup>465</sup> *Ibidem*.

<sup>466</sup> *Ibidem*, page 162.

<sup>467</sup> *Ibidem*.

also due to acts of vandalism carried out by the Russian army<sup>468</sup>. This is the faith that befell the statues of Polovtsian Stone Women in the Kharkiv region<sup>469</sup>. Another way in which Ukrainian culture has been damaged is due to the extensive looting of cultural properties in the territories occupied by Russia, especially in Ukraine's south and east<sup>470</sup>. In the Kherson Regional Art Museum, for example, around 10,000 items have been reported stolen<sup>471</sup>. Moreover, in April 2022, at the Melitopol Museum of Local History, Russian troops seized Scythian gold artefacts including a prestigious 1500-year-old golden tiara<sup>472</sup>. Arguments over the cultural ownership of these Scythian gold items have existed since 2014 when Russia illegally annexed Crimea<sup>473</sup>. Additionally, in the same month of 2022, three art museums located in Mariupol were also looted by Russian forces, which directed their unlawful actions primarily towards the works of artists whom both Russia and Ukraine claim as part of their cultural heritage<sup>474</sup>. The targeting of those specific artworks fits within the description of Russian attacks against Ukraine culture provided by the Director General of the Mystetskyi Arsenal National Art and Culture Museum Complex, Olesia Ostrovska-Liuta. Indeed, she identified three elements on which Putin's target of Ukrainian heritage and tradition is based: *"the destruction of artefacts, the claiming (of) Ukrainian artefacts as Russian instead of Ukrainian, a practice known as 'retribution,' and the illegal seizure of Ukrainian objects by the Russian military"*<sup>475</sup>.

Russian attacks against Ukrainian culture are not limited to material sites or objects, instead, the objective of eliminating Ukrainian identity is embodied in targeting intangible aspects of Ukrainian heritage<sup>476</sup>. In the regions that have been under Russian illegal occupation for long enough, bans have been reported on speaking the Ukrainian language and studying Ukrainian history<sup>477</sup>. Instead, the

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<sup>468</sup> *Ibidem*, page 166.

<sup>469</sup> *Ibidem*.

<sup>470</sup> Powderly, Joseph, and Strecker, Amy. "Afterword." *Brill | Nijhoff EBooks*, July 15, 2023, page 424. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).

<sup>471</sup> Kosciejew, Marc. "Endangered Cultural Heritage in the Russia-Ukraine War: Comparing and Critiquing Interventions by International Cultural Heritage Organizations." *International Journal of Heritage Studies* 29, no. 11, August 21, 2023, page 1161. <https://doi.org/10.1080/13527258.2023.2243457>.

<sup>472</sup> *Ibidem*.

<sup>473</sup> Kandiuk, Mary. "The War on the Cultural Heritage of Ukraine." *Art Documentation* 42, no. 1, March 1, 2023, pages 7 and 8. <https://doi.org/10.1086/728257>.

<sup>474</sup> *Ibidem*, page 8.

<sup>475</sup> *Ibidem*.

<sup>476</sup> *Ibidem*, page 10.

<sup>477</sup> *Ibidem*.

schools' curricula have been changed to include subjects promoting Russian propaganda<sup>478</sup>. In this regard, the Ukrainian Education Ombudsman, Serhii Horbachov, talks about an “*education genocide*<sup>479</sup>”.

The attack on Ukrainian heritage is severe enough that soon after the beginning of the war UNESCO created a preliminary list, constantly updated on their website, recording every verified damaged or destroyed Ukrainian cultural site<sup>480</sup>. As of May 2024, 351 damaged cultural sites have been reported, including 129 religious sites, 157 structures of historical and/or artistic significance, 31 museums, 19 monuments, 14 libraries, and 1 archive<sup>481</sup>. The most affected regions are the Kyiv Region, the Kharkiv Region, and the Donetsk Region, which, by itself, contains more than 25% of the total damaged sites<sup>482</sup>. Among these sites, particularly relevant is the Odesa Transfiguration Cathedral, a 1794 Orthodox church, the first ever built in the city of Odesa, victim of a Russian missile attack on the 23<sup>rd</sup> of July 2023<sup>483</sup>. The Transfiguration Cathedral is situated within the Historic Centre of Odesa, which is a UNESCO World Heritage Site and part of UNESCO's list of World Heritage in Danger<sup>484</sup>. UNESCO's Director-General condemned this Russian attack in Odesa, urging the Russian Federation to adhere to its commitments under international law, including respecting the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and the 1972 UNESCO World Heritage Convention<sup>485</sup>.

### *3.2: Identification of Russia's destruction of Ukrainian cultural heritage as a war crime*

As analysed in Chapter 2, the intentional destruction of cultural heritage can constitute a war crime under international law. Article 8 (2) (b) (ix) of the Rome Statute, for example, specifically

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<sup>478</sup> *Ibidem*.

<sup>479</sup> *Ibidem*.

<sup>480</sup> “Damaged Cultural Sites in Ukraine Verified by UNESCO.” UNESCO Official Website (2024). <https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>. (Accessed 17 May 2024).

<sup>481</sup> *Ibidem*.

<sup>482</sup> *Ibidem*.

<sup>483</sup> “Odesa: UNESCO Strongly Condemns Repeated Attacks against Cultural Heritage, Including World Heritage.” UNESCO World Heritage Centre, July 23, 2023. <https://whc.unesco.org/en/news/2592>.

<sup>484</sup> “The Historic Centre of Odesa.” UNESCO World Heritage Centre (2023). <https://whc.unesco.org/en/list/1703>. See also “UNESCO World Heritage Centre - List of World Heritage in Danger.” UNESCO Official Website (2023). <https://whc.unesco.org/en/danger/>. (Accessed 17 May 2024).

<sup>485</sup> “Odesa: UNESCO Strongly Condemns Repeated Attacks against Cultural Heritage, Including World Heritage.” UNESCO World Heritage Centre, July 23, 2023. <https://whc.unesco.org/en/news/2592>.

identifies intentional attacks towards religious, educational, art buildings, and historic monuments, committed during an international armed conflict, as a serious violation of the laws and customs of war, constituting a war crime for the purpose of the Statute<sup>486</sup>. However, neither Russia nor Ukraine are currently parties to the Statute<sup>487</sup>. Russia withdrew its signature after the ICC ruling that demanded a stop to its 2014 occupation of Crimea<sup>488</sup>. Ukraine, on the other hand, signed the Statute but never ratified it<sup>489</sup>. Therefore, in theory, neither party is bound by the provision of Article 8 (2) (b) (ix). Paragraph 3.4 will analyse in detail whether the ICC has jurisdiction to prosecute war crimes in Ukraine. However, even though neither country is currently a party to the Statute, the latter is often considered customary international law in regard to defining war crimes<sup>490</sup>. If the provisions of Article 8 (2) (b) (ix) are considered to have a strong *opinio iuris* and to be a widely accepted general practice as law<sup>491</sup>, then they would be applicable also to non-state parties<sup>492</sup>. Moreover, as analysed in Chapter 1, intentionally damaging a country's cultural heritage is, by itself, a norm of customary international law, and, therefore, it entails international criminal responsibility<sup>493</sup>. If such norm of customary international law is breached in relation to a conflict, such breach can constitute a war crime<sup>494</sup>. However, in the specific case of the Russia-Ukraine war, the destruction of cultural heritage is criminalized not only by customary international law but also by treaty law, as both parties signed and ratified the Geneva Conventions and its First Additional Protocol<sup>495</sup> and the 1954 Hague

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<sup>486</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 8 (2) (b) (ix).

<sup>487</sup> Siekiera, Joanna. "Between Genocide and War Crime – Legal-Cultural Analysis of the Russian Aggression in Ukraine." *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 66.

<sup>488</sup> *Ibidem*.

<sup>489</sup> *Ibidem*.

<sup>490</sup> *Ibidem*.

<sup>491</sup> As seen in Chapter 1, for a norm to constitute customary international law it must have a strong *opinion iuris* and be a widely accepted general practice as law.

<sup>492</sup> *Ibidem*, page 66 and 67.

<sup>493</sup> See Eritrea/Ethiopia Case on the Stela de Matara in Chapter 1.1. Source: Eritrea-Ethiopia Claims Commission, "Partial Award: Central Front, Eritrea's Claims 2,4,6,7,8, and 22". Permanent Court of Arbitration; Eritrea-Ethiopia Claims Commission, April 28, 2004, [https://legal.un.org/riaa/cases/vol\\_XXVI/115-153.pdf](https://legal.un.org/riaa/cases/vol_XXVI/115-153.pdf).

<sup>494</sup> Schwarz, Alexander. "War Crimes," Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 1. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>495</sup> The Second Additional Protocol, which extends the provisions of the Geneva Conventions to non-international conflicts, was ratified only by Ukraine. However, the Second Protocol does not apply to the 2022 Russia-Ukraine war because the latter is categorised as an international armed conflict.



Convention<sup>496</sup>, which contain provisions protecting cultural properties during armed conflicts. Indeed, the “*extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*<sup>497</sup>” constitutes a grave breach of the Geneva Convention IV, Article 147. As such, it can constitute a war crime<sup>498</sup>. Additionally, Article 85 (4) (d) of the 1977 First Additional Protocol to the Geneva Conventions specifically refers to cultural property protection, stating that wilful damages, committed in the context of international armed conflicts, to cultural heritage sites, monuments, places of worship, works of art, and property with a relevant cultural or spiritual value are considered a grave breach of the First Additional Protocol<sup>499</sup> and an infringement of the Geneva Conventions and, as such, constitute a war crime<sup>500</sup>. As seen in Chapter 1, the 1954 Hague Convention is another relevant means of protection of cultural properties in international humanitarian law, being the first treaty specifically dedicated to the protection of cultural heritage. As such, a grave breach of the Convention committed in relation to a conflict can constitute a war crime<sup>501</sup>. Therefore, Russian damage to Ukrainian cultural heritage has the potential to constitute a war crime as it constitutes a severe breach of customary and treaty international humanitarian law which protect cultural property during an armed conflict. At the time of writing no charges against the Russian Federation or Vladimir Putin or Russian Commanders<sup>502</sup> criminalizing

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<sup>496</sup> Moldovan, Tiberiu. “THE RUSSIAN INVASION in UKRAINE and CULTURAL HERITAGE PROTECTION.” *JOURNAL of ANCIENT HISTORY and ARCHAEOLOGY* 9, no. 1, April 30, 2022, page 235. <https://doi.org/10.14795/j.v9i1>.

<sup>497</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, August 12, 1949, Article 147.

<sup>498</sup> Dinstein, Yoram, and Tabory, Mala. “War Crimes in International Law”. In Schwarz, Alexander. “War Crimes,” Oxford Public International Law. *Max Planck Encyclopedia of Public International Law*, April 2018, page 3. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

<sup>499</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Article 85 (4) (d).

<sup>500</sup> The First Additional Protocol to the Geneva Conventions also applies exclusively to international armed conflicts.

<sup>501</sup> The fact that such breach must be committed in relation to an armed conflict is the *conditio sine qua non* for identifying the act as a war crime; however, it should be noted that the 1954 Hague Convention applies both in times of war and peace. Source: “1954 Convention.” UNESCO Official Website (2024). <https://www.unesco.org/en/heritage-armed-conflicts/convention-and-protocols/1954-convention#:~:text=Now%20widely%20referred%20as%20the>.

<sup>502</sup> The severe breach of international humanitarian law protecting cultural heritage could give rise to both individual and state responsibility. Therefore, the Russian damage to Ukrainian heritage in the 2022 war could, potentially, result both in the prosecution of the Russian Federation under the ICJ, which solves disputes between states, or in the prosecution of Vladimir Putin or Russian Commanders under the ICC, which prosecutes individuals. Paragraph 3.3 will explain why and under which conditions the ICC has jurisdiction to prosecute war crimes in the Russia-Ukraine war despite the non-ratification of the Rome Statute by neither party at the time of the war. Nevertheless, it is important to mention that the

their destruction of cultural heritage as a war crime have been initiated<sup>503</sup>. As subparagraph 3.4 will explain, there is an ongoing investigation on the situation in Ukraine, which includes charges of war crimes; however, no public statement has been released on specific charges related to cultural heritage at this time<sup>504</sup>.

If the ICC were to open a process to prosecute the war crime of destruction of cultural heritage in Ukraine, the prosecutor will need to demonstrate the intentionality of the Russian damage to Ukrainian cultural heritage and the fact that the destroyed sites were not military targets<sup>505</sup>. On the first point, even if some destruction of Ukrainian cultural sites may have been unintentional, like the burning of Ukrainian artist Maria Prymachenko's renowned paintings during the fire at the Ivankiv Museum, which was the accidental consequence of a missile attack directed towards a TV tower in Kyiv<sup>506</sup>, most of the destructions, nevertheless, could be proven as intentional, specifically by referring to Putin's *mens rea* of targeting and eliminating Ukrainian culture and identity. On the second point, both the Geneva Conventions<sup>507</sup> and the Hague Convention<sup>508</sup> present as a waiver the notion of military necessity; however, Article 6 of the Second Protocol to the 1954 Hague Convention clearly states that the waiver of military necessity can only be invoked under two conditions: either

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considerations on a judicial process for the incrimination of the war crime of destruction of Ukrainian cultural heritage are all hypothetical as, at the moment of writing (May 2024), no such procedure has been started.

<sup>503</sup> Moldovan, Tiberiu. "THE RUSSIAN INVASION in UKRAINE and CULTURAL HERITAGE PROTECTION." *JOURNAL of ANCIENT HISTORY and ARCHAEOLOGY* 9, no. 1, April 30, 2022, page 236. <https://doi.org/10.14795/j.v9i1>.

<sup>504</sup> "Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation." *International Criminal Court Official Website*. Office of the Prosecutor, March 2, 2022. <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>. And "Situation in Ukraine." *International Criminal Court Official Website*, March 2022. <https://www.icc-cpi.int/situations/ukraine>.

<sup>505</sup> Moldovan, Tiberiu. "THE RUSSIAN INVASION in UKRAINE and CULTURAL HERITAGE PROTECTION." *JOURNAL of ANCIENT HISTORY and ARCHAEOLOGY* 9, no. 1, April 30, 2022, page 236. <https://doi.org/10.14795/j.v9i1>.

<sup>506</sup> Głowczewska, Aleksandra, and Zawacka-Klonowska, Dominika. "'Inter Arma Silent Musae'. Destroying Museums, Historical Buildings, and Monuments during the War in the Ukraine as War Crimes within the Meaning of International Law." *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 139. <https://doi.org/10.31743/recl.16610>.

<sup>507</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, August 12, 1949, Article 147.

<sup>508</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, May 14, 1954, Article 4 (2).



when the cultural property has been turned into a military objective or when there is no alternative to achieve the military advantage that would be reached by targeting that site<sup>509</sup>. It is important to mention that the Russian Federation has not ratified such Additional Protocol<sup>510</sup>; however, the provision of Article 6 could still be used in a possible future case either as customary international law or as to clarify the scope of Article 4 (2) of the 1954 Hague Convention<sup>511</sup>.

Despite no procedure being started condemning either Russia or Russian Commanders for the war crime of destruction of cultural heritage, allusion to the identification of Russian actions towards Ukraine cultural properties and sites as a war crime have been made by both the European Parliament and UNESCO. Indeed, in a Resolution of October 2022, which will be analysed in detail in the following subparagraph, the EU Parliament has defined Russian attacks against Ukrainian cultural heritage as a war crime, identifying them as a severe breach of the 1954 Hague Convention<sup>512</sup>. Moreover, in a report, UNESCO also used the term “war crime” in relation to Russian actions against Ukrainian cultural properties and sites<sup>513</sup>.

### 3.3: Response of the international community to the “cultural crisis” in Ukraine

The extensive damage to Ukrainian cultural heritage during the 2022 war has concerned and mobilised the international community. In the first week of the war, *the United Nations Educational, Scientific and Cultural Organization* (UNESCO), the International Council on Archives (ICA), the International Council of Museums (ICOM), and the International Federation of Library and Information Associations and Institutions (IFLA) all released statements on their websites revealing

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<sup>509</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, March 26, 1999, Article 6.

<sup>510</sup> Moldovan, Tiberiu. “THE RUSSIAN INVASION in UKRAINE and CULTURAL HERITAGE PROTECTION.” *JOURNAL of ANCIENT HISTORY and ARCHAEOLOGY* 9, no. 1, April 30, 2022, page 234. <https://doi.org/10.14795/j.v9i1>.

<sup>511</sup> *Ibidem*.

<sup>512</sup> Głowczewska, Aleksandra, and Zawacka-Klonowska, Dominika. “‘Inter Arma Silent Musae’. Destroying Museums, Historical Buildings, and Monuments during the War in the Ukraine as War Crimes within the Meaning of International Law.” *Review of European and Comparative Law*, no. Special Issue, December 22, 2023, page 140. <https://doi.org/10.31743/recl.16610>.

<sup>513</sup> Jawad, Ayesha, and Bokhari, Maira. “Measuring the Protection of Cultural Property under International Humanitarian Laws: Analysis of Russia-Ukraine Conflict.” *Journal of Law & Social Studies* 4, no. 3, September 30, 2022, page 476. <https://doi.org/10.52279/jlss.04.03.469480>.

their concerns for the dangers posed by the situation in Ukraine on cultural heritage and expressing solidarity and support for the Ukrainian culture and its professionals<sup>514</sup>. However, it is interesting to notice that the majority of the statements fail to mention Russia's name and to call the events a "war"<sup>515</sup>. The only statement to clearly mention and condemn Russia is ICOM's<sup>516</sup>. UNESCO's initial statement appears particularly controversial. Indeed, it refers to the situation in Ukraine as "military operations", echoing, in this way, Putin's speech in which he explained and justified the Russian invasion defining it as a "*special military operation*" instead of a war<sup>517</sup>. Moreover, UNESCO's statement, contrary to the others mentioned, does not express concern for Ukrainian cultural heritage specifically, rather, it generically calls for the respect of international humanitarian law, notably of the 1954 Hague Convention, without directing this recommendation to any party<sup>518</sup>. As the war proceeded, new statements were released. UNESCO's follow-ups specifically condemn Russia and exhort Ukrainian authorities to use the Blue Shield emblem of the 1954 Hague Convention to mark cultural properties and highlight their protected status under international law<sup>519</sup>. The harshness and directiveness of UNESCO's follow-up statements condemning Russia's actions is unusual considering that the Russian Federation is a permanent member of the United Nations Security Council. Indeed, it is uncommon for a UN Agency like UNESCO to explicitly admonish one of the Security Council's permanent members<sup>520</sup>.

Additionally to the release of statements, these organizations have been active in providing concrete support to Ukrainian professionals to safeguard Ukrainian cultural heritage. ICA, for example, organized a webinar to explain how to digitalize archives to library workers in Ukraine<sup>521</sup>. Moreover, it presents on its website the link to donate to a charity account run by Ukraine's State Archival Service to sustain Ukraine's documentary heritage<sup>522</sup>. ICOM also offered financial support while providing emergency supplies to museums in Ukraine to help with the packing and protecting

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<sup>514</sup> Koscieljew, Marc. "Endangered Cultural Heritage in the Russia-Ukraine War: Comparing and Critiquing Interventions by International Cultural Heritage Organizations." *International Journal of Heritage Studies* 29, no. 11, August 21, 2023, page 1164. <https://doi.org/10.1080/13527258.2023.2243457>.

<sup>515</sup> *Ibidem*.

<sup>516</sup> *Ibidem*.

<sup>517</sup> *Ibidem*.

<sup>518</sup> *Ibidem*, page 1165.

<sup>519</sup> *Ibidem*, page 1167.

<sup>520</sup> *Ibidem*, page 1171.

<sup>521</sup> *Ibidem*.

<sup>522</sup> *Ibidem*.

of Ukraine's cultural properties<sup>523</sup>. UNESCO implemented a multi-million-dollar emergency plan to preserve and safeguard Ukraine's cultural heritage<sup>524</sup> and presents on its website an updated list of the cultural sites damaged during the war, aiming to spread awareness on the disastrous effect of the conflict on Ukraine's culture<sup>525</sup>. Another relevant event in demonstrating the international community's response to the Russian damage to Ukrainian culture is the postponement of the 45<sup>th</sup> Session of UNESCO's World Heritage Committee. The Session, which was supposed to occur in Kazan, Russia, in June 2022, was instead moved to September 2023 and hosted in Riyadh, Saudi Arabia<sup>526</sup>. This change of plans occurred after 46 members of the Committee declared in an open letter that they would not go to Russia or to any World Heritage Committee in general if it were to be chaired by Russia<sup>527</sup>. Moreover, during its 45<sup>th</sup> Session, the Committee approved the inscription of the Saint Sophia Cathedral and Monastic Buildings, Kyiv-Pechersk Lavra<sup>528</sup>, and the Ensemble of Historic Centre of L'viv<sup>529</sup> on the List of World Heritage in Danger, joining the Historic Centre of Odesa, already listed in January 2023<sup>530</sup>. The inscription of these sites on the List of World Heritage in Danger grants Ukraine the possibility of requesting increased financial and technical support from other countries parties to the 1972 UNESCO World Heritage Convention to protect the sites and restore them if they were to be damaged<sup>531</sup>.

In the past year, the Russian Federation's involvement in UNESCO has changed significantly. For example, the Russian Federation did not attend the 42<sup>nd</sup> session of the UNESCO General

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<sup>523</sup> *Ibidem*.

<sup>524</sup> *Ibidem*.

<sup>525</sup> "Damaged Cultural Sites in Ukraine Verified by UNESCO." UNESCO Official Website (2024). <https://www.unesco.org/en/articles/damaged-cultural-sites-ukraine-verified-unesco>. (Accessed 17 May 2024).

<sup>526</sup> Powderly, Joseph, and Strecker, Amy. "Afterword." *Brill | Nijhoff EBooks*, July 15, 2023, page 447. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).

<sup>527</sup> *Ibidem*, page 447 and 448.

<sup>528</sup> "45 COM 7B.59 - Decision. Kyiv: Saint-Sophia Cathedral and Related Monastic Buildings, Kyiv-Pechersk Lavra (Ukraine)." UNESCO World Heritage Centre (2023). <https://whc.unesco.org/en/decisions/8335/>.

<sup>529</sup> "45 COM 7B.60 - Decision. L'viv – the Ensemble of the Historic Centre (Ukraine)." UNESCO World Heritage Centre, 2023. <https://whc.unesco.org/en/decisions/8334/>.

<sup>530</sup> "Odesa Inscribed on UNESCO's World Heritage List in the Face of Threats of Destruction," January 25, 2023. <https://www.unesco.org/en/articles/odesa-inscribed-unescos-world-heritage-list-face-threats-destruction>. See also "Ukraine: UNESCO Sites of Kyiv and L'viv Are Inscribed on the List of World Heritage in Danger," September 15, 2023. <https://whc.unesco.org/en/news/2608>.

<sup>531</sup> UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention). Paris, November 16, 1972, Article 11 (4).

Conference which took place in Paris on the 7<sup>th</sup> of November 2023, as France was late in issuing Russian representatives' visas<sup>532</sup>. Additionally, on the 15<sup>th</sup> of November 2023, for the first time in history, the Russian Federation was excluded from UNESCO's Executive Board which elects representatives according to a quota system for each region<sup>533</sup>. In the Eastern Europe Group of which Russia is part of, Serbia, Albania, Slovakia, and Czech Republic representatives were elected this year<sup>534</sup>. This result is particularly significant considering the Russian Federation being one of the five permanent members of the UN Security Council, and having, therefore, generally higher influence in the UN system.

Another relevant event in demonstrating the serious concerns of the international community regarding the effect of the war on Ukraine's cultural heritage is UNESCO's decision to grant twenty Ukrainian cultural properties with provisional enhanced protection<sup>535</sup>. During an extraordinary meeting of UNESCO's Committee for the Protection of Cultural Property in the Event of Armed Conflict held on the 7<sup>th</sup> of September 2023, the Committee decided to grant to these Ukrainian sites, including Kyiv's Saint-Sophia Cathedral and Related Monastic Buildings and the Ensemble of the Historic Centre of L'viv, the greatest possible form of protection under the 1954 Hague Convention<sup>536</sup>. The status of enhanced protection increases the cultural sites' immunity from attacks and from it turning into a military target. Violating such immunity constitutes a grave breach of the 1954 Hague Convention and its 1999 Second Protocol and could, therefore, amount to a war crime.

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<sup>532</sup> Pohorilko, Maryna. "Russian Representatives Skip Opening of the UNESCO Conference as France Delays the Issuance of Their Visas." *Obozrevatel*, November 3, 2023. <https://eng.obozrevatel.com/section-world/news-russian-representatives-skip-opening-of-the-unesco-conference-as-france-delays-the-issuance-of-visas-08-11-2023.html>. See also "France Scuttles Russia's Participation in UNESCO General Conference Session," November 7, 2023. <https://tass.com/politics/1702831>.

<sup>533</sup> "Historic First: Russia Excluded from UNESCO Executive Board," November 16, 2023. <https://www.ukrainianworldcongress.org/historic-first-russia-excluded-from-unesco-executive-board/#:~:text=The%20Russian%20Federation%20has%20been>.

<sup>534</sup> *Ibidem*.

<sup>535</sup> "Ukraine: 20 Cultural Properties Receive Enhanced Protection by UNESCO's Second Protocol to the 1954 Hague Convention," September 7, 2023. <https://www.unesco.org/en/articles/ukraine-20-cultural-properties-receive-enhanced-protection-unescos-second-protocol-1954-hague>.

<sup>536</sup> "Cultural Property under Enhanced Protection Ukraine," January 5, 2024. <https://www.unesco.org/en/culture/cultural-property-under-enhanced-protection>. (Accessed 18 May 2024). See also "Ukraine: 20 Cultural Properties Receive Enhanced Protection by UNESCO's Second Protocol to the 1954 Hague Convention," September 7, 2023. <https://www.unesco.org/en/articles/ukraine-20-cultural-properties-receive-enhanced-protection-unescos-second-protocol-1954-hague>.

In addition, the status of enhanced protection possibly allows competent authorities from any of the 87 States Parties to the 1999 Second Protocol to bring charges against individuals who violated the protected cultural property's immunity<sup>537</sup>.

Support to the Ukrainian cultural sector and sites has been granted also by the European Union. The EU Parliament, for example, on the 20<sup>th</sup> of October 2022, published a resolution on cultural solidarity with Ukraine<sup>538</sup>. In the resolution, the parliament clarifies the intent of the Russian target of Ukraine's culture as an “*attempt to eradicate the identity and culture of a sovereign nation [...] through strategic and targeted acts of destruction of cultural sites*”<sup>539</sup>. The Parliament describes such actions as a war crime under the 1954 Hague Convention, stressing its ratification by both Russia and Ukraine<sup>540</sup>. Considering this and perceiving the assaults on Ukraine's identity as an assault on a shared European identity, the Parliament declares its solidarity and support for the Ukrainian cultural sector and stresses the European Commission and the Member States to incorporate the urgent needs of the culture and cultural heritage sectors into the EU's humanitarian aid to Ukraine<sup>541</sup>. Finally, the resolution expresses the importance of documenting all acts against cultural heritage, particularly those that may constitute war crimes and those that are carried out against cultural properties protected by international conventions<sup>542</sup>.

The attention posed by the European Union on Ukraine's culture is evident in the birth of the RES-POL project — Rapid Expert Support for Culture and Media Policies in Ukraine, a project funded by the European Union and presented in Kyiv on the 27<sup>th</sup> of February 2024<sup>543</sup>. The project's goal is to create policies to develop and sustain Ukrainian cultural sector, considering it as a

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<sup>537</sup> “Ukraine: 20 Cultural Properties Receive Enhanced Protection by UNESCO's Second Protocol to the 1954 Hague Convention,” September 7, 2023. <https://www.unesco.org/en/articles/ukraine-20-cultural-properties-receive-enhanced-protection-unescos-second-protocol-1954-hague>.

<sup>538</sup> “European Parliament Resolution of 20 October 2022 on Cultural Solidarity with Ukraine and a Joint Emergency Response Mechanism for Cultural Recovery in Europe (2022/2759(RSP)).” *Official Journal of the European Union*, October 20, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022IP0374>.

<sup>539</sup> *Ibidem*.

<sup>540</sup> *Ibidem*.

<sup>541</sup> *Ibidem*.

<sup>542</sup> *Ibidem*.

<sup>543</sup> Press and information team of the Delegation to UKRAINE. “With the EU Support New Project Starts: Experts Will Develop National Policy for 4 Cultural Sectors | EEAS.” [www.eeas.europa.eu](http://www.eeas.europa.eu), February 27, 2024. [https://www.eeas.europa.eu/delegations/ukraine/eu-support-new-project-starts-experts-will-develop-national-policy-4-cultural-sectors\\_en?s=232](https://www.eeas.europa.eu/delegations/ukraine/eu-support-new-project-starts-experts-will-develop-national-policy-4-cultural-sectors_en?s=232).

fundamental asset “both in the context of Ukraine state's recovery, national unity, and in the context of joining the EU as an equal partner, a carrier of significant innovative potential<sup>544</sup>” With this intent, and aiming to overcome the disastrous effects of the war on Ukraine’s culture, the EU provides Ukrainian Ministries the support to strengthen Ukrainian cultural sector and increase its development, while working to harmonize Ukraine’s framework in this area with the EU legislation<sup>545</sup>. The project will last until March 2025 and has a budget of over 800,000 euros<sup>546</sup>.

### 3.4: Response of the International Criminal Court

Four days after Russia invaded Ukraine on the 24<sup>th</sup> of February 2022, the Prosecutor of the International Criminal Court (ICC), Karim A.A Khan, announced the decision to open an investigation into the situation in Ukraine<sup>547</sup>. This decision was based on the conclusions of a preliminary examination conducted in 2020, which stated the presence of “reasonable basis<sup>548</sup>” to believe that war crimes and crimes against humanity have been committed in Ukraine<sup>549</sup>. As specified by the Prosecutor, this investigation intends to extend the previous one and will include also new crimes committed following the exacerbation of the conflict in February 2022<sup>550</sup>.

As seen in Chapter 2, the ICC has jurisdiction over four categories of crimes: genocide<sup>551</sup>, crimes against humanity<sup>552</sup>, war crimes<sup>553</sup>, and the crime of aggression<sup>554</sup>. A country’s participation in the International Criminal Court (ICC) and the consequent acceptance of its jurisdiction is voluntary and is usually formalized through the signature and ratification of the Rome Statute, the treaty that established the Tribunal. That said, the ICC Prosecutor’s decision to open an investigation

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<sup>544</sup> *Ibidem*.

<sup>545</sup> *Ibidem*.

<sup>546</sup> Vdovychenko, Yurii. “With the EU Support New Project Starts: Experts Will Develop National Policy for 4 Cultural Sectors.” EU for Ukraine, February 27, 2024. <https://eu4ukraine.eu/en/whats-happening-en/news-en/eu-support-new-project-starts.html>.

<sup>547</sup> Mulligan, Stephen. “The Role of International Tribunals in the Response to the Invasion of Ukraine.” *Congressional Research Service*, March 22, 2023, page 2.

<sup>548</sup> *Ibidem*.

<sup>549</sup> *Ibidem*.

<sup>550</sup> *Ibidem*.

<sup>551</sup> Rome Statute of the International Criminal Court. Rome, July 17, 1998, Article 5 (a).

<sup>552</sup> *Ibidem*, Article 5 (b).

<sup>553</sup> *Ibidem*, Article 5 (c).

<sup>554</sup> *Ibidem*, Article 5 (d).

in Ukraine may seem unusual considering that neither Russia nor Ukraine are currently members of the Rome Statute. However, the ICC has the power to prosecute non-parties for all crimes, excluding the crime of aggression<sup>555</sup>, if the requirements of Article 12 (3) of the Rome Statute are met<sup>556</sup>. Specifically, a country must accept the ICC jurisdiction by submitting a declaration, and the case must be either self-initiated by the ICC Prosecutor or referred by a state party to the Rome Statute<sup>557</sup>. In 2014, Ukraine accepted the ICC's jurisdiction for crimes committed on its territory during the period from the 21<sup>st</sup> of November 2013 to the 22<sup>nd</sup> of February 2014 and requested the ICC to start an investigation<sup>558</sup>. In 2015, with a second declaration, Ukraine extended the acceptance of ICC's jurisdiction to an open-ended period, giving the ICC the legal authority to proceed with the investigation of war crimes and crimes against humanity committed in Ukraine and extend this investigation to consider contemporary events as well<sup>559</sup>. However, it is important to notice that Ukraine's acceptance of the ICC's jurisdiction does not grant the ICC the authority to prosecute Russian leaders for the crime of aggression. The ICC would have such power only if Russia signed and ratified the Rome Statute or if the case was referred to the ICC by the UN Security Council<sup>560</sup>. However, both scenarios are highly unlikely, given that Russia is the aggressor in the conflict and holds veto power in the UN Security Council as one of its five permanent members. Consequently, proposals have been made for the establishment of a special *ad hoc* tribunal to prosecute Russian individuals for the crime of aggression in Ukraine<sup>561</sup>. Such a proposal has also been made by the European Parliament, which approved a Resolution on January 18, 2023, advocating for the establishment of such a tribunal, believing that it “*would fill the large gap in the current institutional*

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<sup>555</sup> ICC's jurisdiction extends to non-parties for all crimes, including the crime of aggression, in situations referred to the ICC by the UN Security Council. An attempt to do so for the situation in Ukraine was made in 2022 but was vetoed by Russia. Source: Mehrotra, Abhinav, and Gupta, Biswanth. “Vladimir Putin, the War Criminal Explained” *Intpolicydigest* (2023), page 2. <https://pure.jgu.edu.in/id/eprint/5796/1/intpolicydigest.org-Vladimir%20Putin%20the%20War%20Criminal%20Explained.pdf>

<sup>556</sup> Mulligan, Stephen. “The Role of International Tribunals in the Response to the Invasion of Ukraine.” *Congressional Research Service*, March 22, 2023, page 3.

<sup>557</sup> *Ibidem*.

<sup>558</sup> *Ibidem*.

<sup>559</sup> *Ibidem*.

<sup>560</sup> Sarkin, Jeremy, and Almeida, Juliana. “UNDERSTANDING the ACTIVATION of the CRIME of AGGRESSION at the INTERNATIONAL CRIMINAL COURT: PROGRESS and PITFALLS.” *Wisconsin International Law Journal* 36, no. 3 (2019), page 533. [https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2020/01/36.3\\_518-551\\_SarkinAlmeida.pdf](https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2020/01/36.3_518-551_SarkinAlmeida.pdf).

<sup>561</sup> Powderly, Joseph, and Strecker, Amy. “Afterword.” *Brill | Nijhoff EBooks*, July 15, 2023, page 437. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).



*international criminal justice set-up*<sup>562</sup>”. However, European Parliament resolutions are not binding. At the time of writing, despite the proposal, no concrete progress has been made on the establishment of an *ad hoc* tribunal for Ukraine.

On the other hand, significant progress has been made in prosecuting war crimes committed in Ukraine. In March 2023, the ICC Prosecutor issued an arrest warrant against Vladimir Putin and Maria Lvova-Belova for “*the unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation, contrary to Article 8(2)(a)(vii) and Article 8(2)(b) (viii) of the Rome Statute*<sup>563</sup>.” This event is particularly significant as it marks the first time that the Head of State of a permanent member of the UN Security Council has been charged with an international crime<sup>564</sup>. It is still unclear how the notion of Head of State immunity applies in this context, and it is uncertain whether Putin will ever appear at the ICC headquarters in The Hague<sup>565</sup>. Nevertheless, the arrest warrant brands him as a suspected war criminal, having strong consequences on his reputation.

Regarding the war crime of cultural heritage, at present, no arrest warrants have been made by the ICC for the Russian destruction of Ukrainian cultural properties; however, the investigation is still ongoing, leaving it as a concrete possibility.

### *Conclusions:*

In conclusion, Russia’s attack towards Ukrainian cultural heritage is a concerning and significant characteristic of the ongoing conflict, especially if considered in relation to Putin’s attitudes towards Ukrainian identity and statehood. The damage to over 350 cultural sites up to May 2024 led to immediate responses of the international community which condemned Russian actions, classifying them as a war crime. Indeed, the intentional destruction of cultural properties is a serious violation of both customary and treaty international humanitarian law, being a grave breach of the Geneva Conventions and the 1954 Hague Convention. Since the beginning of the war, international organizations like UNESCO, ICOM, ILA, and IFLA have been actively trying to protect Ukrainian cultural heritage, either by issuing financial support, sending materials, or even granting the at-risk

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<sup>562</sup> JOINT MOTION for a RESOLUTION on the Establishment of a Tribunal on the Crime of Aggression against Ukraine | RC-B9-0063/2023 | European Parliament.” [www.europarl.europa.eu](http://www.europarl.europa.eu), January 18, 2023. [https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063\\_EN.html](https://www.europarl.europa.eu/doceo/document/RC-9-2023-0063_EN.html).

<sup>563</sup> Powderly, Joseph, and Strecker, Amy. “Afterword.” *Brill | Nijhoff EBooks*, July 15, 2023, page 442. [https://doi.org/10.1163/9789004434011\\_018](https://doi.org/10.1163/9789004434011_018).

<sup>564</sup> *Ibidem*.

<sup>565</sup> *Ibidem*.



sites additional protection under international law. The European Parliament also intervened, by condemning Russian actions as a war crime and developing the RES-POL project — Rapid Expert Support for Culture and Media Policies in Ukraine, to help sustain Ukraine’s cultural sector. Considering that neither Russia nor Ukraine are currently parties to the Rome Statute, in theory, the International Criminal Court (ICC) should not have jurisdiction to prosecute war crimes committed in the conflict, including the war crime of intentionally destroying cultural heritage. However, in 2014 Ukraine accepted the ICC’s jurisdiction for crimes committed on its territory and later renewed its acceptance to an open-ended period, giving the ICC the right to start an investigation on the situation in Ukraine. This investigation bore its first fruit in March 2023 with the issue of arrest warrants against Vladimir Putin and Maria Lvova-Belova for the war crime of forcefully deporting Ukrainian children to Russian territories. As of May 2024, there have been no charges by the ICC for the war crime of destruction of cultural heritage. However, the investigations are still ongoing.

## Conclusions:

International law provides numerous means of protecting cultural heritage, recognizing its value both as a custodian of a people's identity and self-determination, and as a protector of the heritage of all humankind. Cultural heritage is protected in international Conventions, like the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which is the first international treaty dedicated entirely to the protection of cultural heritage, in UN Security Council resolutions, as a norm of customary international law, and through to the efforts of international organizations like UNESCO.

As presented in Chapter 1, the damage to cultural heritage can constitute crimes against humanity, intent to commit genocide, and war crimes. Concerning crimes against humanity, the focus is on the impact of cultural heritage destruction on people and the *mens rea* (intent) of the perpetrator. Regarding the destruction of cultural heritage as a crime of genocide, it is important to explain that, even though the 1948 Convention on the Prevention and Punishment of the Crime of Genocide does not explicitly qualify acts of destruction of cultural heritage as genocide, it is recognised that intentionally destroying a group's culture can indicate the intent to commit genocide towards that targeted group if the latter is also subject to physical or biological destruction through one or more ways listed in Article II of the 1948 Genocide Convention. Therefore, while the destruction of cultural heritage might not constitute genocide *per se* under the 1948 Genocide Convention, it can demonstrate an intent to commit genocide. As of May 2024, no legal proceedings have ever resulted in the identification of the destruction of cultural heritage as either a crime against humanity or intent to commit genocide. However, this does not preclude the possibility of such classifications in the future.

What has been more common in international jurisprudence is the prosecution of the destruction of cultural heritage as a war crime. Indeed, as analysed in Chapter 2, damage to cultural property is considered a war crime under both Article 3 (d) of the ICTY Statute and Article 8 (2) (b) (ix) and Article 8(2)(e)(iv) of the Rome Statute. It is precisely under Article 3 (d) of the ICTY Statute that the ICTY convicted Kordić, Čerkez, Strugar, and Jokić for their damage to cultural heritage in Yugoslavia. As presented in the Chapter, particularly relevant in this context was the damage to Dubrovnik's Old Town, as, at the time of the conflict, it was already listed in its entirety as a UNESCO World Heritage Site and marked with UNESCO emblems. Chapter 2 proceeded by examining the *Al Mahdi* case, prosecuted by the ICC. This case, contrary to those prosecuted by the ICTY and presented earlier in the chapter, was the first and only case where the defendant was convicted solely

for the war crime of destruction of cultural heritage. It was also the first case in which reparations for such a crime were adopted. Pursuant to Article 8(2)(e)(iv) of the Rome Statute, the ICC convicted Al Mahdi, head of *Hisbah* in 2012, for the destruction of buildings culturally relevant to the population of Timbuktu and of Mali, during the time of occupation from the 30<sup>th</sup> of June to the 11<sup>th</sup> of July 2012. The *Al Madhi* case was extremely significant in expressing the gravity of intentionally attacking cultural heritage, and in recognizing this act as a serious crime having relevant repercussions on both the targeted people and the international community. The unique precedent in international criminal law brought by this case influenced the Office of Prosecutor (OTP) of the ICC's decision to develop a Policy on Cultural Heritage. Such policy was adopted in June 2021 with the purpose of offering more clearance on how the ICC should address future crimes against cultural heritage under the Rome Statute. Particularly relevant is the emphasis put, in the Policy, on the interpretation of the term "cultural property" present in Article 8 of the Rome Statute. The Policy specifies that such a term is to be interpreted to mean the broad concept of "cultural heritage", therefore encompassing, within its scope, both tangible and intangible "human achievements".

The question of cultural heritage protection and of the prosecution of the war crime of destruction of cultural properties is especially pertinent considering the ongoing war in Ukraine. For this reason, the entire Chapter 3 was dedicated to applying the laws of international humanitarian law and the previous considerations on cultural heritage to the conflict in Ukraine. Since the Russian Federation's illegal invasion of Ukraine on the 24<sup>th</sup> of February 2022, there has been severe targeting of Ukraine's cultural heritage. By May 2024, damage to 350 cultural sites has been reported. This is particularly significant considering Russian President Vladimir Putin's attitudes towards Ukrainian identities and his definition of Ukrainian history and culture as part of that of Russia. Russia's actions against Ukraine's cultural properties have mobilised the reaction of the international community, which condemned such actions and identified them as a war crime, considering the intentional destruction of cultural properties as a serious violation of both customary and treaty international humanitarian law, being a grave breach of the Geneva Conventions and the 1954 Hague Convention.

Support to Ukrainian cultural proprieties has been provided by international organizations such as UNESCO, ICOM, ILA, and IFLA, as well as by the European Union, which developed the RES-POL project to help sustain Ukraine's cultural sector. Furthermore, Russian violations of international humanitarian law in Ukraine spurred the reaction of the International Criminal Court which started an investigation into the situation in Ukraine. In March 2023, the ICC issued arrest warrants against

Vladimir Putin and Maria Lvova-Belova for the war crime of forcefully deporting Ukrainian children to Russian territories.

While neither Russia nor Ukraine are currently parties to the Rome Statute establishing the ICC, Ukraine accepted the ICC's jurisdiction for crimes committed on its territory in 2014 and later extended its acceptance to an open-ended period, granting the ICC the authority to investigate the current situation and prosecute war crimes, crimes against humanity, and crime of genocide committed in Ukrainian territories. As of May 2024, the only publicly declared charges are the ones against Putin and Lvova-Belova for the unlawful deportation of children, a war crime under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute. No charges have been issued for the war crime of destruction of cultural heritage. However, as the investigations are still ongoing, such charges remain a concrete possibility for the foreseeable future.

The targeting of cultural heritage during conflicts should not be dismissed as a way of putting the focus “on stones rather than on people”. Culture and tradition embody the essence of what it means to be part of a group, and of what it means to be human. Intentionally directing attacks towards cultural properties is a way to aim at the very core of a people's identity, depriving them of the intrinsic characteristics that make them who they are while simultaneously stripping the whole humankind a portion of our collective heritage. Therefore, attacks on cultural sites must be recognised as a significant security issue, considering that culture is fundamentally about people.

Precedents such as the *Strugar* and the *Al Mahdi* cases highlight the growing recognition of cultural heritage protection within international law. The advent of new instruments for the protection of culture like the UNESCO World Heritage Convention and the 1954 Hague Convention signifies a shift towards more culture-sensitive international legal frameworks. Nevertheless, culture remains on the frontline of conflicts, as exemplified by the war in Ukraine, which has resulted in the destruction of more than 350 cultural sites in less than three years. As threats to cultural heritage, particularly during conflicts, persist, it is imperative to maintain a robust legal system that not only penalises offenders but also fosters global collaboration and proactive measures to protect cultural properties. This is crucial in order to safeguard our shared humanity.

In this context, the role of institutions such as the ICC and international organizations is indispensable in upholding the values enshrined in our shared cultural heritage. However, the protection of cultural sites and tradition must transcend the static nature of written commitments and

evolve into dynamic, concrete actions. By continuing to transform legal frameworks and policies into effective measures on the ground, these institutions can help protect the essence of our collective history and identity, ensuring that cultural heritage continues to inspire and unite future generations.

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