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GENERAL ARTICLES

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Attacks against Cultural Property in Armed Conflict – How to Reduce the Risk of Impunity?

Abstract: People see cultural property as their heritage, which identifies them and made them who they are today. Loss of cultural property deprives people of tangible remnants of their past and leaves deep unhealable wounds. Therefore, there are special regimes and measures in place in order to protect cultural property during armed conflict. However, instead of saving and sparing cultural property, belligerents often even intentionally target the cultural property of the other people as a means of warfare in order to break the backbone and morale of these people or make their identity fade away. Measures such as enhanced protection, individual criminal responsibility, and means for paying more attention to the dissemination and implementation of the rules of warfare do not seem to have sufficient desired effect. So how can we more effectively make belligerents refrain from destroying cultural property? How can we increase deterrence effects and decrease impunity? This article first shortly reflects on the legal framework of cultural property protection in armed conflict. Then it touches upon the various obligations of states with regard to the practical implementation of, and adherence to, these rules, after which it flags several cases before international courts and tribunals, both regarding individual criminal responsibility and state responsibility. Thereafter the recent Russian

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destruction of cultural property in Ukraine is addressed, followed by an examination of how deterrence can be enhanced and impunity reduced. The article ends with several conclusions and recommendations in that regard.

Keywords: armed conflict, impunity, cultural property, war crimes, international accountability

Foreword

"Over the past few decades, culture has moved to the frontline of war, both as collateral damage as well as a target for belligerents, who use its destruction to foster violent means and aims, hatred and vengeance". These are the alarming words by then Director-General of UNESCO Irina Bokova in 2016.[1] Already earlier UNESCO was "[m]indful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights".[2] People attach great importance to their cultural property;[3] they see it as their heritage, which identifies them and makes them who they are today. Loss of cultural property deprives people of tangible remnants of their past and leaves deep and unhealable wounds. Thus there are special regimes and enhanced measures in place to protect cultural property during armed conflict. However, there is a serious downside to this approach; instead of saving and sparing cultural property during armed conflicts, belligerents often even intentionally target the cultural property of the other people as a means of warfare in order to break the backbone and morale of these people. Destruction of cultural property has sometimes be-

1 R. O'Keefe et al., *Protection of Cultural Property: Military Manual*, UNESCO, Paris 2016, p. xiii.

2 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 17 October 2003, https://www.unesco.org/en/legal-affairs/unesco-declaration-concerning-intentional-destruction-cultural-heritage [accessed: 22.06.2024].

3 I use the term "cultural property" here, as that is the term used by, and defined in, the 1954 Hague Convention and the 1999 Second Protocol (that refers to the 1954 Hague Convention). "Cultural property" and "cultural heritage" are interrelated, but slightly different concepts and these terms are regularly used inconsistently. The definition of cultural property in the 1954 Hague Convention may give the impression that "cultural property" is a broader term than "cultural heritage", as the term "cultural property" includes "movable or immovable property of great importance to the cultural heritage of every people" but is broader than that. However, the policy of the International Criminal Court considers "cultural heritage" as a more expansive term than "cultural property", since cultural property itself only touches on the tangible aspects of human culture, whereas attacks against or affecting cultural heritage may constitute or relate to numerous other crimes under the Rome Statute of the ICC. See International Criminal Court – The Office of the Prosecutor, *Policy on Cultural Heritage*, June 2021, para. 14 and further, https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf [accessed: 22.06.2024].

come a goal in itself in various conflicts.[4] Relatively recently developed measures such as enhanced protection, individual criminal responsibility, and paying more attention to the dissemination and implementation of the rules of warfare do not have the sufficient desired effect. So how can we more effectively make belligerents refrain from seeing the destruction of cultural property as a military objective? And especially: how can we decrease impunity?

From the 1954 Hague Convention to the 1999 Second Protocol

Over the course of time, the protection of cultural property has gained a prominent position under international humanitarian law. Along with some leading national examples,[5] the 1899 and 1907 Hague Conventions are often mentioned as the first international steps in that regard. In 1954, after the experience of the Second World War, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("the 1954 Hague Convention") was adopted, together with its First Protocol.[6] The basic notion is that the High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts,[7] adopted in 1977, included two Additional Protocols[8] to the 1949 Geneva Conventions, both containing an article related to the protection of cultural property. Article 53 of the First Additional Protocol ("API") explicitly refers to the protection of cultural objects and places of worship, and so does the Second Additional Protocol in its Article 16. API even included the notion of individual criminal responsibility by considering offences against cultural property as a "grave breach" when committed willfully.[9] Moreover, the High Contracting Parties are under an obligation to repress grave breaches and to search for the suspects behind such breaches on their territory in order to prosecute or extradite them.[10]

This, however, was not sufficient. By the last decade of the 20th century it became evident that the 1954 Hague Convention needed updating. Amongst other crises, the two Gulf Wars, the armed conflict in former Yugoslavia, and the situ-

4 A. Bos, *Words of Welcome*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff Publishers, Leiden–Boston 2010, pp. xv-xvii, xvii.

5 Such as the 1863 Lieber Code in the United States of America.

6 14 May 1954, 249 UNTS 240.

7 Geneva, 1974-1977.

8 1125 UNTS 3 and 1125 UNTS 609.

9 Article 85(4) API.

10 Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva 1987, p. 975, para. 3403.

ation in Afghanistan unfortunately made that crystal clear. Often the demolition of cultural property was purely intentional. Taking the destruction of the bridge in Mostar and the bombing of Dubrovnik as an example, it can be seen that the attacking armed forces[11] were familiar with the provisions of the 1954 Hague Convention, and Yugoslavia had been actively engaged in the dissemination of these provisions; and it can be stated that the destruction had been intentional and that the cultural destruction was a military objective in itself. The aim had not simply been the destruction of property as such, but the disruption of the ordinary urban and religious lives of different peoples.[12]

In order to better protect cultural property, innovative aspects were introduced in the 1999 Second Protocol to the 1954 Hague Convention ("the 1999 Second Protocol")[13] such as "enhanced protection", "criminal responsibility and jurisdiction", and the "protection of cultural property not of an international character". Also, the 1999 Second Protocol further defines some of the terms and provisions of the 1954 Hague Convention, whose lack of clarity stood in the way of their actual effective implementation. All these new aspects reflected the ongoing developments in international humanitarian and criminal law.

That the destruction of cultural property should not be an objective in itself does not mean that cultural property must always be spared.[14] However, there are very strict rules on when cultural property can be subject to an attack. One of such conditions is that there is a situation of "imperative military necessity" – a term that has not been clearly defined in the 1954 Hague Convention and as a consequence has not limited warfare in a very significant way.[15] Article 6 of the 1999 Second Protocol tries to give more guidance in this regard by stating that a waiver on the basis of imperative military necessity pursuant to Article 4(2) of the 1954 Hague Convention may only be invoked to direct an act of hostility against cultural property when and for as long as: (i.) that cultural property has, by its function, been made into a military objective; and (ii.) there is no feasible alternative available to obtain

11 The Yugoslav People's Army, or JNA.

12 J. Toman, *The Road to the 1999 Second Protocol*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff Publishers, Leiden–Boston 2010, p. 10. See also idem, *The Hague Convention – A Decisive Step Taken by the International Community*, "Museum International" 2005, Vol. 57(4), p. 20: "The worst aspect was the confirmation […] that the destruction of culture had been the objective of the belligerent parties. […] The Yugoslav armed forces were fully aware of the provisions of the Convention and the Protocol because Yugoslavia was very active not only in the dissemination, but also in the reaffirmation and development of humanitarian law".

13 26 March 1999, 2253 UNTS 172.

14 See Article 4 of the 1954 Hague Convention.

15 J.-M. Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff Publishers, Leiden–Boston 2010, p. 25.

a similar military advantage to that offered by directing an act of hostility against that objective; or "to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage". There are also instructions on who can take the decision to invoke imperative military necessity.[16] Moreover, an effective advance warning must be given whenever circumstances permit.[17] In addition, and in relation to Article 4 of the 1954 Hague Convention, Article 7 of the 1999 Second Protocol lists various precautions to be adhered to in launching such an attack.

However, what can be seen in practice is that cultural property is also being attacked in cases where it has not become by its function a military objective; when there seems to be no imperative necessity; when there has been no waiver as described in the 1999 Second Protocol; when the decision to invoke imperative military necessity has not been taken by the competent commanding officer; and when no effective advance warning has been given and the required precautions were missing. The aforementioned innovative measures thus seem to have an insufficient effect. So what can be done?

Individual Criminal Responsibility and Its Implementation in the National Jurisdiction of States Parties

Article 28 of the 1954 Hague Convention states that "High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention". This provision, however, has largely remained a dead letter, mainly because it does not list the violations which require a criminal sanction.[18] Such a list is essential if a coherent and complete system of criminal repression of war crimes[19] is to be instituted worldwide.

16 Article 6(c) of the 1999 Second Protocol: "The decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise".

17 Article 6(d) of the 1999 Second Protocol.

18 J.-M. Henckaerts, op. cit., p. 36.

19 A war crime is a violation of the laws or customs of armed conflict that gives rise to criminal responsibility of the perpetrator under international law. Both the destruction or damage and the misappropriation of cultural property during either international armed conflict, including belligerent occupation, or non-international armed conflict can amount to a war crime. See R. O'Keefe et al., op. cit., p. 4, paras. 13-14. See also International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, UN Doc. A/CN.4/SER.A/1950/Add. 1 (1950) where the ILC defined war crimes as "violations of the laws and customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of the civilian population of or in occupied territory, murder or ill treatment of prisoners of war, of persons on the seas, killing of hostages,

Consequently, Chapter 4[20] of the 1999 Second Protocol provides a list of serious violations of international humanitarian law in relation to cultural property.[21] The definition of serious violations in itself, however, is not sufficient to ensure that persons committing such violations are punished. To achieve that would still require effective enforcement at the national level. This is a fundamental obligation imposed on States Parties, the implementing legislation of which should cover two aspects: criminalizing violations; and establishing jurisdiction to try or extradite.[22]

And that is exactly what the 1999 Second Protocol addresses.[23] It not only reaffirms the inviolability of cultural property in time of war or military occupation, but also imposes an obligation[24] on the States Parties to provide for individual criminal responsibility in the event of several different serious violations of the 1999 Second Protocol. Article 16(1) of the 1999 Second Protocol requires States Parties to establish their jurisdiction over the offences listed in Article 15, insofar as they are committed in their territory by one of their nationals, and in the case of the offences set out in Article 15(1)(a), (b), or (c), when the alleged offender is present in the territory of that State Party. Nonetheless, as is apparent from Article 16(2)(a), broader jurisdictional criteria may be applied with respect to individual criminal responsibility than what is specified in Article 16(1). Moreover, Article 17(1) of the 1999 Second Protocol lists the rule known as *aut dedere aut judicare* – which means that a state on whose territory an alleged offender[25] is found to be present shall, if it does not extradite that person, submit the case to its competent authorities for the purpose of prosecution.[26]

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

20 On criminal responsibility and jurisdiction.

21 Namely, those listed in Article 15: "1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the [1954 Hague] Convention or this [1999 Second] Protocol commits any of the following acts:
(a) making cultural property under enhanced protection the object of attack;
(b) using cultural property under enhanced protection or its immediate surroundings in support of military action;
(c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
(d) making cultural property protected under the Convention and this Protocol the object of attack;
(e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention".

22 J.-M. Henckaerts, op. cit., p. 37. See also Articles 17 and 18 of the 1999 Second Protocol.

23 See also UNESCO, *The Penal Protection of Cultural Property: The Fight against Impunity in the Framework of the 1954 Hague Convention and Its 1999 Second Protocol*, 2017, UN Doc. CLT-2017/WS/14, p. 9.

24 See Article 15(2) of the 1999 Second Protocol.

25 Of an offence set forth in Article 15(1)(a) to (c). Article 18 of the 1999 Second Protocol lists these offences as extraditable offences.

26 On 14 May 2024, during the Hague Conference commemorating 70 years of the 1954 Hague Convention, panelists of the thematic session "Criminal responsibility for the destruction of cultural property –

As seen above, there are numerous references to the term "serious violations" as listed in Article 15(1). However, there are also "other violations", which are listed in Article 21 of the 1999 Second Protocol. Under that article the States Parties are required to adopt such other legislative, administrative, or disciplinary measures as may be necessary to suppress those other intentional violations of the 1999 Second Protocol. These are: "(a) any use of cultural property in violation of the Convention or this Protocol; and (b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol". However, the Parties have greater freedom of choice with respect to these measures than in the case of the serious violations, since the measures in question need not necessarily be of a criminal law nature.

Determination of the penalty is a matter to be decided by national legislators. However, according to UNESCO's 2017 manual on the penal protection of cultural property, imprisonment is the only appropriate penalty for war crimes, including those committed against cultural property.[27] I return to this issue in further detail below.

Finally, who can be subjected to these penalties? Individuals, whether members of armed forces or civilians, may be held criminally responsible, not only for physically committing serious violations of the 1999 Second Protocol, but also for ordering such violations to be committed. In situations of armed conflict, armed forces or groups are generally placed under a command that is responsible for the conduct of its subordinates. It is thus reasonable, in order to make the repression system effective, that the hierarchical superiors should be held individually responsible when they fail to take the proper measures to prevent their subordinates from committing serious violations. UNESCO points out in its 2017 manual that this principle is known as "command or superior responsibility".[28]

Many obligations regarding implementation of the above into the national legislation of States Parties are also referred to. In order to assist in the implementation, *Guidelines for the Implementation of the 1999 Second Protocol*[29] have been developed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict.[30] It is important to mention that the Guidelines explicitly specify the obligation of States Parties to adopt appropriate legislation to make serious

Combating impunity through international law" emphasized that with regard to the offences listed in Article 15(1)(a) to (c), universal criminal jurisdiction is applicable. For the commemoration conference, see also the last section of this article.

27 UNESCO, *The Penal Protection*..., p. 11.

28 Ibidem. See also R. O'Keefe et al., op. cit., p. 5, para. 17.

29 UNESCO, *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, latest version adopted 13 December 2023, https://www.unesco.org/sites/default/files/medias/fichiers/2024/05/1999-SecondProtocol_Guidelines_2023_Eng.pdf [accessed: 22.06.2024].

30 The Committee can be seen as the 1999 Second Protocol's executive body. Its functions are described in Article 27 of the 1999 Second Protocol. It was established on 26 October 2005.

violations of the 1999 Second Protocol criminal offences under their national law, an obligation sperate from and in addition to the responsibility of states under international law.[31] It confirms that state responsibility[32] and individual criminal responsibility can exist and occur on a parallel basis.[33]

Application of Individual Criminal Responsibility before International Courts

After the Second World War, several defendants before the International Military Tribunal at Nuremberg[34] were convicted for their role in the systematic destruction and plunder of cultural property in occupied territories.[35] Also, the Extraordinary Chambers in the Courts of Cambodia had a mandate with regard to cultural property in the second half of the 1970s.[36] More recently, individual criminal responsibility was applied before the International Criminal Tribunal for the former Yugoslavia, where a number of the accused were convicted for their intentional destruction and damage of cultural sites during the conflicts in the Balkans in the 1990s.[37] To date, the deliberate destruction of cultural property has been the sole focus of one conviction before the International Criminal Court.[38]

[31] Paragraph 8 of the Guidelines. See also Article 38 of the 1999 Second Protocol: "No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation".

[32] The laws of state responsibility are the principles governing when and how a state is held responsible for a breach of an international obligation. See also International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [accessed: 22.06.2024].

[33] There is also a reference to both state responsibility and individual criminal responsibility in the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. See para. VI on state responsibility and para. VII on individual criminal responsibility.

[34] Charter of the International Military Tribunal, https://www.legal-tools.org/doc/64ffdd/pdf/ [accessed: 22.06.2024].

[35] International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, Judgment of 30 September and 1 October 1946, Misc No 12 (1946), Cmd 6964 (charges in relation to four accused included war crimes and crimes against humanity for destruction and misappropriation of cultural property in occupied territory). See also R. O'Keefe et al., op. cit., Appendix IV.

[36] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, as amended on 27 October 2004, NS/RKM/1004/006, https://www.legal-tools.org/doc/9b12f0/pdf/ [accessed: 22.06.2024], Article 7: "The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979".

[37] For relevant cases, see the website of the ICTY: https://www.icty.org/. A concise overview of cases up until 2016 can also be found in R. O'Keefe et al., op. cit., Appendix IV.

[38] *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Case No. ICC-01/12-01/15-171), Judgment and Sentence of 27 September 2016, https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF [accessed: 22.06.2024].

International Criminal Tribunal for the former Yugoslavia[39]

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the United Nations Security Council, pursuant to its authority under Chapter VII of the UN Charter, to enact measures necessary to maintain or restore international peace and stability. ICTY's mandate is to try individuals responsible for violations of international humanitarian law and international laws or customs of war committed during the conflict in the former Yugoslavia in the early 1990s.[40]

The ICTY Statute contains specific war crimes that are relevant to cultural property and the ICTY dealt with various cases concerning the destruction of cultural property. Article 3 lists, *inter alia*, in its Paragraph (d) as war crime 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". Theodor Meron, ICTY President between 2003 and 2005 as well as between 2011 and 2013, has pointed out that although it has been the practice of the ICTY to use Article 3(d) as the statutory provision under which to punish the destruction of cultural property, Article 5(h) of the ICTY Statute has also been used by the ICTY Trial Chambers[41] to hold individuals who committed destruction

[39] See also below, where I refer to the Genocide Convention, thereby stating that according to the ICTY although an attack on cultural or religious property or symbols of a group would not constitute a genocidal act, such an attack may nevertheless be considered evidence of an intent to physically destroy the group.

[40] See T. Meron, *The Protection of Cultural Property in the Event of an Armed Conflict within the Case-law of the International Criminal Tribunal for the Former Yugoslavia*, "Museum International" 2005, Vol. 57(4), p. 42.

[41] For instance Trial Chamber, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment of 3 March 2000 (charges including war crimes and crimes against humanity for destruction and misappropriation of cultural property in Bosnia-Herzegovina, one count being vacated in Appeals Chamber, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment of 29 July 2004); Trial Chamber, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment of 26 February 2001 (charges including war crimes and crimes against humanity for destruction of cultural property in Bosnia-Herzegovina, one count being overturned in Appeals Chamber, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment of 17 December 2004); Trial Chamber, *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment of 27 February 2003 (charges including war crimes and crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Judgment of 31 March 2003 (charges including war crimes and crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment of 31 July 2003 (charges including crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Sentencing Judgment of 30 March 2004 (charges including crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Babić*, Case No. IT-03-72-S, Sentencing Judgment of 29 June 2004 (charges including crimes against humanity for destruction of cultural property in Croatia); Trial Chamber, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment of 27 September 2006 (charges including crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Milutinović et al*., Case No. IT-05-87-T, Judgment of 26 February 2009 (subsequently listed as *Prosecutor v. Šainović et al.*) (charges including crimes against humanity for destruction of cultural property in Kosovo); Trial Chamber, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Judgment of 23 February 2011 (charges including crimes against humanity for destruction of cultural property in Kosovo); Trial Chamber, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Judgment of 27 March 2013 (charges including crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Judgment

of cultural property responsible for their acts.[42] Article 5 refers to crimes against humanity, and Paragraph (h) specifically refers to persecution on political, racial, and religious grounds.[43]

Among all the cases the ICTY dealt with, the so-called *Strugar* case[44] has probably been described the most extensively by various authors.[45] Pavle Strugar was the overall commander of the Yugoslav People's Army (JNA), which conducted a campaign of unlawful shelling against the Old Town of Dubrovnik in 1991. Strugar was considered to have had both legal and effective control of the JNA forces. Therefore, it was held against him that he issued orders to the JNA forces involved in the shelling of the Old Town of Dubrovnik, and that he was in a position to stop the attack and could and should have done so, as well as failed afterwards to ensure that the perpetrators were punished.[46] The ICTY was

> […] of the view that all the property within the Old Town, i.e. each structure or building, is within the scope of Article 3(d) of the Statute. The Chamber therefore conclude[d] that the attack launched by the JNA forces against the Old Town on 6 December 1991 was an attack directed against cultural property within the meaning of Article 3(d) of the Statute, insofar as that provision relates to cultural property.[47]

of 31 March 2016 (charges including war crimes and crimes against humanity for destruction of cultural property in Bosnia-Herzegovina); Trial Chamber, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment of 24 March 2016 (charges including crimes against humanity for destruction of cultural property in Bosnia-Herzegovina).

42 T. Meron, op. cit., pp. 44-45. He repeats this in his conclusions on p. 56: "I would single out the notion […] that the destruction of institutions dedicated to religion or education can, if committed with the requisite discriminatory intent, amount to persecution as a crime against humanity. (Of course, where this intent is absent, the destruction can still amount to a war crime.)". See also S. Brammertz et al., *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, "Journal of International Criminal Justice" 2016, Vol. 14(5), pp. 1143-1174.

43 See also J. Powderly, *Prosecuting Heritage Destruction*, in: J. Cuno, T.G. Weis (eds.), *Cultural Heritage and Mass Atrocities*, Getty Publications, Los Angeles 2022, p. 436, and I. Ryška, *Types of Cultural Property and Their Protection under International Criminal Law*, "International and Comparative Law Review" 2020, Vol. 20(1), p. 225 and p. 231. Ivan Ryška refers especially to *Prosecutor v. Kordić and Čerkez*.

44 Trial Chamber II, *Prosecutor v. Pavle Strugar*, Case No. IT-0142-T, Judgment of 31 January 2005. The judgment was upheld on appeal (17 July 2008).

45 For instance: S. Somers, *Investigation and Prosecution of Crimes against Cultural Property*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff Publishers, Leiden–Boston 2010, pp. 77-80. (Ms Somers was member of the ICTY Office of the Prosecutor in the *Strugar* case.) Or: I.S. Trindade, *The Strugar Case: A Study on the Protection of Cultural Property in Armed Conflict*, 2019. Joseph Powderly (op. cit., p. 437) calls the *Strugar* case "perhaps [the] most significant" ICTY case where cultural property destruction featured prominently. Ivan Ryška (op. cit., p. 228) calls the *Strugar* case one of the two most famous ICTY cases regarding war crimes against cultural property.

46 Communications Service of the International Criminal Tribunal for the former Yugoslavia, *Case Information Sheet "Dubrovnik" (IT-01-42) on Pavle Strugar*, https://www.icty.org/x/cases/strugar/cis/en/cis_strugar_en.pdf [accessed: 22.06.2024].

47 *Prosecutor v. Pavle Strugar*, para. 327.

The Court held that these acts were a war crime and sentenced Strugar to 7.5 years imprisonment. The 1954 Hague Convention is cited throughout the case, and Susan Somers, who was one of the Prosecutors in the *Strugar* case, stated that the command climate within the JNA had been one of impunity with respect to the attacks against the Old Town. That atmosphere of impunity emboldened the troops, and the bombing was the result of that atmosphere.[48] She mentioned that training as to the law on cultural property is therefore of the essence, although lack of knowledge of the rules might not have been the real problem in the case at hand.[49] It was probably more the command climate which was the problem, as well as that the feeling of impunity may have resulted in the belief that one will not be held accountable for one's deeds.

The International Criminal Court

The Rome Statute of the International Criminal Court (ICC)[50] can be considered a landmark instrument on the individual criminal responsibility for international crimes.[51] Moreover, the Statute contains important provisions with respect to the protection of cultural property. Article 8(2)(b)(ix)[52] and Article 8(2)(e)(iv)[53] state that "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments […]" is considered a war crime within the jurisdiction of the ICC, provided they are not military objectives.[54] Although this insertion in the Statute should be applauded, it should also be mentioned that the Statute does not contain a reference to the seizure, destruction, or willful damage of cultural property as such. This is a considerable difference from the ICTY Statute, which contains this reference. However, in contrast to the Rome Statute, the ICTY Statute does not govern *attacks* against cultural objects.[55] The Office

48 S. Somers, op. cit., p. 78.

49 Lieutenant-Colonel Joris Kila of the Netherlands' Ministry of Defense also echoed this. He referred to the destruction of the Mostar bridge as intentionally destroying or damaging the opponent's expressions of identity. J. Kila, *Dissemination of the 1954 Hague Convention and the 1999 Second Protocol: Embedding Cultural Property Protection within the Military*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff Publishers, Leiden–Boston 2010, p. 96.

50 17 July 1998, 2187 UNTS 90.

51 See also International Criminal Court – The Office of the Prosecutor, op. cit.

52 Regarding international armed conflict.

53 Regarding non-international armed conflict.

54 The requisite conduct against cultural property may also be charged through Articles 8(2)(a)(iv), 8(2)(b)(xiii), or 8(2)(e)(xii) of the Statute. These crimes are not specific to cultural property, but instead reflect the general prohibition of destroying or appropriating any property, provided it may be considered to be protected under applicable law. See International Criminal Court – The Office of the Prosecutor, op. cit., pp. 18-19, para. 52. Moreover, pillage is addressed in Articles 8(2)(b)(xvi) and 8(2)(e)(v) of the Statute.

55 In *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, op. cit., the ICC Trial Chamber thus concluded in para. 16 of its judgment that the legal contexts differ.

of the Prosecutor of the ICC has pointed out that Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute in fact exceed the degree of protection recognized by the ICTY, in that there is no requirement for proof of actual damage once an attack has been directed against a protected object contrary to Articles 8(2)(b)(ix) and 8(2)(e)(iv). The term "directing an attack" implies that it is sufficient that the act was launched against a protected building. The occurrence of actual damage is not required.[56]

As the ICC acts on the basis of the principle of complementarity, it can only exercise jurisdiction when states are unable or unwilling to investigate and prosecute crimes under the Rome Statute, or in cases of inaction of a state.[57] Therefore, it is of critical importance for States Parties to have or (where necessary) to adopt legislation that allows for the domestic investigation and prosecution of such crimes.[58]

On 27 September 2016, the ICC rendered its judgment in the case *The Prosecutor v. Ahmad Al Faqi Al Mahdi*.[59] Al Mahdi was found guilty as a co-perpetrator[60] of the war crime consisting of intentionally directing attacks[61] against historic monuments

[56] International Criminal Court – The Office of the Prosecutor, op. cit., p. 16, para. 46. See also K. Wierczyńska, A. Jakubowski, *Individual Responsibility of Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, "Chinese Journal of International Law" 2017, Vol. 16(4), pp. 702-703.

[57] See P. Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, International Centre of Transitional Justice, New York 2016. Or: Darryl Robinson, who refers to *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, *Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)*, ICC-01/04-01/07, 16 June 2009, para. 77, in: idem, *The Mysterious Mysteriousness of Complementarity*, "Criminal Law Forum" 2010, Vol. 21, pp. 67-102: "The [Trial] Chamber [of the ICC] nonetheless found the case admissible by creatively holding that the inaction of the State was a new form of 'unwillingness'".

[58] M. Hector, *Enhancing Individual Criminal Responsibility for Offences Involving Cultural Property – The Road to the Rome Statute and the 1999 Second Protocol*, in: N. van Woudenberg, L. Lijnzaad (eds.), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff Publishers, Leiden–Boston 2010, p. 74. See also International Criminal Court – The Office of the Prosecutor, op. cit., p. 6, para. 10: "Noting that the ICC is complementary to national jurisdiction, as part of a shared effort to further address the impunity gap, the Office [of the Prosecutor] will continue to provide support and encouragement to national proceedings to hold individuals accountable for crimes against or affecting cultural heritage".

[59] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, op. cit. It was agreed upon that there was an armed conflict of a non-international character in Mali during the relevant period. Al Mahdi admitted guilt to the crime. Karolina Wierczyńska and Andrzej Jakubowski (op. cit., p. 699) are convinced that the criminal proceedings against Al Mahdi and his conviction can be seen as a manifestation of the global efforts to bring perpetrators of cultural heritage crimes to justice. On 17 August 2017, the Trial Chamber issued a "Reparations Order" concluding that Al Mahdi is liable for €2.7 million in expenses for individual and collective reparations for the community of Timbuktu. It stated in paras. 15 and 16 that "cultural heritage is considered internationally important regardless of its location and origin" and that "cultural heritage is important not only in itself, but also in relation to its human dimension. Cultural property also allows a group to distinguish and identify itself before the world community". See also J. Powderly, op. cit., p. 442.

[60] In para. 45 of the Judgment, Al Mahdi's capacity as head of the morality brigade "Hesba" was explicitly mentioned.

[61] *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, op. cit., para. 48: "The circumstances of the attack, as well as Mr Al Mahdi's statements that the purpose of the operation was to destroy these buildings, demonstrate that the perpetrators intended these buildings to be the object of the attack".

and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu (Mali), in June and July 2012. He was sentenced to nine years imprisonment.[62] The mausoleums of saints and mosques of Timbuktu were considered an integral part of the religious life of its inhabitants and a common heritage for the community. They did not constitute military objectives, but were specifically identified, chosen, and targeted by Al Mahdi because of their religious and historical character. The only confirmed charge in this case was the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute.[63] The Prosecutor had decided that the information available did not provide a reasonable basis to believe that crimes against humanity under Article 7 of the Statute had been committed in Mali.[64]

Application of State Responsibility before the International Court of Justice

As was noted above, attacks against cultural property can result in both state responsibility and individual criminal responsibility. I also referred to an earlier reflection by the then ICTY President Theodor Meron, where he pointed out that persecution[65] on political, racial, and religious grounds may be considered as a crime against humanity if committed with the requisite *discriminatory* intent. This reflection leads to an examination of a recent judgment of the International Court of Justice in relation to a long ongoing armed conflict between Armenia and Azerbaijan, whereby the application of the International Convention on the Elimination of All Forms of Racial Discrimination was at stake. Following this examination, I will refer to an even more recent case, i.e. the one that South Africa commenced against Israel based on the Convention on the Prevention and Punishment of the Crime of Genocide.

Armenia v. Azerbaijan

On 16 September 2021, Armenia instituted proceedings against Azerbaijan before the International Court of Justice (ICJ),[66] alleging violations of the International

62 On 25 November 2021, Al Mahdi's imprisonment sentence was reduced by two years.

63 *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, op. cit., para. 11. See also International Criminal Court – The Office of the Prosecutor, op. cit., p. 5, para. 6: "This case, focusing solely on crimes against cultural heritage, was symbolic, and sent a strong message that the intentional targeting of cultural heritage is a serious crime and should be duly punished, since it affects both the local community and the international community as a whole".

64 See also J. Powderly, op. cit., p. 443: "The decision not to charge him with the crime against humanity […] was necessarily a conscious one. It is entirely conceivable that limiting the charges against al-Mahdi was a purely pragmatic decision on the part of the Office of the Prosecutor, which viewed the case as a stepping-stone in prosecuting further cases arising from the situation in Mali".

65 Including destruction of cultural property.

66 The main judicial organ of the United Nations. See Article 92 of the Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993.

Convention on the Elimination of All Forms of Racial Discrimination (CERD).[67] Armenia alleged that Azerbaijan has subjected Armenians to a state-sponsored policy of racial discrimination, including destruction of cultural heritage.[68] It requested the ICJ to adjudge and declare that Azerbaijan is responsible for violating the CERD, and that as a consequence of its international responsibility for these breaches Azerbaijan must cease forthwith any such ongoing internationally wrongful acts, including "refraining from suppressing the Armenian language, destroying Armenian cultural heritage or otherwise eliminating the existence of the historical Armenian cultural presence or inhibiting Armenians' access and enjoyment thereof".[69]

Armenia sought refuge under Article 5(d)(vii) CERD, which prohibits racial discrimination in relation to the right to freedom of religion, and Article 5(e)(vi) CERD, which guarantees the right to equal participation in cultural activities. According to Armenia, the latter article entails a right to the protection and preservation of Armenia's historic, cultural, and religious heritage.[70] Armenia requested the ICJ to institute provisional measures,[71] intended to halt any ongoing violation that is likely to cause irreparable harm.[72]

By Order dated 7 December 2021, the ICJ indeed indicated certain provisional measures.[73] The ICJ came to this decision after it first concluded that "prima facie, it has jurisdiction pursuant to Article 22 of CERD[74] to entertain the case

[67] 7 March 1966, 660 UNTS 195. Article 1(1) CERD defines racial discrimination in the following terms: "[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

[68] Exactly a week later, on 23 September 2021, Azerbaijan submitted its own suit against Armenia before the ICJ, mirroring Armenia's CERD accusations and accusing Armenia of discrimination against Azerbaijanis, including ethnic cleansing and the erasure of cultural heritage. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Azerbaijan v. Armenia*), 23 September 2021. Together with the Application, Azerbaijan submitted a request to the ICJ for the indication of certain provisional measures. None of those were directly related to the protection of cultural property.

[69] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Order of 7 December 2021, ICJ Reports, 2021, p. 363, para. 2. There was a lot of media attention to this step. See, for instance, H. Watenpaugh, *International Court of Justice Lawsuits May Impact Heritage Protection*, "Newsweek", 14 October 2021.

[70] *Armenia v. Azerbaijan*, Order of 7 December 2021, p. 377, para. 50.

[71] The ICJ can do so under Article 41 of its Statute.

[72] *Armenia v. Azerbaijan*, Order of 7 December 2021, p. 364, para. 5.

[73] Ibidem, p. 393, para. 98. Judge Yusuf stated in his dissenting opinion that the request of Armenia has ceased to have any object following the declaration by the Agent of Azerbaijan, assuring among other things that Azerbaijan would protect, and not damage or destroy, cultural monuments, artefacts, and sites which are important for the population of Armenian ethnic origin in the territory (paras. 1 and 14 of his dissenting opinion). Also Judge ad hoc Koroma referred to this in his dissenting opinion and stated that the focus of the Court Order should have been on compliance with the undertakings made by (the Agent of) Azerbaijan on 2 October 2021 (para. 22 of his dissenting opinion).

[74] As neither Armenia nor Azerbaijan had accepted the compulsory jurisdiction of the Court according to Article 36(2) of the Statute, that road was blocked.

to the extent that the dispute between the Parties relates to the 'interpretation or application' of the Convention".[75] The Court may then exercise the power to indicate provisional measures if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.[76] Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.[77] The ICJ recalled that it had already indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage "has been the scene of armed clashes between the Parties" and when "such clashes may reoccur".[78] The ICJ indicated that:

> [t]he Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, […] [t]ake all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts[.][79]

Although the indication of provisional measures cannot be considered as an ultimate determination whether the rights which Armenia wishes to see protected indeed exist, the decision of the ICJ can be read as indication that alleged abuses to cultural property can plausibly constitute racial discrimination under the CERD.[80]

South Africa v. Israel

It has been determined in the jurisprudence that attacks against cultural property can be seen as an indicator of a genocidal act, although not as a genocidal act as such.[81] The ICTY stated in the *Tolimir* case that: "Although an attack on cultural or

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75 *Armenia v. Azerbaijan*, Order of 7 December 2021, p. 375, para. 43.

76 Ibidem, para. 44. In para. 61, the Court considered "plausible the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage". Judge Yusuf stated in his dissenting opinion that the Court did not state which rights asserted by Armenia it deemed plausible (para. 3).

77 Ibidem, p. 375, para. 45.

78 Ibidem, p. 389, para. 84. With reference to the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, ICJ Reports, 2011 (II), p. 552, para. 61.

79 *Armenia v. Azerbaijan*, Order of 7 December 2021, p. 393, para. 98.

80 See also L. Khatchadourian, *World Court Decision Sets 'New Precedent' for Cultural Heritage Protection*, "Cornell Chronicle", 8 December 2021, https://news.cornell.edu/media-relations/tip-sheets/world-court-decision-sets-new-precedent-cultural-heritage-protection [accessed: 22.06.2024].

81 "Cultural genocide" is not by itself recognized as falling under the offences as listed in the Convention on the Prevention and Punishment of the Crime of Genocide. Originally, three forms of genocide were described in Article 1 of the Draft Convention, and these were called "physical", "biological", and "cultural", by Professor Raphael Lemkin. The following means of "cultural genocide" were listed: a) forced transfer of children to another human group; b) forced and systematic exile of individuals representing the culture

religious property or symbols of a group would not constitute a genocidal act, such an attack may nevertheless be considered evidence of an intent to physically destroy the group".[82] Thereafter, the ICJ has taken the view that: "The Court recalls […] that it may take account of attacks on cultural and religious property in order to establish an intent to destroy the group physically".[83]

Now the question is again before the ICJ, as South Africa, in an Application dated 29 December 2023, instituted proceedings against Israel, alleging violations by Israel of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide[84] in relation to Palestinians in the Gaza Strip. Among other things, South Africa stated that "Israel has damaged and destroyed numerous centres of Palestinian learning and culture", including numerous museums and cultural heritage sites, as well as Gaza's ancient history, thereby aiming to bring "cultural genocide" under the scope of the Genocide Convention.[85]

On 26 January 2024, the ICJ indicated several provisional measures,[86] none of which explicitly related to cultural property.[87] However, as stated above, inasmuch

of a group; c) prohibition of the use of the national language even in private intercourse; d) systematic destruction of books printed in the national language, or of religious works, or prohibition of new publications; e) systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value, and of objects used in religious worship. The very short explanation of subcategory e) read: "Such measures are also directed at undermining the existence of a group of human beings". UN Economic and Social Council, *Draft Convention on the Crime of Genocide*, 26 June 1947, UN Doc. E/447, p. 26. For further reading, see E. Novic, *The Concept of Cultural Genocide. An International Law Perspective*, Oxford University Press, Oxford 2016. During an UNESCO Conference in The Hague on 9 June 2016, ICTY Registrar John Hocking also made a link between genocide and destruction of cultural property: "Where there is cultural destruction there may be genocide. Where there is cultural cleansing there may be ethnic cleansing".

82 Trial Chamber II, *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgment of 12 December 2012, para. 746. See also Trial Chamber, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment of 2 August 2001, para. 580: "The Trial Chamber however points out that where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group". See also I. Ryška, op. cit., p. 234 and J. Powderly, op. cit., pp. 438-439.

83 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, ICJ Reports, 2015, p. 117, para. 390. In the Judgment, there is a referral in para. 388 to an earlier case, where the ICJ came to a similar conclusion: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports, 2007, pp. 185-186, para. 344. See also G. Gagliani, *The International Court of Justice and Cultural Heritage – International Cultural Heritage through the Lens of World Court Jurisprudence*, in: A.-M. Carstens, E. Varner (eds.), *Intersections in International Cultural Heritage Law*, Oxford University Press, Oxford 2020, pp. 239-240; as well as K. Wierczyńska, A. Jakubowski, op. cit., pp. 707-708.

84 9 December 1948, 78 UNTS 277.

85 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, 29 December 2023, para. 91.

86 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024, General List No. 192.

87 This was not requested by South Africa.

as the Court Order only regarded the indication of provisional measures, the South African accusations regarding the Israelian destruction of centres of Palestinian learning and culture and Gaza's ancient history will be assessed in a later stage of the legal proceedings, including the question of the jurisdiction of the ICJ to deal with the merits of the case.[88]

The Russian War against Ukraine

On 24 February 2022, Russia launched its war against Ukraine. As a matter of fact, its aggression against Ukraine started already years earlier, with the annexation of Crimea in 2014 and its aggressive involvement in parts of Eastern Ukraine by means of its *de facto* take over of the Donbas.[89]

Both the Russian Federation and Ukraine are independent states, and members of the United Nations. In that sense, we can define the conflict as an international armed conflict. It may well be that an occupying power considers the territory as its own (or as independent territory),[90] and that is seemingly what Russia is doing. On 30 September 2022, Russia announced the annexation of the Donetsk, Kherson, Luhansk, and Zaporizhzhia oblasts, following Russian-organized "referenda" in these regions for residents to vote on whether they wished to become part of the Russian Federation. The UN General Assembly responded by passing a resolution rejecting this annexation as illegal and upholding Ukraine's right to territorial integrity.[91] In Ukrainian law, these territories are defined as the "temporarily occupied territories of Ukraine".[92] And indeed, what matters is not the subjective view of the occupying power but the objective position under international law. If, as a matter of international law, the situation is one of belligerent occupation, the occupying power will bear the corresponding obligations and rights under the laws of armed conflict, regardless of whether it accepts them or not.[93] An occupying power must respect, unless absolutely prevented, the laws in force in the occupied territory. In the context of cultural property, this means that, unless absolutely prevented from doing so, the occupying power must leave in place and abide by any laws for the protection and preservation of immovable or movable cultural property applicable in the territory prior to the onset of the occupation.[94]

88 *South Africa v. Israel*, Order of 26 January 2024, p. 24, para. 84.

89 The Donetsk and Luhansk oblasts.

90 R. O'Keefe et al., op. cit., p. 49, para. 164.

91 UN General Assembly, *Resolution ES-11/4: Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations*, 12 October 2022, UN Doc. A/RES/ES-11/ 4. 143 states voted in favour to 5 against with 35 abstentions.

92 Law No. 1207-VII (15 April 2014) and Law No. 254-19-VIII (17 March 2015). There is also a Ukrainian Ministry of Reintegration of Temporarily Occupied Territories of Ukraine.

93 R. O'Keefe et al., op. cit., p. 49, para. 164.

94 Ibidem, p. 51, paras. 171-172.

The 1999 Second Protocol has a specific article on the protection of cultural property in occupied territory. Article 9(1) states that:

> [w]ithout prejudice to the provisions of Articles 4 and 5 of the [1954 Hague] Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:
> (a) any illicit export, other removal or transfer of ownership of cultural property;
> (b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;
> (c) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

Moreover, Paragraph 2 states that "[a]ny archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory".

Having said that, although the Russian Federation is a Party to the 1954 Hague Convention since 4 January 1957, which means that the relevant provisions of the 1954 Hague Convention on occupation are applicable, it has yet to become a Party to the 1999 Second Protocol. Although the provisions of the 1999 Second Protocol therefore are not legally binding upon the Russian Federation, according to UNESCO's Military Manual,[95] many rules apply as a matter of best practice where an occupying power is not bound by the 1999 Second Protocol.[96]

[95] It should be emphasized that this Military Manual (R. O'Keefe et al., op. cit.) is also not binding upon states, and merely serves an indicative purpose. The International Committee of the Red Cross (ICRC), however, did a study in 2005 on rules of customary international law and found that a few rules related to the protection of cultural property could be considered as such. These regard Rules 38-41:

"Rule 38. Each party to the conflict must respect cultural property: A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.

Rule 40. Each party to the conflict must protect cultural property: A. All seizure of or destruction or willful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory".

J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge 2005, pp. 127-138.

[96] UNESCO's Military Manual (R. O'Keefe et al., op. cit.) points out, for instance, regarding the destruction of or damage to cultural property (para. 180), archaeological excavations (para. 207), and the alteration and change of use of cultural property (para. 211) that where an occupying power is not party to the 1999

Thus, based on the 1954 Hague Convention and the 1999 Second Protocol, an occupying power must ensure, as far as possible, that any existing laws prohibiting the misappropriation or vandalism of cultural property in the territory are enforced. The same goes for laws for the preservation of cultural property more broadly.[97] Moreover, the occupying power is prohibited from destroying or damaging cultural property unless this is imperatively required by military necessity.[98] All forms of theft, pillage, or other misappropriation and/or vandalism of cultural property by military forces are absolutely prohibited during belligerent occupation, as well as during hostilities. All intentional acts of this sort constitute war crimes.[99] In addition to refraining themselves from all these unlawful actions, occupying forces must also prohibit, prevent, and, if necessary, put a stop to the commission of such acts by others, including by organized criminal groups.[100] In that regard one can recall the activities of the "Wagnergroup" that was active in Ukraine alongside the Russian armed forces. Hand in hand with its obligation to prohibit, prevent, and, if necessary, put a stop to all forms of misappropriation of cultural property, an occupying power is obliged to prohibit and prevent any illicit export, other removal or transfer of ownership of cultural property by anyone. *A fortiori*, it must not engage in any such acts itself.[101]

There are numerous reports and press articles about the intentional destruction by Russian belligerents of cultural property in Ukraine.[102] On 10 May 2022, Europa Nostra strongly condemned "the ongoing deliberate destruction of cultural heritage in Ukraine".[103] It also denounced "the apparent intentional attempt by Russia to erase Ukraine's history, intangible heritage and collective memory". It referred to information published by Ukraine's Ministry of Culture and Information Policy, stating that (at that time) over 300 cultural heritage sites and objects had been

Second Protocol, best practice is to do nonetheless what the specific article in the 1999 Second Protocol provides.

97 R. O'Keefe et al., op. cit., p. 51, para. 174.

98 Otherwise, the destruction constitutes a war crime. Ibidem, p. 53, para. 179.

99 Ibidem, p. 55, para. 185. That paragraph also describes that there is a special responsibility for commanders towards their subordinates in that regard.

100 Ibidem, p. 55, para. 187.

101 Ibidem, p. 61, para. 203.

102 See, for instance, M. Milligan, *War in Ukraine Sees Destruction of Cultural Heritage Not Witnessed since WW2*, "Heritage Daily", 5 December 2023.

103 Declaration adopted by Europa Nostra on 10 May 2022. The declaration also brings back into memory Resolution 2347 (2017) as adopted by the UN Security Council on 24 March 2017, in which the Security Council stated, *inter alia*, that it "deplores and condemns the unlawful destruction of cultural heritage, inter alia destruction of religious sites and artifacts, as well as the looting and smuggling of cultural property from archaeological sites, museums, libraries, archives and other sites, in the context of armed conflicts, notably by terrorist groups". (The resolution did not focus on Russia or Ukraine, but on the Islamic State in Iraq and the Levant [ISIL, also known as Da'esh], Al-Qaida, and associated individuals, groups, undertakings, and entities.)

destroyed or damaged because of attacks carried out by the Russian army. Also, since February 2022 UNESCO has repeatedly expressed its concerns. In a statement issued on 3 March 2022, UNESCO underlined the obligations of international humanitarian law, notably the 1954 Hague Convention and its 1954 and 1999 Protocols, to refrain from inflicting damage to cultural property, and condemned all attacks and damage to cultural heritage in all its forms in Ukraine. As of December 2023, UNESCO has verified damage to 334 sites since 24 February 2022.[104] "That way, Russia hits the soul of the nation, as identity and self-respect becomes tangible by means of cultural heritage. Russia is doing this on purpose, in order to break the morale and resistance of the Ukrainian people against the invasion".[105] Although not explicitly referring to the destruction of cultural property,[106] European Commission's President Ursula von der Leyen emphasized in March 2023 that the Russian war crimes may not be left unprosecuted or unpunished.[107]

For now, the condemnations are thus first and foremost in the form of words, and not so much in the form of deeds, insofar as concerns the willful destruction of Ukrainian cultural objects. However, it appears that Ukraine is not sitting still. Andrea Cayley,[108] coordinator of the Atrocity Crimes Advisory Group,[109] stated[110] that no less than 140,000 war crimes have already been provisionally identified in Ukraine, including deliberate attacks against cultural property. There seem to be no prosecutions and convictions yet, as the focus amid the ongoing armed conflict is currently first and foremost on collecting and safeguarding evidence. This has been confirmed by the Ukrainian Vice-Minister of Foreign Affairs, Ms Iryna Borovets, who confirmed that everyone concerned must be held accountable for the destruction of cultural property in Ukraine.[111]

104 125 religious sites, 147 buildings of historical and/or artistic interest, 29 museums, 19 monuments, 13 libraries, and 1 monument.

105 T. Kouwenaar, *Kunstschatten in Oekraïne onder vuur: erfgoed beschermen in oorlogstijd* [Cultural Treasures in Ukraine under Fire: Heritage Protection in Times of War], "De Veiligheidsdiplomaat", February 2023.

106 Although there is reference to Russia's wish to erase the Ukrainian identity.

107 https://eu-solidarity-ukraine.ec.europa.eu/holding-russia-accountable_en. Earlier, on 4 March 2022, European Union Justice Ministers requested Eurojust to support investigations into war crimes and crimes against humanity by national courts and by the ICC.

108 Executive Director, Washington DC Programs, Sandra Day O'Connor College of Law.

109 On 25 May 2022, the United States, the European Union, and the United Kingdom established the Atrocity Crimes Advisory Group (ACA) as the agreed trans-Atlantic community mechanism for addressing atrocity crimes in Ukraine. In the context of European Union Advisory Mission for Civilian Security Sector Reform Ukraine's participation in ACA, workshops on crimes against cultural property are organized in different Ukrainian cities, attended by investigators and prosecutors from the National Police of Ukraine, the Security Services of Ukraine, the State Bureau of Investigation, the Office of the Prosecutor General, and personnel from the regional prosecution offices of various Ukrainian regions. The workshops aim at enhancing capabilities on the investigation and prosecution of crimes against cultural property.

110 On 14 May 2024 in a conversation with the author.

111 On 14 May 2024 during the conference in The Hague commemorating 70 years of the 1954 Hague Convention.

How to Prevent Impunity or to Make Punishments More Effective?

As stated above, the serious violations as listed in Article 15(1) of the 1999 Second Protocol are not accompanied by an indication of possible penalties. Moreover, the obligation in Paragraph 2 for each State Party to adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in Article 15 only states that such offences must be made punishable "by appropriate penalties". According to UNESCO's manual on the penal protection of cultural property, imprisonment is the only appropriate penalty for war crimes, including those committed against cultural property.[112] Fines and forfeiture alone are deemed to be inappropriate, although they may be imposed in addition to a custodial sentence. "The determination of the term of imprisonment is a matter decided by national legislators. It should, however, be judged in comparison with the usual practice for the determination of penalties for other domestically punishable crimes and take into account aggravating and mitigating factors".[113]

Stronger punishments or a higher chance of being punished?

It is a rather popular opinion that for a punishment to be deterrent, it should be severe. However, different studies show that it is not so much the severeness of the punishment that matters,[114] but more how big is the chance that it indeed is punished in practice at all. Cesare Beccaria and Jeremy Bentham stated in the 17th and 18th century respectively that fear for punishment is stronger (and thus the risk for impunity lower), in cases where there is more certainty that punishment indeed will follow; that the punishment will be applied more expeditiously (the consequences of misbehaviour are generally less taken into account if they are further away in the future); and the punishment is suitable but sufficient.[115]

Also, a more focussed approach may help, i.e. an approach suited for specific offences or perpetrators.[116] In his recently published book Frank Wieland[117] stated that after his experience as judge for some decenniums, his conclusion was that

112 UNESCO, *The Penal Protection…*, p. 11.

113 Ibidem, pp. 10-11.

114 See, for instance, M. Kuiper, *Waarom pleiten juristen en politici voor zwaardere straffen?* [Why Are Lawyers and Politicians Calling for Harsher Punishments?], University of Amsterdam, Faculty of Law, 30 September 2021, https://www.uva.nl/shared-content/faculteiten/nl/faculteit-der-rechtsgeleerdheid/nieuws/2021/09/waarom-pleiten-juristen-en-politici-voor-zwaardere-straffen.html?cb [accessed: 22.06.2024].

115 B. Berghuis, *Over de afschrikwekkende werking van straffen* [About the Deterrent Effect of Punishment], "Secondant", 29 June 2020.

116 Ibidem.

117 Frank Wieland is a long-time judge at the Amsterdam Penal Court.

a more focussed approach and attention for proper counselling of the convict is more effective than severe punishment.[118] This is not only commonly heard in the Netherlands, but also internationally: "Research on crime deterrence shows that increasing punishment severity does little to prevent crime. This is partly because criminals seldom know the legal sanctions for specific crimes. Increasing the chance of being caught is a more effective deterrent".[119]

The Department of Justice of the United States of America[120] even produced a fact sheet called *Five Things about Deterrence*, whereby the first point states that "the certainty of being caught is a vastly more powerful deterrent than the punishment"; and the fourth point that "increasing the severity of the punishment does little to deter crime". To point out research in another country, the University of Helsinki came to similar conclusions.[121]

A new crime against humanity dedicated to attacks against cultural property?

French-Israeli lawyer Yaron Gottlieb[122] pointed out that criminalization has failed to recognize attacks against cultural heritage[123] as an independent crime with a severe impact on the international community. He therefore has propagated – in the Draft Convention on Prevention and Punishment of Crimes against Humanity – that a separate article on crimes against humanity be dedicated to attacks against cultural heritage.[124] The new crime against humanity should read as follows: "Causing severe damage to cultural heritage".[125] According to Gottlieb, the current legal regime is based on a conservative paradigm viewing crimes against cultural heritage as crimes against property,[126] whereas a more nuanced

118 F. Wieland, *Het Proces*, Ambo|Anthos, Amsterdam 2023, p. 23. See also F. Jensma, *Ook levenslang is geen oplossing* [Also Life Sentence Is Not a Solution], "NRC", 5 January 2024.

119 T. Butterworth, *Is Increasing Criminal Penalties Effective at Reducing Crime?* "The Nevada Independent", April 2023.

120 Office of Justice Programs/National Institute of Justice, May 2016, NCJ 247350.

121 Done by Miikka Vuorela in 2020.

122 Y. Gottlieb, *Attacks Against Cultural Heritage as a Crime Against Humanity*, "Case Western Research Journal of International Law" 2020, Vol. 52(1), pp. 287-330.

123 Gottlieb uses the term "cultural heritage" and not "cultural property", as he wishes to include, among other things, the intangible notion in it as well.

124 Draft articles on the Prevention and Punishment of Crimes Against Humanity were adopted by the International Law Commission at its seventy-first session in 2019 and submitted to the UN General Assembly as part of the Commission's report covering the work of that session (UN Doc. A/74/10).

125 Y. Gottlieb, op. cit., p. 320. The proposed specific elements of the crime are: 1) the perpetrator caused severe damage to cultural heritage; 2) the perpetrator was aware of the factual circumstances that established the status of the heritage targeted and intended that heritage to be severely damaged nonetheless.

126 That is in line with the view of the ICC in the *Al Mahdi* case, where it was said that Al Mahdi was not charged with crimes against persons, but with crimes against property. In the view of the Court, even if

approach would place such crimes at the intersection of crimes against property and crimes against people.[127]

As seen above, the destruction of cultural property in armed conflict is – based on the evidence collected in the respective cases – generally considered as a war crime, not as a crime against humanity. Having said that, we have also seen that although it has been the practice of the ICTY to use Article 3(d) as the statutory provision under which to punish destruction of cultural property, Article 5(h) of the ICTY Statute has also been used by the ICTY Trial Chambers to hold individuals who committed the destruction of cultural property responsible for their acts, thus making it a crime against humanity instead of merely a war crime. Viewing destruction of cultural heritage as a crime against humanity would, according to Gottlieb, ensure a consistent criminalization approach and would prevent impunity for such acts.[128] As one of the main objectives of the Draft Convention is the prevention of crimes against humanity (next to punishment), the insertion of an article on destruction of cultural heritage would add to the prevention of these acts. It would also underscore that the destruction of cultural property not only breaks the backbone and morale of the people whose heritage is targeted, but also erases part of the heritage of all mankind.

On 14 November 2022, at its seventy-seventh session, the Sixth Committee of the UN General Assembly adopted resolution A/C.6/77/L.4, whereby all states are invited to submit written comments and observations on the draft articles. The draft articles will be further examined during the seventy-ninth session of the Sixth Committee in autumn 2024. We will then see whether states have taken the ideas of Gottlieb on board.

Concerns about Impunity expressed during the Commemoration of 70 Years of the 1954 Hague Convention: Conclusions of Expert-Panelists

From 13 until 15 May 2024, the Kingdom of the Netherlands, together with UNESCO, organized a conference[129] regarding the commemoration of 70 years of existence of the 1954 Hague Convention. One of the thematic sessions of that conference had the title "Criminal Responsibility for the Destruction of Cultural Property – Combating Impunity through International Law". The conclusions of

inherently grave, crimes against property are generally of lesser gravity than crimes against persons. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, op. cit., para. 77.

127 Y. Gottlieb, op. cit., p. 290.

128 Ibidem, pp. 295-296.

129 Called "Cultural Heritage and Peace: Building on 70 Years of the UNESCO Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict".

the panelists[130] are very much in line with the conclusions that can be drawn from this article.

First, it was emphasized that many more states need to ratify especially the 1999 Second Protocol.[131] Nataraj Munessamy from Mauritius pointed out that according to his information only 14 African states ratified that Protocol, and that out of those 14 only ten are reporting back to UNESCO. Thus, the universality of the relevant international legal instruments needs to be enhanced, and the number of States Parties to those instruments should increase. Becoming a Party to an international legal instrument is the legal point of departure for implementation and application of the relevant rules and laws on armed conflict.[132]

Second, the provisions of these international legal instruments should be implemented in the national legislation of the State Parties, and the legal provisions should be concrete and precise, and thus not too generic. Concrete and well-defined penal provisions and sanctions enhance clarity and consequently implementation and adherence in practice. Implementing legislation must be adopted by states covering two aspects: criminalizing violations and establishing jurisdiction to try or extradite.

Third, regarding the adherence in practice, panelist Roger O'Keefe emphasized that States Parties are *obliged* to prosecute if attacks on cultural property occur,[133] resulting in appropriate evidence-based sentencing. Also Farida El Khamlichi pointed out that prosecution and convictions are important in giving a signal that attacking cultural property is really a criminal act.[134] Ana Filipa Vrdoljak stressed that first and foremost is the responsibility of national jurisdictions to take up cases of attacks on cultural property.[135] In that regard she rejected any criticism that

[130] Ana Filipa Vrdoljak, Professor at the University of Technology, Sydney; Kristin Hausler, Director of the Centre for International Law of the British Institute of International and Comparative Law; Andrea Cayley, Executive Director of the Sandra Day O'Connor College of Law, Arizona State University; Nataraj Muneesamy, Assistant Director of Public Prosecutions of Mauritius; Roger O'Keefe, Professor of International Law, Bocconi University; Farida El Khamlichi, President of the National Commission on International Humanitarian Law, Morocco.

[131] See also M. Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, "European Journal of International Law" 2011, Vol. 22(1), pp. 201-217. The author concludes that it is crucial to promote the ratification of the 1999 Second Protocol by a large number of states and to encourage states to adopt implementing legislation that may allow domestic judges to prosecute the most serious crimes against cultural heritage.

[132] Even where a state is not a Party to an international legally binding instrument regulating the protection of cultural property in armed conflict, it remains bound by obligations imposed by customary international law. See also fn. 95 above.

[133] In that regard, the Preamble of the ICC Rome Statute states: "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

[134] Nataraj Muneesamy, being a Public Prosecutor himself, stated in the same panel that it is all about three words: "prosecution, prosecution, and prosecution".

[135] See also K. Wierczyńska, A. Jakubowski, op. cit., p. 719: "Without doubt it will be necessary for State authorities to ensure that in the first instance all perpetrators of serious violations of international cultural heritage obligations are prosecuted before their respective domestic courts".

international tribunals are doing too little. After all, jurisdiction of international courts is of a secondary nature. Having said that, enhanced recognition of the jurisdiction of international courts and tribunals may help them close the gap when actual domestic prosecutions are not instigated.

However, in practice it turns out that prosecution is easier said than done. According to the panelists there are various reasons for that. National prosecutors and judges (both civil and military) may be struggling with the application of international law terms, such as "military necessity" or "military objective". Therefore, proper education and training is a necessity, and both the resources and manpower should be made available for that.[136] Moreover, an (international) task force of experts should be established, able to collect and preserve relevant evidence on the ground, in order to lay the proper foundations for prosecution, as well as identifying the countries where an offence can be prosecuted in cases of universal jurisdiction. Collecting and securing evidence is a major challenge, both during and after an armed conflict. Therefore, according to Roger O'Keefe enhanced national, regional, and international cooperation is needed.[137]

To decrease the risk of impunity, both prosecution, and if applicable punishment need to occur as expeditiously as possible. Moreover, special attention for the particularities of the offence and the perpetrator may add to the effectiveness of the punishment, and thus minimize the risks of repetition of the same offence. In addition, Kirsten Hausler suggests that victims should have a role in criminal proceedings.[138]

Although one can today observe increased efforts on the part of the international community to fight the impunity of individual criminals who engage in crimes against cultural property through effective prosecution,[139] many steps should still need to be taken in order to seriously decrease impunity and make punishments more of a deterrent.[140]

136 In that regard see also fn. 109 above regarding the situation in Ukraine.

137 See also K. Wierczyńska, A. Jakubowski, op. cit., p. 720: "[…] the recent initiative by the UNSC and the Council of Europe confirm that without close cooperation between States with respect to the prosecution, extradition, and punishment of those committing crimes against cultural heritage, the fight against the impunity of perpetrators of cultural crimes is doomed to failure". The authors refer to, among others, Resolution 2347 (2017) as adopted by the UN Security Council on 24 March 2017 and the Council of Europe Convention on Offences relating to Cultural Property, adopted on 3 May 2017 (CETS No. 221; entered into force on 1 April 2022, with currently solely Cyprus, Greece, Hungary, Italy, Latvia, and Mexico as States Parties).

138 Thereby acknowledging that it sometimes may be difficult to determine who are the actual and concrete victims in case of a cultural property attack.

139 According to K. Wierczyńska, A. Jakubowski, op. cit., p. 701.

140 Ibidem, p. 702.

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