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CULTURAL HERITAGE IN ARMED CONFLICT: A MULTIFACETED APPROACH TO CRIMINAL ACCOUNTABILITY IN INTERNATIONAL LEGAL FRAMEWORKS

CONTENT: 1. Introduction. – 2. Conceptual Foundations: Cultural Heritage as a Common Good of Humanity. – 3. Normative and Empirical Intersections in Cultural Heritage Protection. – 4. Targeting Cultural Heritage: Historical Patterns of Destruction. – 4.1. The Evolution of Protective Norms in International Humanitarian Law. – 4.2. Paths to Criminalisation in International Criminal Law. – 5. Individual Criminal Responsibility: Insights from ICC Jurisprudence. – 6. Conclusion.

1. *Introduction*

The importance of cultural heritage as a «common good of humanity»[1] is widely recognised in international law; yet the seriousness of war-related threats to its safeguarding is still underestimated. This unique category of legal goods can readily be a "neglected" victim of hostilities, which naturally stir our conscience because of their human toll. Nevertheless, the compelling focus on atrocities against populations should not obscure the irremediable damage inflicted on singular cultural entities under the pretext of military necessity.

Crimes afflicting cultural heritage, far from being "victimless" offences, cause profound harm to humanity as a whole. Their gravity is emphasised by the permanent effects: once heritage is destroyed, its singular value – transcending mere material form and embodying the identities and histories of peoples – is irretrievably lost. Hence, attacks on cultural heritage undermine collective values and identities by assaulting the very symbols through which societies define themselves. In this respect, culture is inextricably intertwined with the core values and human rights that legal orders seek to protect.

Recognising the enormous criminological impact of ongoing hostilities on cultural heritage preservation, this analysis adopts an interdisciplinary approach, prompted by the complexity and multifaceted profile of the subject. The distinctive character of cultural heritage informs and shapes its legal regime, which is composed of intersecting bodies of

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[1] S. MANACORDA, A. VISCONTI (eds.), *Protecting Cultural Heritage as a Common Good of Humanity: A Challenge for Criminal Justice*, Milano, 2014.

laws and principles. The universality that denotes this field – deriving from the intrinsic nature of its object – demands primary attention to international regulatory structures[2]. If the protection of cultural heritage indeed serves a common interest of humanity, it must transcend national borders and domestic legislation. However, the precise contours of this shared interest – understood as a legal good whose violation justifies criminal intervention – remain blurred.

Accordingly, the first part of this study delineates the principal conceptual and legal characteristics of cultural heritage, aiming to provide interpretative guidance for the multi-layered repression of conflict-related heritage crimes. The second part then traces the historical evolution of criminal protective mechanisms within international public law, focusing on the provisions of international humanitarian law that prohibit unlawful attacks on heritage and illustrating the shift from a state-centred system of domestic liability to direct international prosecution under the Rome Statute of the International Criminal Court.

2. *Conceptual Foundations: Cultural Heritage as a Common Good of Humanity*

This reflection begins with the well-established premise that cultural heritage is inherently worthy of protection, a principle long recognised by the international community, as well as by individual nation-states. At the domestic level, for instance, Article 9 of the Italian Constitution mandates the Republic to safeguard the «natural beauties and the historical and artistic heritage of the Nation»[3]. Contemporary legal thought no longer disputes cultural heritage as a legal good warranting protection, including under criminal law; rather, the focus has shifted to developing a systematic theoretical framework capable of advancing the specific objectives of the legal order entrusted with its protection. This issue remains particularly contentious due to the indeterminate conceptual boundaries of this legal good, which, in turn, leave unresolved the question of how to delineate the precise object and scope of laws aimed at its protection – especially within the domain of criminal law[4].

Any conceivable definition of cultural heritage is inevitably shaped by two components belonging to distinct yet closely interconnected dimensions. First, an externally observable component addresses empirical elements of reality – not strictly material or tangible[5] –

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[2] S. STARRENBURG, *The genealogy of "universality" within cultural heritage law*, in M. LOSTA, A. M. LA ROSA and F. LORENZINI (eds.), *Heritage Destruction, Human Rights and International Law*, Leiden, Boston, 2023, pp. 42-67.

[3] This is the full text of Article 9 of the Italian Constitution: «The Republic shall promote the development of culture and of scientific and technical research. It shall safeguard the natural beauties and the historical and artistic heritage of the Nation. It shall safeguard the environment, biodiversity and ecosystems, also in the interest of future generations. State law shall regulate the methods and means of safeguarding animals». See Constitution of the Italian Republic, Italian Constitutional Court translation, Senate Parliamentary Information, Archives and Publications Office, 2023, www.senato.it/pubblicazioni accessed April 5, 2025.

[4] G. P. DEMURO, *Beni culturali e tecniche di tutela penale*, vol. 2, Milano, 2002. See also A. VISCONTI, *Problemi e prospettive della tutela penale del patrimonio culturale*, Torino, 2023, p. 81 *et seq*. For the international perspective, see F. FRANCIONI, A. F. VRDOLJAK (eds), *The Oxford Handbook of International Cultural Heritage Law*, Oxford, 2020, p. 75 *et seq*.

[5] As surprising as it may seem, this consideration applies even to the relatively recent category of intangible cultural heritage, which, by definition, pertains to something immaterial. The distinction from the traditional category of "tangible" cultural heritage lies in the fact that in the case of the former, the perceivable substrate is represented by different, yet still externally perceptible, domains such as language, rituals, or traditional craftsmanship. Notably, Article 2(1)-(2) of the 2003 UNESCO Convention for the Safeguarding of the

typically enumerated in a non-exhaustive catalogue of protected objects (e.g., monuments, sculptures, paintings). Second, an immaterial or intangible component bestows the attribute of "cultural" upon the material substrate[6]. This qualifying predicate of "culturality" stems from a strong axiological or value-laden dimension that integrates normative elements (*Normative Tatbestandsmerkmale*) anchored in extra-legal criteria[7] – such as the requirement of «outstanding universal value from the point of view of history, art or science» in Article 1 of the 1972 UNESCO World Heritage Convention[8].

Intangible Cultural Heritage defines it as follows: «1. The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. 2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts;(c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship». *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted 17 October 2003, entered into force 20 April 2006, 2368 UNTS 3, Article 2(1)-(2).

[6] The definition of cultural heritage provided by Italian law offers a clear example of the simultaneous operability of the two dimensions described above. Article 2 of Legislative Decree No 42/2004 (Code on Cultural Heritage and Landscape) states: «1. Cultural heritage consists of cultural and natural goods. 2. Cultural goods include movable and immovable *things* that, according to Articles 10 and 11, possess artistic, historical, archaeological, ethno-anthropological, archival, or bibliographic significance, as well as other *things* identified by law or in accordance with the law as *testimony of civilizational value*. […]». (emphasis added). Consequently, Article 10, referenced in Article 2 of the Code, qualifies as cultural goods the movable and immovable things owned by public entities that have «artistic, historical, archaeological or ethno-anthropological *significance*», as well as those owned by private parties when accompanied by a specific «declaration of *cultural significance*» (*Dichiarazione dell'interesse culturale ex* Article 13 of the Code) (emphasis added). The declaration of cultural significance is itself based on references to «particularly important artistic, historical, archaeological, or ethno-anthropological significance» of the material objects or their connection to «the history of politics, the military, literature, art, science, technology, industry and culture in general, or as testimonies of the identity and history of public, collective or religious institutions». These references to evident axiological or value-laden elements are then complemented by a detailed list of specific items – *i.e.*, material elements – under Article 11 of the Code (such as «frescoes, coats of arms, graffiti, tombstones, inscriptions, tabernacles, and other decorative elements of buildings»). The full text of the Italian Code on Cultural Heritage and Landscape is available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2004-01-22;42!vig=, accessed April 6, 2025.

[7] The concept of normative elements is employed here to indicate the classification of the elements of crimes first theorised by German criminal law scholars at the beginning of the 19th century. See, among others, E. WOLF, *Die Typen der Tatbestandsmässigkeit: Vorstudien zur allgemeinen Lehre vom besonderen Teil des Strafrechts*, Breslau, 1931; K. HEINZ KUNERT, *Die normativen Merkmale der strafrechtlichen Tatbestände*, Berlin, Boston, 1958; M. E. MAYER, *Der allgemeine Teil des deutschen Strafrechts: Lehrbuch*, vol. 2, Heidelberg, 1915. For the traditional classification of normative elements based on the nature of the referenced standard in Italian literature, see G. RUGGIERO, *Gli elementi normativi della fattispecie penale. Lineamenti generali*, Napoli, 1965; L. RISICATO, *Gli elementi normativi della fattispecie penale. Profili generali e problemi applicativi*, Milano, 2004; G. MARINUCCI, E. DOLCINI, *Corso di diritto penale*, Milano 2001, p. 136; E. MUSCO, G. FIANDACA, *Diritto penale. Parte generale*, Bologna, 2010, p. 72.

[8] Here is the full text of Article 1 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO in 1972, regarding the definition of the cultural and natural heritage: «For the purpose of this Convention, the following shall be considered as "cultural heritage": monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings, and combinations of features, which are of outstanding universal value

Because "culturality" inherently refers to extra-legal, meta-juridical parameters, its axiological foundations entail a degree of fluidity when delineating the scope of cultural heritage law. To the core question – "What is cultural heritage?"– the only indisputable answer is that it constitutes a «manifestation of human life»[9]. Hence, the precise determination of the protected object is inextricably linked to the evolving social sensibilities across space and time[10]. Even the terminological choice "cultural heritage" is not neutral, conveying value-laden judgments: it not only suggests intergenerational transmission, but also signals worthiness of preservation irrespective of economic value[11]. After all, not every antique object is "culture", nor can culture be reduced solely to "art"[12]. Moreover, the broad term "heritage" implies that any tangible or intangible entity can be characterized by a cultural predicate, independent of its variable proprietary status under national law (consider, for instance, the divergent domestic regulations of archaeological finds or *bona fide* acquisitions). For these reasons, the traditional category of "cultural property" now appears too reductive and problematic.

Shifting from abstract theorisation to practical observation, international cultural heritage law in its strict application exhibits the simultaneous operation of multiple, instrument-specific definitions; for example, those of the 1970 UNESCO Convention, the 1972 World Heritage Convention, the 2001 Underwater Cultural Heritage Convention, the 2003 Intangible Cultural Heritage Convention, and the 2005 Cultural Diversity Convention[13].

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from the point of view of history, art, or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity, or their place in the landscape, are of outstanding universal value from the point of view of history, art, or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological, or anthropological point of view». *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, entered into force 17 December 1975, 1037 UNTS 151 (available at https://whc.unesco.org/en/conventiontext/, accessed 6 April 2025).

[9] See L. V. PROTT, P. J. O'KEEFE, *"Cultural heritage" or "cultural property"?*, in *International Journal of Cultural Property*, 1992, p. 307 *et seq*.

[10] This idea is explicitly reflected in Article 1 of the 2001 UNESCO Universal Declaration on Cultural Diversity: «Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations». UNESCO, *Universal Declaration on Cultural Diversity*, adopted by the General Conference at its 31st session on 2 November 2001. See also A. VISCONTI, *Problemi e prospettive della tutela penale del patrimonio culturale*, Torino, 2023, p. 83: «*Come tale rappresenta qualcosa di adattabile, fluido, mutevole, pur all'interno di una sua continuità*».

[11] See L. V. PROTT, P. J. O'KEEFE, *"Cultural heritage" or "cultural property"?*, p. 307 *et seq*.

[12] See M. BALCELLS, *One looter, Two Looters, Three Looters… The Discipline of Cultural Heritage Crime Within Criminology and Its Inherent Measurement Problems*, in S. HUFNAGEL, D. CHAPPELL (eds.), *The Palgrave Handbook on Art Crime*, London, Sydney, 2019, p. 33 *et seq*.

[13] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, adopted 14 November 1970, entered into force 24 April 1972, 823 UNTS 231, Article 1 (1970 UNESCO Convention); *Convention concerning the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, entered into force 17 December 1975, 1037 UNTS 151 Articles 1 and 2 (World Heritage Convention); *Operational Guidelines for the Implementation of the World Heritage Convention*, 12 July 2017, UNESCO Doc WHC 17/01, paras 46 and 47; *Convention on the Protection of Underwater Cultural Heritage*, adopted 2 November 2001, entered into force 2 January 2009, 2562 UNTS 1, Article 1 (2001 Underwater Cultural Heritage Convention); *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted 17 October 2003, entered into force 20 April 2006, 2368 UNTS 1, Article 2 (Intangible Cultural Heritage Convention); *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted 20 October 2005, entered into force 18 March 2007, 2440 UNTS 311, Article 4 (Cultural Diversity Convention).

Together, these instruments reveal a pattern of progressive extension in the conceptualisation of the protected object; a tendency to emancipate it from the requisite of tangibility, embracing an increasingly culturality-related, value-based approach. Thus, protective norms have transitioned from tangible items – movable and immovable (paintings, sculptures, manuscripts and books, monuments, groups of buildings, geological and physiographical formations, natural sites, etc.) – to intangible entities, such as practices, representations, expressions, knowledge and skills, cultural activities or industries.

Yet this holistic consideration of cultural heritage and the radical blurring of its boundaries proves difficult to reconcile with traditional paradigms of substantive criminal law and its safeguards – especially the principle of determinacy, which requires that offences and penalties be clearly and unequivocally defined. Unsurprisingly, while the formal scope of cultural heritage law expands, its punitive apparatus remains confined to tangible components: instruments prosecuting heritage crimes in armed conflict refer to "cultural property" or "cultural objects", never to "heritage"[14]. Empirical evidence, however, suggests that cultural heritage crime affects intangible components as well – especially when linked to the commission of iconoclastic acts – complicating the reconstruction of the applicable legal framework (for instance, the prosecution for war crimes or crimes against humanity under the Rome Statute).

The compartmentalisation of cultural heritage meanings across conventions[15] underscores the fragmented nature of the subject. Because any *reductio ad unum* among overlapping definitions is impossible, a pragmatic case-by-case approach is preferable, delineating each norm's scope through historical and legal contextualisation within its specific branch of international law.

When seeking a systematic understanding of the criminal protection afforded to cultural heritage in armed conflict, the broad notions of "common goods" and "common interests" – both rooted in the universal vocation attributed to cultural heritage – provide a versatile theoretical framework. These concepts serve as a hermeneutic key for conducting cross-cutting analyses across the multitude of intersecting normative sources, which often lack terminological coherence due to their distinct historical and institutional contexts. The former helps clarify the object of protection; the latter, the operative mechanisms by which protection is afforded. Indeed, despite fragmentation, there is general consensus in three principal respects: (a) cultural heritage expresses axiological and identity claims, bearing values the community deems worthy of protection, including under criminal law; (b) its universal vocation, linked to humanity rather than nationality, means the impoverishment of one nation's heritage is regarded as an impoverishment of the heritage of all peoples of the world[16]; and (c) its intergenerational value, with preservation embedded in the objective of fostering the interests of future generations.

These characteristics justify the inclusion of cultural heritage among common goods – understood here as «things that express functional utilities for the exercise of fundamental human rights and for the free development of personality»[17] – and preclude the possibility of

[14] See, for example, *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 26 March 1999, entered into force 9 March 2004, 2253 UNTS 172, Article 15; *Rome Statute of the International Criminal Court*, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 3, Articles 8(2)(b)(ix) and 8(2)(e)(iv).

[15] F. FRANCIONI, A. F. VRDOLJAK (eds.), *The Oxford Handbook of International Cultural Heritage Law* (n. 4) p. 77.

[16] C. FORREST, *International Law and the Protection of Cultural Heritage*, New York, 2012, p. 410.

[17] See *Proposta della Commissione Rodotà per la modifica delle norme del codice civile in materia di beni pubblici*, 14 June 2007, Article 1(3)(c): «*Previsione della categoria dei beni comuni, ossia delle cose che esprimono utilità funzionali all'esercizio di diritti*

subjecting their regulation solely to traditional property rights schemes, instead calling for special mechanisms of protection at transnational and international levels. In this context, the fundamental role of international law emerges as a «limitation on sovereign freedom, including with respect to cultural goods: it is the structure of international law which introduces the kind of restriction on sovereign arbitrariness that can be functionalized to serve the interest of future generations and, as such, those of cultural heritage and common goods»[18]. In this vein, the concept of commons – precisely by virtue of its breadth – may serve as a flexible *trait d'union* for guiding the application of a heterogeneous system of substantive and procedural laws, each with diverse scope and nature.

With respect to the mechanisms of protection, particular attention must be given to the relatively recent notion of "common interests" – understood as «a consensus according to which the respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States»[19]. Since cultural heritage preservation is now embraced within the orbit of such fundamental values, its universality becomes the paradigm through which its legal treatment is shaped[20]. The idea that the loss or destruction of cultural heritage constitutes damage to the heritage of all humanity legitimises the adoption of international duties to criminalise, as well as substantive international criminal provisions. But the theoretical enthusiasm for affording the broadest protection of cultural heritage through the criminal justice system must be reconciled with the practical effectiveness of such protection and its inherent limitations – especially regarding intangible heritage. Even for tangible cultural heritage – explicitly addressed in many international treaties and for which attacks may amount to war crimes under customary international law – its blurred definition continually risks jeopardising the uniform and rational implementation of the existing instruments. Conversely, the dangers of a pan-criminalisation approach must not be overlooked, particularly given the persistent absence of precise definitions and legal certainty as to the applicable law.

3. *Normative and Empirical Intersections in Cultural Heritage Protection*

The peculiarities of the object of protection are reflected in the complexity of cultural heritage law, which cannot be fully appreciated without considering the numerous forms of what have been defined as "intersections" – substantive overlaps among principles, rules and norms – existing in both national and international regimes between cultural heritage law in

fondamentali nonché al libero sviluppo della persona». See also U. MATTEI, *Beni comuni. Un manifesto*, Roma, Bari, 2011; ID., *Contro-riforme*, Torino, 2013; ID., *Senza proprietà non c'è libertà. Falso*, Roma, Bari, 2014; ID., *Il benicomunismo e i suoi nemici*, Torino, 2015; F. CAPRA, U. MATTEI, *The Ecology of Law*, Oakland, 2015.

[18] «[…] *la limitazione della libertà sovrana anche rispetto ai beni culturali: è la struttura del diritto internazionale che introduce quel tipo di limite all'arbitrio del sovrano che può essere funzionalizzato anche all'interesse delle generazioni future, e quindi all'interesse per i beni culturali e i beni comuni*». U. MATTEI, *Patrimonio culturale e beni comuni: un nuovo compito per la comunità internazionale*, in S. MANACORDA, A. VISCONTI (eds.), *Protecting Cultural Heritage as a Common Good of Humanity: A Challenge for Criminal Justice* (n. 1) p. 32.

[19] B. SIMMA, *From Bilateralism to Community Interest in International Law*, in 250 *Recueil des Cours*, Oxford, 1994, p. 217 *et seq.*

[20] S. STARRENBURG, *The Genealogy of "Universality" within Cultural Heritage Law*, in M. LOSTA, A. M. LA ROSA and F. LORENZINI (eds.), *Heritage Destruction, Human Rights and International Law*, 2023, p. 42 *et seq.*

the strict sense and other legal fields, such as public law and private law, or public international law and international economic law[21].

Setting aside the national perspective and focusing on universal mechanisms for the protection of cultural heritage during armed conflict, the emergence of a systematic body of law exclusively dedicated to this subject is a relatively recent – yet continuously expanding – development within the international legal framework. Historically, it has evolved from the corpus of international public law, whose traditional instruments were progressively tailored to safeguard cultural heritage as an emerging common interest of the international community. More specifically, this process involved the integration of the laws and customs of war. State sovereignty in choosing methods and means of warfare is primarily constrained by humanitarian rules designed to guarantee the respect for civilians' fundamental rights. The general recognition of the importance of cultural heritage «for all mankind» has established – at least in theory – the principle that the interests of States in achieving military advantage, in the balancing, can never override the common interest of cultural heritage protection. Consequently, the prohibition on directing attacks against cultural heritage has crystallised under international humanitarian law.

Over time, the growing awareness of cultural heritage's significance has fostered the development of an autonomous branch of international cultural heritage law, defined by a mosaic of principles and provisions, with the UNESCO cultural conventions forming its principal normative framework. These norms function in continuous intersection with other branches of international law, which have experienced the increasing introduction of *lex specialis* provisions dedicated to the protection and preservation of cultural heritage.

Assessment of the overall legal framework for criminal repression of cultural heritage offences in armed conflict reveals the relevance of these recurring intersections among diverse legal fields. In this domain, cultural heritage law is unavoidably entangled with at least two principal legal fields: international humanitarian law – whose obligations also affect domestic penal legislation – and international criminal law as a response to serious violations of both the laws of war and human rights law. The 1954 Hague Convention and its Protocols[22] clearly exemplify the phenomenon: while an integral part of cultural heritage law, they also operate within the broader framework of international humanitarian law by establishing obligations for the protection of cultural property in wartime, while simultaneously engaging domestic criminal justice systems through duties of criminalisation imposed upon States.

The intersection with international criminal law, in turn, highlights the «human rights dimension to cultural heritage», now essential in the international normative evolution[23]. Not only has cultural heritage law endorsed a more holistic understanding of culture and its relationship to identity, but contemporary legal thought increasingly acknowledges cultural rights as fundamental human rights of individuals, groups, and peoples as well[24] – namely,

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[21] This approach is adopted by in A.M. CARSTENS, ELIZABETH VARNER (eds.), *Intersections in International Cultural Heritage Law*, Oxford, 2020.

[22] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 14 May 1954, entered into force 7 August 1956, 249 UNTS 240 (1954 Hague Convention).

[23] A. STRECKER, J. POWDERLY, *Introduction: Heritage Destruction, Human Rights, and International Law in Times of Conflict and in Peace* in *Heritage Destruction, Human Rights and International Law*, Leiden, 2023, p. 1 *et seq*.

[24] F. FRANCIONI, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, in 25 *Michigan Journal of International Law*, 2004, p. 1209 *et seq*.; ID., *Introduction: Human Rights and Cultural Pluralism: What Role for International Law?*, in *Diritti umani e diritto internazionale*, 2018, p. 307 *et seq*.; see also L. PINESCHI, *Cultural Diversity as a Human Right? General Comment No. 21 of the Committee on Economic, Social and Cultural Rights*

the right to historical and cultural identity and the right to participate in cultural life, including access to and enjoyment of cultural heritage[25]. This human rights-based approach unequivocally links heritage to the respect for human dignity in a democratic society, mandating equal legal safeguards in both international and non-international armed conflicts. Such an interpretation justifies and legitimises – by reference to the principle of *extrema ratio* – the intervention of international criminal law for cultural heritage-related offences beyond the war crimes framework, to encompass prosecution for crimes against humanity. In addition, it allows cultural crimes to be considered as evidence of *mens rea* or the specific intent requirement for the crime of genocide.

From an empirical perspective, the criminal protection of cultural heritage in armed conflict pertains to wilful offences committed against heritage because of, or under the pretext of, hostilities – excluding "physiological" threats arising from disasters independent of malicious or negligent actions by human agents (which fall more appropriately under disaster risk management). Armed conflict constitutes a major threat to the preservation of the world's collective cultural heritage from a dual perspective.

On the one hand, cultural property may be deliberately targeted during military operations due to its intrinsic symbolic and identitarian value. As a result, a close connection can be drawn to the issue of iconoclasm – literally, the "breaking of images" – understood as the «motivated annihilation of any presence or power», embodied by a symbol, «through the annihilation' of that symbol»[26]. The eradication of cultural objects serves as a method of psychological warfare and a powerful propaganda tool, driven by religious or political motives, blending the conquest of "physical space" with that of "symbolic space"[27]. The

in S. BORELLI, F. LENZERINI (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Leiden, 2012, p. 29 *et seq*.; V. TÜNSMEYER, *Bridging the Gap Between International Human Rights and International Cultural Heritage Law Instruments: A Functions Approach* in *Intersections in International Cultural Heritage Law* (n. 21), p. 319 *et seq*.

[25] The existence of "cultural rights" was first acknowledged by the international community in *Universal Declaration of Human Rights*, adopted 10 December 1948 UNGA Res 217 A(III)) Article 22, where they are juxtaposed with the right of «everyone, as a member of society», to economic and social rights «indispensable for his dignity and the free development of his personality». Afterwards, the right of minorities «to enjoy their own culture» was recognized in *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, Article 27. See also *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, Article 15 (guaranteeing the right «to take part in cultural life», to «enjoy scientific progress», and to benefit from intellectual property protections). A major step forward came with the *UNESCO Universal Declaration on Cultural Diversity*, adopted 2 November 2001, Article 5: «Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent». The 2007 Fribourg Declaration on Cultural Rights, developed by the Observatory of Diversity and Cultural Rights of the Interdisciplinary Institute of Ethics and Human Rights at the University of Fribourg, in collaboration with the Organisation Internationale de la Francophonie and UNESCO, represents a pivotal document in articulating cultural rights, broadly conceived to include both tangible and intangible culture. Article 1 states: «*Les droits énoncés dans la présente Déclaration sont essentiels à la dignité humaine; à ce titre ils font partie intégrante des droits de l'homme et doivent être interprétés selon les principes d'universalité, d'indivisibilité et d'interdépendance*». The full text is available at https://www.fidh.org/en/issues/cultural-rights/fribourg-declaration. In this context, resolutions of the Human Rights Council, along with special rapporteur reports, have played a crucial role in affirming cultural rights and heritage protection – see for instance HRC Res 49/7, *Cultural Rights and the Protection of Cultural Heritage*, 31 March 2022, UN Doc A/HRC/RES/49/7.

[26] N. N. MAY (ed.), *Iconoclasm and Text Destruction in the Ancient Near East*, Chicago, 2012, p. 1 *et seq*.

[27] See S. HARDY, *Iconoclasm: Religious and Political Motivations for Destroying Art*, in *The Palgrave Handbook on Art Crime*, *supra*, p. 625 *et seq*. The phenomenon of iconoclasm is shown to have deep historical roots, extending back to Ancient Egypt and the Roman Empire, and remains significant in contemporary history, as evidenced

destruction of the Bamiyan Buddhas by the Taliban in 2001 offers a striking example[28]. When perpetrated during armed conflicts, iconoclasm resulting in damage or eradication of identity may amount to a crime against humanity or to the discussed concept of cultural genocide[29].

On the other hand, the destruction or dispersal of cultural heritage – aside from potentially constituting "collateral damage" from military action – may be exacerbated by conditions of warfare, which facilitate the commission of "ordinary" crimes against heritage, such as plunder, vandalism and illicit trafficking. Evidence demonstrates that economically motivated looting under the cover of conflict directly fuels the illicit trafficking of stolen cultural goods, with proceeds often channelled to finance the conflict itself, and this trade is frequently intertwined with organized transnational crime[30].

The various motives and modalities underlying the severe threat that wars pose to cultural heritage are not mutually exclusive: for instance, looting may serve military strategic purposes, while acts of vandalism may mask iconoclastic intentions, further exacerbating the damage to cultural heritage[31]. All of this underscores the strong nexus between cultural heritage protection and security concerns, particularly where crimes against heritage are perpetrated by terrorist groups or in conjunction with transnational criminal organizations.[32] The layered structure of the issue thereby demands a multidisciplinary approach, with international criminal law – traditionally neglected – assuming an increasingly pivotal role in ensuring accountability through prosecution of those responsible for cultural heritage offences during armed conflict[33].

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by the actions of the Islamic State in Syria and Iraq. See also G. J. STEIN, *Performative Destruction: Da'esh (ISIS) Ideology and the War on Heritage in Iraq*, in J. CUNO, T. G. WEISS (eds.), *Cultural Heritage and Mass Atrocities*, Los Angeles, 2022, p. 168 *et seq*.

28 F. FRANCIONI, F. LENZERINI, *The Destruction of the Buddhas of Bamiyan and International Law*, in *European Journal of International Law*, 14(4), 2003, p. 619.

29 On the qualification of cultural heritage destruction under international criminal law, see M. FRULLI, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, in *European Journal of International Law*, 22(1), 2011, p. 203 *et seq*.; J. D, KILA, *Iconoclasm and Cultural Heritage Destruction During Contemporary Armed Conflicts*, in *The Palgrave Handbook on Art Crime*, 2019, *supra*, p. 653; F. SIRONI DE GREGORIO, *Attacking Cultural Property to Destroy a Community: Heritage Destruction as a Crime Against Humanity and Genocide*, in *Rivista Semestrale di Diritto*, 2020, p. 269.

30 See N. BRODIE, I. SABRINE, *The Illegal Excavation and Trade of Syrian Cultural Objects: A View from the Ground* in 43(1) *Journal of Field Archaeology*, 2018, p. 73; R. MAC GINTY, *Looting in the Context of Violent Conflict: A Conceptualisation and Typology*, in *Third World Quarterly*, 25(5), 2004, p. 857; C. JONES, *New Documents Prove ISIS Heavily Involved in Antiquities Trafficking*, 30 September 2015 (available at https://gatesofnineveh.wordpress.com/2015/09/30/new-documents-prove-isis-heavily-involved-in-antiquities-trafficking/). Despite the empirical relevance of the phenomenon, it is not further addressed in this work, as it pertains to peacetime mechanisms of protection.

31 J. KILA, *Iconoclasm and cultural heritage destruction during contemporary armed conflicts*, p. 657.

32 P. CAMPBELL, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, in *International Journal of Cultural Property*, 2023; P. BLANNIN, *Islamic State's Financing: Sources, Methods and Utilisation*, in *Counter Terrorist Trends and Analyses*, 9(5), 2017, p. 13.

33 The *Al Mahdi* case is emblematic in this context: *infra*, par. 5; *Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Trial Chamber VIII, Judgment and Sentence, 27 September 2016. See also M. STERIO, *Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case* in *Case Western Reserve Journal of International Law*, 49, 2017, p. 63 (available at https://scholarlycommons.law.case.edu/jil/vol49/iss1/6); K. WIERCZYŃSKA, A. JAKUBOWSKI, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, in *Chinese Journal of International Law*, 16(4), 2017, p. 695; P. CASALY, *Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law*, in *Journal of International Criminal Justice*, 14(5), 2016, p. 1199.

4. *Targeting Cultural Heritage: Historical Patterns of Destruction*

This analysis begins from the well-established premise that cultural heritage constitutes a legal good deserving protection, including through criminal law, within the limits set by the *ultima ratio* principle. However, this assumption is a relatively recent development in legal regulation.

From a historical perspective, the practices of theft, looting, and spoliation of cultural heritage are as old as human civilization itself[34]. In antiquity, plunder was an integral part of warfare, as is notably exemplified by the siege of Jerusalem in 70 CE, commemorated by the Arch of Titus, which depicts the emperor's triumphant return to Rome bearing the spoils of the Temple.[35] What contemporary sensibilities now classify as art crime was once regarded as a demonstration of power, domination, and control, operating under the maxim *victori sunt spolia* ("to the victor belong the spoils"). With the advent of Christianity, the plunder and spoliation of cultural heritage were systematically carried out for purposes of religious cleansing, as exemplified by the sack of Constantinople in 1204 – events entirely comparable to modern iconoclastic acts.

During the Renaissance, with the rise of humanist values, considerable prestige was attached to the possession of artworks, especially those from Greek and Roman antiquity. This fascination intensified during the Enlightenment, as reflected in the phenomenon of the Grand Tour. Although specific legislation for the protection of cultural heritage had already begun to emerge – for example, Pope Pius II's 1462 bull *Cum almam nostrum Urbem* – and restitution clauses were incorporated into earlier international agreements, notably the Treaties of Westphalia (1648), it was the 1815 Treaty of Paris that marked a true paradigm shift by articulating the principle that cultural heritage should not be treated as war booty. During the Napoleonic Wars, the era's appreciation for culturally significant objects in fact fuelled systematic looting and large-scale seizures, as exemplified by the French plundering of the Italian peninsula. After Napoleon's fall, also due to Canova's restitution campaigns, Quatremère's conceptions of the universal value of culture began to take root across Europe as guiding principles[36], accompanied by the corollary that the preservation of cultural heritage inherently transcends the dynamics of inter-State conflict. Nonetheless, the hypocrisies of imperialism and the double standards applied to non-Western states regarding the recognised significance of cultural heritage to collective identity must not be overlooked[37].

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[34] V. HIGGINS, *Plunder and Looting: Some Historical Reminders*, in *The Palgrave Handbook on Art Crime*, *supra*, p. 409 *et seq*.; M. M. MILES, *Art as Plunder: The Ancient Origins of Debate about Cultural Property*, Cambridge, 2008; EAD., *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art* in 11(1) *International Journal of Cultural Property*, 2002, p. 28; T. SCOVAZZI, *Diviser c'est détruire – Principi etici e giuridici nella restituzione dei beni culturali* in S. PELLEGRINO, G. TEMPESTA (eds.) *I beni culturali di interesse religioso: principi e norme in materia di circolazione internazionale*, Barletta, 2013.

[35] Roman cultural relations were actually complex, as they also reflect an emerging awareness of the collective value of heritage. In this regard, Cicero's prosecution of Governor Verres for his greed and spoliations is well known.

[36] A. C. QUATREMERE DE QUINCY, *Lettres sur le préjudice qu'occasionneroient aux arts et à la science, le déplacement des monumens de l'art de l'Italie*, 1815. The core idea expressed in this work is that the spoliation of cultural heritage from its places of origin equals to its destruction (*diviser c'est détruire*).

[37] D. LOWENTHAL, *The Heritage Crusade and the Spoils of History*, Cambridge, 1998; J. VAN BEURDEN, *Treasures in Trusted Hands: Negotiating the Future of Colonial Cultural Objects*, Leiden, 2017; A. VISCONTI, *Between "Colonial*

4.1. *The Evolution of Protective Norms in International Humanitarian Law*

The nineteenth and twentieth centuries witnessed the progressive codification of international humanitarian law (IHL) rules on the protection of cultural heritage during armed conflicts, as evidenced by the adoption of the first legally binding provisions prohibiting its destruction and pillage in wartime: Articles 27 and 56 of the Regulations annexed to the Second Hague Convention (1899) – reiterated with minor modifications in the Regulations annexed to the Fourth Hague Convention (1907)[38]. Article 27, in particular, imposed the obligation to spare, «as far as possible», buildings dedicated to «religion, art, science, and charity, hospitals, and places where the sick and wounded are collected». In the 1907 version, the normative force of the provision was strengthened by replacing the verb "should" with "must", and by adding a specific reference to «historic monuments»[39]. More importantly, Article 56 – whose substantive content remained unchanged – prohibits the seizure, destruction, or wilful damage of such institutions, foreshadowing an emerging duty to prosecute these acts by stating that they «should be made the subject of legal proceedings»[40].

Notably, these principles were later considered by the International Military Tribunal (IMT) as customary international law, binding on the international community as a whole, and provided the legal basis for holding Nazi generals accountable for the systematic looting and destruction of cultural property as war crimes[41]. At the time, however, their legal force remained dependent on State ratification, reflecting their foundation in conventional international law. Furthermore, even for States party to the Hague system, the substantive protection afforded was limited and proved largely ineffective in practice. The insufficiency of the existing framework became evident in the aftermath of World War I: while the Treaty of Versailles (1919) reaffirmed, at the theoretical level, the new paradigm of cultural heritage

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Amnesia" and "Victimization Biases": Double Standards in Italian Cultural Heritage Law, in *International Journal of Cultural Property*, 28(4), 2021, p. 551.

[38] *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, adopted 29 July 1899, entered into force 4 September 1900; *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, adopted 18 October 1907, entered into force 26 January 1910.

[39] Article 27(1), 1899 Hague Regulations: «In sieges and bombardments all necessary steps *should* be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes» (emphasis added). Article 27(1), 1907 Hague Regulations: «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» (emphasis added).

[40] Article 56, 1899 Hague Regulations: «The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings».
Article 56, 1907 Hague Regulations: 'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of *legal* proceedings.' (*emphasis added*).

[41] *Charter of the International Military Tribunal, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (London Agreement), 8 August 1945, 82 UNTS 279, Article 6(b). The IMT jurisdiction is established over «violations of the laws or customs of war», including «plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity».

protection – both through rules on the restitution and by providing for extensive reparations – no significant progress was made in strengthening the operative instruments of safeguarding.

During the Second World War, the Nazi regime systematically instrumentalised art and culture to propagate Aryan ideology, aiming to reshape historical narratives by destroying works labelled as "degenerate" and appropriating those deemed consistent with their system of values[42]. These objectives were institutionally pursued, most notably through the *Einsatzstab Reichsleiter Rosenberg* (ERR), an organisation which orchestrated the systematic confiscation and plunder of cultural property across occupied territories[43]. Hitler's extensive programme of cultural eradication – and the unprecedented scale of destruction it entailed – decisively underscored the need for a more robust legal regime, one that would recognise cultural heritage as an autonomous value deserving protection in itself, beyond the "civilian-use" logic that characterised the Hague Regulations II and IV.

In direct response to these events, UNESCO was founded in 1945 to promote peace through respect for all cultures, thereby laying the institutional groundwork for the 1954 Hague Convention – the first IHL treaty devoted exclusively to cultural heritage[44]. The Convention was subsequently complemented by the 1977 Additional Protocols to the 1949 Geneva Conventions[45], which further integrated cultural protection into the broader corpus of IHL[46].

The 1954 Hague Convention was directly influenced by the Nuremberg Trials, which introduced the principle of punishing attacks against cultural heritage as a matter of positive international law[47]. In its Preamble, the Convention adopts a universal approach to cultural heritage protection, underscoring its significance «for all peoples of the world» and affirming that «this heritage should receive international protection»[48]. Despite this textual reference to

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42 L. H. NICHOLAS, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War*, London, 1994.

43 Alfred Rosenberg, one of the principal ideologues of the Nazi Party, directed the ERR. For his role in the organization and other serious violations—he was sentenced to death at the Nuremberg Trials. See Count Three (War Crimes), Part E (Plunder of Public and Private Property), Indictment, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, 42 vols, Nuremberg 1947–1949, vol. 1, p. 11 *et seq*.

44 *Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention*, adopted 14 May 1954, entered into force 7 August 1956, 249 UNTS 240 (1954 Hague Convention).

45 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, entered into force 7 December 1978; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977, entered into force 7 December 1978.

46 *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, adopted 12 August 1949, entered into force 21 October 1950; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, adopted 12 August 1949, entered into force 21 October 1950; *Geneva Convention (III) relative to the Treatment of Prisoners of War*, adopted 12 August 1949, entered into force 21 October 1950; *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, *adopted* 12 August 1949, entered into force 21 October 1950.

47 UNESCO, *Preliminary Draft International Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Doc 7C/PRG/7, Annex I, 5.

48 *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (note 44), preambular paras 2 and 3.

«cultural heritage», the Convention's scope of application is defined by the narrower concept of «cultural property»[49].

The principle of protection is articulated through two complementary elements: safeguarding and respect[50]. Safeguarding is operationalised by obliging States Parties, in peacetime, to take all appropriate measures to shield cultural property from the foreseeable effects of armed conflicts[51]; respect requires, in time of conflict, abstention from any use, attack or reprisal that could expose such property to destruction or damage[52]. Article 4(3) further obliges States to prohibit and prevent theft, pillage, misappropriation, and vandalism.

[49] *Ibid.*, Article 1: «For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments"».

[50] *Ibid.*, Article 2: «For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property».

[51] *Ibid.*, Article 3: «The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate».

[52] *Ibid.*, Article 4: «1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property. 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver. 3. The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party. 4. They shall refrain from any act directed by way of reprisals against cultural property. 5. No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article 3».

The Convention also establishes a regime of «special protection» for cultural property «of very great importance», which may be inscribed in an *ad hoc* international register[53]: once registered, such property enjoys a special immunity regime[54].

Regarding enforcement, Article 28 imposes a duty on States to «prosecute and impose penal or disciplinary sanctions» on all persons responsible for breaches of the Convention – embracing a form of universal jurisdiction[55]. Nevertheless, this provision is broadly framed: it neither defines specific offences nor compels criminal penalties, thus failing to establish a clear duty to criminalise.

Adopted alongside the 1954 Convention, the First Protocol was intended to respond to the extensive cultural plunder perpetrated during the Second World War[56]. It bans the export of cultural property from occupied territories and mandates its restitution[57], but it

[53] *Ibid.*, Article 8: «1. There may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance, provided that they: (a) are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication; (b) are not used for military purposes. 2. A refuge for movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs. 3. A center containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military personnel or material, even in transit. The same shall apply whenever activities directly connected with military operations, the stationing of military personnel, or the production of war material are carried on within the center. 4. The guarding of cultural property mentioned in paragraph I above by armed custodians specially empowered to do so, or the presence, in the vicinity of such cultural property, of police forces normally responsible for the maintenance of public order shall not be deemed to be used for military purposes. 5. If any cultural property mentioned in paragraph 1 of the present Article is situated near an important military objective as defined in the said paragraph, it may nevertheless be placed under special protection if the High Contracting Party asking for that protection undertakes, in the event of armed conflict, to make no use of the objective and particularly, in the case of a port, railway station or aerodrome, to divert all traffic there from. In that event, such diversion shall be prepared in time of peace. 6. Special protection is granted to cultural property by its entry in the "International Register of Cultural Property under Special Protection". This entry shall only be made, in accordance with the provisions of the present Convention and under the conditions provided for in the Regulations for the execution of the Convention».

[54] *Ibid.*, Article 9, Hague Convention: «The High Contracting Parties undertake to ensure the immunity of cultural property under special protection by refraining, from the time of entry in the International Register, from any act of hostility directed against such property and, except for the cases provided for in paragraph 5 of Article 8, from any use of such property or its surroundings for military purposes».

[55] *Ibid.*, Article 28: «The 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».

[56] *Protocol for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 14 May 1954, entered into force 7 August 1956, 249 UNTS 358 (First Protocol to the 1954 Hague Convention).

[57] *Ibid.*, Article I: «1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article I of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May, 1954. 2. Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory. 3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations. 4. The High Contracting Party whose obligation it was to prevent the exportation of cultural

lacks concrete enforcement mechanisms, merely requiring States to «take all necessary measures» – an obligation even broader than Article 28 of the Convention[58].

As anticipated, the 1977 Additional Protocols to the 1949 Geneva Conventions marked the next step in integrating cultural heritage protection into IHL. Article 53 of Additional Protocol I (AP I)[59] and Article 16 of Additional Protocol II (AP II)[60] – governing international and non-international armed conflicts, respectively – set out a minimum standard of wartime safeguards for «cultural objects», granting them protection independent of that afforded to civilian objects. This approach reflects the international community's pragmatism: while the Geneva Conventions have been ratified by an overwhelming majority of States, many have not acceded to the Hague instruments[61]. The Protocols therefore function as a supplementary, rather than substitutive, layer of protection: Article 53 AP I and Article 16 AP II apply «without prejudice» to the 1954 Hague Convention and to «other relevant international instruments» (e.g., the 1907 Hague Regulations and the 1970 and 1972 UNESCO Conventions). Both provisions prohibit three principal categories of conduct: acts of hostility directed against historic monuments, works of art, or places of worship; the use of such objects in support of military operations; and any form of reprisal targeting these assets. With respect to the first prohibition, the 1954 Hague Convention offers a greater degree of protection. It extends safeguards to the immediate surroundings of cultural sites, mandates that States Parties undertake preparatory measures in peacetime, and expressly criminalises acts such as theft, pillage, misappropriation, and vandalism. However, the Convention also provides a broad exception for imperative military necessity – or «unavoidable» necessity in the case of property under special protection – a waiver not found in the 1977 Protocols. In contrast, the 1907 Hague Regulations impose a less rigorous obligation, requiring belligerents only to spare protected objects «as far as possible», whereas both the 1954 Convention and the Protocols impose a categorical prohibition on attacks. As for military use and reprisals, the Protocols and the 1954 Convention afford substantially equivalent safeguards – most notably, an absolute and non-derogable ban on reprisals in both regimes.

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property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph».

[58] *Ibid.*, Article III (11)(a): «Each State Party to the Protocol on the date of its entry into force shall take all necessary measures to ensure its effective application within a period of six months after such entry into force».

[59] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3, Article 53 (Protocol I): «Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited: (a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; (b) to use such objects in support of the military effort; (c) to make such objects the object of reprisals».

[60] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609, Article 16 (Protocol II): «Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort».

[61] As of 2024, the Geneva Conventions have been ratified by 196 States; Protocol I by 174 States; and Protocol II by 169 States. By contrast, only 51 States have ratified the 1899 Hague Convention, and 38 the 1907 Hague Convention. The 1954 Hague Convention has 136 ratifications; its First Protocol, 114; and its Second Protocol, only 91. See ICRC, UNESCO official ratification data.

From a compliance perspective, the Geneva Conventions and AP I – albeit confined to a narrowly defined class of violations – impose binding obligations on States to criminalise «grave breaches» that qualify as war crimes[62]. Under Article 85(4)(d) AP I, a grave breach encompasses any wilful attack causing «extensive destruction» of clearly recognisable historic monuments, works of art, or places of worship that (i) enjoy special international protection, (ii) are not proximate to military objectives, and (iii) have not been used in support of military operations[63]. The Geneva framework, even if under stringent cumulative conditions – intent, scale of damage, international recognition, and absence of military necessity – unequivocally mandates criminal prosecution, whereas the 1954 Hague Convention and the 1899/1907 Hague Regulations leave enforcement largely to State discretion. In this respect, the Protocols represent a decisive advance in the operationalisation of humanitarian law.

Still, the requirement that cultural property obtain special-protection status – often impeded by political and procedural barriers – and the broad latitude accorded to military-necessity exceptions remain major obstacles to the effective implementation of the protective regime established by the IHL treaties and, above all, by the 1954 Hague Convention as the principal instrument dedicated to cultural heritage in wartime. The devastating conflicts that marked the 1990s – including the Iran-Iraq War, the First Gulf War, and the Yugoslav Wars – laid these structural deficiencies bare. As the mayor of Dubrovnik poignantly observed following the city's bombardment: «We had UN and UNESCO flags flying from our ramparts…We were on the lists of world heritage sites, had been for years. We were covered by the Geneva Conventions, the Hague Conventions, two men from UNESCO in Paris had been sent there especially to observe. But nobody could stop it. I must say, we were disappointed in the world»[64].

The clear inadequacy of the existing protective framework prompted the adoption of the Second Protocol to the 1954 Hague Convention (1999), which – like the Convention itself – applies to both international and non-international armed conflicts[65]. While strengthening the general protection regime (for instance, by explicitly prohibiting illicit export and archaeological excavation in occupied territory)[66], the Second Protocol replaces

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[62] *Protocol I*, Article 85(5): «Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes».

[63] *Ibid.*, Article 85(4)(d): «In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: […] (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b) , and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives».

[64] A. E. SCHWARTZ, *Can We Shield Art From War?* in *The Washington Post*, 23 June 1993, cited in D. KEANE, *The Failure to Protect Cultural Property in Wartime* in *DePaul Journal of Art, Technology and Intellectual Property Law*, 2004, p. 20.

[65] *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, adopted 26 March 1999, entered into force 9 March 2004, 2253 UNTS 212 (Second Protocol).

[66] *Ibid.*, Article 9: «Without prejudice to the provisions of Articles 4 and 5 of the 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. 2. Any archaeological excavation of, alteration to, or change of use of, cultural

the previously ineffective system of special protection with a new «enhanced protection» regime for «cultural heritage of the greatest importance for humanity»[67]. It also comprehensively overhauls individual criminal responsibility, addressing the 1954 Convention's shortcomings[68]. Article 15 of the Protocol imposes a series of binding obligations on States Parties, requiring them to criminalise a defined set of serious violations[69]. These include: attacks against cultural property under enhanced protection; the use of such property or its immediate surroundings in support of military operations; and the extensive destruction or appropriation of cultural property protected by either the Convention or the Protocol. These offences largely parallel the "grave-breach" regime of the Geneva Conventions, with the notable addition of «appropriation» as an express offence and their prosecution is inspired to the universal jurisdiction doctrine. Further, Article 15 expands the catalogue of punishable offences to include attacks against cultural property under general protection, as well as theft, pillage, misappropriation, and vandalism. In this respect, the Second Protocol moves beyond Article 28 of the 1954 Hague Convention, which provided for either criminal or merely disciplinary measures. This second category of violations represent war crimes, subject to permissive universal jurisdiction[70]. For all enumerated crimes, each States Party is required to establish «appropriate penalties» within its domestic criminal law system. These obligations are supported by provisions on universal jurisdiction, extradition, and mutual legal assistance, which together strengthen the Protocol's cross-border enforceability and affirm its internationalist approach.

In conclusion, the hallmark of cultural heritage protection under IHL is its state-centric orientation: the immediate addressees of the relevant obligations are States – the traditional subjects of the international legal order. A second enduring trait is the framework's exclusive focus on tangible heritage, as reflected in the consistent use of the terms "cultural property" and "objects" throughout IHL definitions.

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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».

[67] *Ibid.*, Article 10: «Cultural property may be placed under enhanced protection provided that it meets the following three conditions: (a) it is cultural heritage of the greatest importance for humanity; ((b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection; (c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used».

[68] J. M. HENCKAERTS, *New Rules for the Protection of Cultural Property in Armed Conflict* in *International Review of the Red Cross*, N. 835, 1999.

[69] *Second Protocol*, Article 15: «1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts: (a) making cultural property under enhanced protection the object of attack; (b) using cultural property under enhanced protection or its immediate surroundings in support of military action; (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol; (d) making cultural property protected under the Convention and this Protocol the object of attack; (e) Theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention. 2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act».

[70] J. M. HENCKAERTS, *New Rules for the Protection of Cultural Property in Armed Conflict* in *International Review of the Red Cross*, 91 (835), 2009, pp. 613-616.

The core of State duties falls into three essential categories[71]: (i) the protection and respect for cultural property during armed conflict and military occupation; (ii) the restitution of unlawfully removed cultural property; and (iii) the prosecution and sanction – whether criminal or disciplinary – of individuals responsible for violations of these duties[72]. The first two constitute primary obligations, while the third operates as a secondary obligation arising in response to their breach. Accordingly, individual criminal liability is mediated chiefly through domestic justice systems, with no direct international enforcement[73]. It is worth noting that the doctrine of military necessity – invoked when cultural property functionally serves as a legitimate military objective – serves as a significant yet indeterminate exemption from liability under the laws of war. This concept, rooted in the perennial tension between humanitarian restraint and military exigency, lacks a universally accepted definition and is prone to discretionary interpretation and legal ambiguity[74].

4.2. *Paths to Criminalisation in International Criminal Law*

The turbulent closing decade of the twentieth century exposed the structural limit of IHL: reliance on States and their domestic criminal systems is insufficient to guarantee compliance with international norms. Growing awareness of this inadequacy catalysed a new phase of international criminalisation, reviving the historical precedent set by the Nuremberg Trials[75]. After the 1990s, offences against cultural heritage secured a firm foothold in the statutes of *ad hoc* international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Extraordinary Chambers in the Courts of Cambodia (ECCC)[76].

Of particular importance, the ICTY's jurisprudence left a lasting mark on the development of a systematic normative framework for individual criminal accountability

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[71] A. JAKUBOWSKI, *State Responsibility and the International Protection of Cultural Heritage in Armed Conflicts* in *Santander Art and Culture Law Review*, 1(2), 2015, p. 147.

[72] 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*, Leiden, 2010, p. 69; R. O'KEEFE, *The Protection of Cultural Property in Armed Conflict*, New York, 2006.

[73] In the Italian legal system, the protection of cultural heritage during armed conflict is governed by Law No. 45 of 2009, which ratifies and implements the Second Protocol to the 1954 Hague Convention. This statute establishes several military offences concerning cultural property, including: attack and destruction (Article 7), unlawful use of protected cultural property (Article 8), devastation and looting (Article 9), misappropriation and damage (Article 10), unlawful exportation and transfer (Article 11), and alteration or misuse (Article 12). Jurisdiction is provided for: (a) where the offence is committed against cultural property located in Italian territory; (b) where the offence is committed by an Italian national against cultural property abroad; and (c) where the offence is committed by a foreign national against cultural property abroad, provided the offender is present in Italy (Article 6). Imperative military necessity is codified as a ground for non-punishability (Article 13).

[74] P. GERSTENBLITH, *The Obligations Contained in International Treaties of Armed Forces to Protect Cultural Heritage in Times of Armed Conflict*, in L. W. RUSH (ed.), *Archaeology, Cultural Property, and the Military*, Woodbridge, 2010, p. 4 *et seq.*; D. KEANE, *The Failure to Protect Cultural Property in Wartime*, in *DePaul Journal of Art, Technology and Intellectual Property Law*, 2004, pp. 17 and 29; J. D. KILA, *Iconoclasm and Cultural Heritage Destruction During Contemporary Armed Conflicts*, *supra*, p. 659.

[75] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946: Judgment of 30 September – 1 October 1946*, Vol I, Secretariat of the Tribunal 1947 (available at https://biotech.law.lsu.edu/Books/blue/pdf/NT_Vol-I.pdf, accessed 22 May 2025).

[76] A.M. CARSTENS, *The Swinging Pendulum of Cultural Heritage Crimes in International Criminal Law* in *Intersections in International Cultural Heritage Law*, *supra*, p. 108 *et seq.*

under international law in respect of offences against cultural heritage. Article 3(d) of the ICTY Statute included among the violations of the laws and customs of war 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», thus providing the legal basis for prosecuting those responsible for the shelling of Dubrovnik[77]. The Tribunal, in applying this provision, grounded its legal analysis in core IHL instruments such as the Hague Regulations, the 1954 Hague Convention, and the 1977 Additional Protocols[78]. In particular, it defined the targeting of cultural property as «a violation of values especially protected by the international community», which constitutes «a crime of even greater seriousness to direct an attack to direct an attack on an especially protected site»[79]. Therefore, the Tribunal emphasized the *lex specialis* character of the offence under Article 3(d), as compared to unlawful attacks on civilian objects, relying on the distinctive nature of the protected object: «the cultural heritage of a certain population»[80].

After decades of uncertainty regarding its political viability – dating back to the aftermath of the First World War – the ICTY's case-law established a solid foundation for recognising the criminal relevance of attacks on cultural or religious institutions, when not justified by military necessity[81], under the general regime of international criminal law[82]. The Rome Statute negotiations illustrate this shift towards direct international individual responsibility. After protracted debate, the drafters included deliberate attacks against cultural property within the catalogue of war crimes under the International Criminal Court (ICC) Statute. Articles 8(2)(b)(ix) and 8(2)(e)(iv) criminalise – respectively, in international armed conflicts and non-international armed conflict – intentional attacks on «buildings dedicated to religion, education, art, [or] science» and on «historic monuments», provided such sites do not constitute military objectives. Elevating these acts to international crimes confirms that cultural heritage protection is no longer a purely humanitarian aspiration but a matter of individual criminal responsibility under international law[83].

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[77] *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 25 May 1993, UN Doc S/RES/827, Article 3(d).

[78] *Prosecutor v Jokić*, Sentencing Judgment, ICTY IT-01-42/1-S, 18 March 2004, paras 8–10, 21–29, 45, 47–50. The accused pleaded guilty to «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» arising from the shelling of Dubrovnik's Old Town, a UNESCO World Heritage site. The Trial Chamber characterised this devastation – unjustified by military necessity – as «very serious».

[79] *Ibid*., paras 46, 53.

[80] *Prosecutor v Kordić and Čerkez*, Judgment, ICTY IT-95-14/2-T, 26 February 2001, paras 206–07, 354–62. The Trial Chamber held that the wilful destruction of institutions dedicated to religion or education (mosques and Catholic churches in Central Bosnia) amounted to a war crime under Art 3(d) of the ICTY Statute.

[81] *Prosecutor v Pavle Strugar*, Trial Judgment, ICTY, No IT-01-42-T, Chamber II.

[82] A. F. VRDOLJAK, *The Criminalisation of the Intentional Destruction of Cultural Heritage* in M. ORLANDO, T. BERGIN (eds), *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives*, Abingdon, New York, 2017; A.M. CARSTENS, *The Swinging Pendulum of Cultural Heritage Crimes in International Criminal Law*, *supra*, p. 111.

[83] *Rome Statute of the International Criminal Court*, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90, Articles 8(2)(b)(xi) and 8(2)(e)(iv): «1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. 2. For the purposes 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; […] (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international

Nevertheless, the Rome Statute's wording largely mirrors the 1907 Hague Regulations, reverting to a broad, undifferentiated inventory of protected objects which brings together cultural sites and hospitals. It thus fails to adopt the value-based approach, focused on the protection of heritage «of the greatest importance for humanity», that animated the 1999 Second Protocol – adopted in the same period. Additionally, the Statute still retains the traditional military necessity waiver found in IHL, with all its attendant ambiguities. The extent of protection is further limited to unmovable tangible cultural property, marking a step back with respect to Article 3(d) of the ICTY Statute, whose formulation encompassed movable tangible property as well. Despite these shortcomings, one feature of the Rome Statute – shared with the 1999 Second Protocol but not with the ICTY – is normatively significant: actual destruction is not a prerequisite for liability; it suffices that the attack is intentionally directed against the protected object. This formulation tightens the penal framework by enabling the criminalisation of mere attempts at destruction, thereby lowering the threshold of criminal liability to include endangerment. The absence of a result requirement is consistent with the harm principle considering the permanent effects of cultural-heritage offences, which entail the irreversible loss of identity-bearing cultural foundations for the community concerned. Overall, it embodies a preventive rationale proportionate to the gravity and collective dimension of the protected interest, while respect for the principle of proportionality is safeguarded by the offence's strict definitional elements.

While the introduction of an *ad hoc* war crime for the purposeful attack against cultural objects – in spite of the aforementioned limitations on the range of safeguards – represents a general advancement in the international regulation of war-related cultural offences, its formulation reveals a conservative and traditionalist approach to cultural heritage, heavily influenced by the practice of humanitarian law. By contrast, the contemporary human rights-oriented perspective suggests a different understanding of cultural heritage, whose manifestations extend far beyond tangible immovable heritage because of its inherent connection to identity and memory. As such, the empirical dimension of the phenomenon of cultural crime during armed conflicts often eludes the narrow confines of the criminal protection afforded by Article 8 of the Rome Statute, instead being indirectly addressed through the applications of Articles 7(h), punishing persecution as a crime against humanity[84], and Article 6, concerning genocide[85].

The crime of intentionally attacking protected objects – for instance – fails in fully grasping the criminal significance of iconoclasm, where there is a tight link between the ideological motives for the conduct and the objectives of eradicating identities through

law, namely, any of the following acts: […] (iv) 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 […]».

[84] *Ibid.*, Article 7(1)(h): «1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […] (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court […]».

[85] *Ibid.*, Article 6: «For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group».

attacks on cultural heritage for its intrinsic symbolic power[86]. The targeting of cultural heritage is a formidable means of psychological warfare, deployed to implement the cleansing of a group on a discriminatory basis (e.g. religion, ethnicity, gender, *etc.*). Deprived of its culture – therefore of its history and identity – the persecuted community is subjected to a process of depersonalisation. Through this lens, offences against cultural heritage – including those acts which could fall under Article 8, such as the destruction of a religious building – may more appropriately be qualified as crimes of persecution or genocide.

However, it must be stressed that international criminal law, as it currently stands, does not acknowledge either cultural persecution or cultural genocide as autonomous offences[87]. The damage to cultural heritage is incorporated into the elements of crimes (*mens rea* or *actus reus*), or used as evidence of the existence of such elements, which are not aimed at its protection *per se*. This path has been followed in ICC jurisprudence, as reflected in the guidelines set forth in the 2021 Office of the Prosecutor Policy on Cultural Heritage[88]. in perfect continuity with the consistent ICTY case law on the matter[89]. Regarding the proposal to introduce a distinct category of cultural genocide, the debate – tracing back to the end of the Second World War – remains far from settled, leaving an open question[90].

5. *Individual Criminal Responsibility: Insights from ICC Jurisprudence*

The adoption of the Rome Statute firmly established the intentional destruction of cultural heritage as a war crime, thereby triggering individual criminal liability under international law[91]. Because the ICC operates under the principle of complementarity – acting only where States are unwilling or unable to prosecute «the most serious crimes of concern to the international community as a whole» (Article 5 Rome Statute)[92] – this development

[86] J. D. KILA, *Iconoclasm and Cultural Heritage Destruction During Contemporary Armed Conflicts*, *supra*, p. 678.
[87] GA Res 96(I), 11 December 1946; Committee on the Progressive Development of International Law and its Codification, *Draft Convention for the Prevention and Punishment of Genocide*, 6 June 1947, UN Doc A/AC.10/42, draft Article 3(e); *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 9 December 1948, entered into force 12 January 1951, 78 UNTS 277, Article 2(e); ICTR Statute, Article 2; Rome Statute, Article 6; Statute of the Special Court for Cambodia, Article 9; Law on the Establishment of Cambodian Extraordinary Chambers, Article 4; ICTY Statute, Article 4.
[88] ICC, Office of the Prosecutor, *Policy on Cultural Heritage*, June 2021, p. 28 *et seq.* (available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210614-otp-policy-cultural-heritage-eng.pdf, accessed 27 May 2025).
[89] See *Prosecutor v Blaškić*, Trial Judgment, ICTY-95-14-T, 3 March 2000); *Prosecutor v Blaškić*, Appeals Judgment, ICTY-95-14-A, 29 July 2004; *Prosecutor v Kordić and Čerkez*, Trial Judgment, ICTY-95-14/2-T, 26 February 2001; *Prosecutor v Brđanin*, Appeals Judgment, ICTY-99-36-A, 3 April 2007; *Prosecutor v Tadić*, Opinion and Judgment, ICTY-94-1-T, 7 May 1997.
[90] For further discussion A. F. VRDOLJAK, *The Criminalisation of the Intentional Destruction of Cultural Heritage* in *Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives*, p. 14; P. CALVOCORESSI, *Nuremberg: The Facts, the Law and the Consequences*, New York, 1948, p. 57; K. WIERCZYŃSKA et al., *The Al Mahdi Case: From Punishing Perpetrators to Repairing Cultural Heritage Harm*, in *Intersections in International Cultural Heritage Law*, *supra*, p. 133 *et seq*.
[91] J. POWDERLY, *Prosecuting Heritage* Destruction, in J. CUNO, T. WEISS (eds.), *Cultural Heritage and Mass Atrocities*, Los Angeles, 2022, p. 430.
[92] Rome Statute, Article 5: «The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with

yields a twofold benefit. First, a State Party may refer attacks on its own cultural heritage to an international forum, circumventing domestic political constraints or capacity shortfalls. Second, the Court may exercise jurisdiction even where the territorial or national State fails to act: (i) where the State is itself a Party but remains inactive; (ii) where it lodges an ad hoc declaration under Article 12(3)[93]; or (iii) pursuant to a Security-Council referral under Article 13(b)[94]. In each scenario, cultural heritage is affirmed as a value belonging to humankind, irrespective of where the offence occurs, and it merits protection exceeding that accorded to ordinary civilian property.

In delineating the practical reach of Articles 8(2)(b)(ix) and 8(2)(e)(iv), the ICC has drawn extensively on the jurisprudence of earlier *ad hoc* tribunals – most notably the ICTY[95], which treated the intentional destruction of cultural and religious property as a war crime, laying the groundwork for its codification as a distinct offence in the Statute[96]. Nevertheless, the Court's heritage-related case law remains relatively recent and continues to evolve within the wider framework of international criminal justice. The analytical focus must thus shift from institutional developments to the substantive contours of liability – namely, the constitutive elements that transform an attack on cultural heritage into a war crime under the Rome Statute.

The war crimes set forth in Articles 8(2)(b)(ix) and 8(2)(e)(iv) presuppose, as a threshold requirement, the existence of either an international or non-international armed conflict, as well as a clear nexus linking the alleged criminal conduct to that conflict. Upon

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respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity (c) War crimes; (d) The crime of aggression».

[93] *Ibid.*, Article 12: «A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5. 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national. 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9».

[94] *Ibid.*, Article 13: «The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15».

[95] M. P. SCHARF, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, in *DePaul Law Review*, 49, 2000, p. 925.

[96] See, among many, *Prosecutor v Kordić and Čerkez*, Judgment, ICTY IT-95-14/2-T, 26 February 2001, paras 206-207, 354-362. The Trial Chamber held that the wilful destruction of institutions dedicated to religion or education (mosques and Catholic churches in Central Bosnia) amounted to a war crime under Article 3(d) of the ICTY Statute. This offence constitutes a *lex specialis* in relation to unlawful attacks on civilian objects, as its protected legal interest is identified as «the cultural heritage of a certain population». Attacks against cultural or religious institutions, when not justified by military necessity, are therefore strictly prohibited. See also *Prosecutor v Jokić*, Sentencing Judgment, ICTY IT-01-42/1-S, 18 March 2004, paras 8-10, 21-29, 45, 47-50. The accused pleaded guilty to «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» arising from the shelling of Dubrovnik's Old Town, a UNESCO World Heritage site. The Trial Chamber characterised this devastation – unjustified by military necessity – as «very serious» and based its legal reasoning on key IHL instruments, including the Hague Regulations, the 1954 Hague Convention, and the 1977 Additional Protocols.

establishing this contextual element, the prosecution must prove two material elements (*actus reus*): that the accused directed an attack, and that the object of this attack was protected – *i.e*, a building dedicated to religion, education, art, science or charitable purposes, a historic monument, a hospital or place where the sick and wounded are collected – and did not constitute a legitimate military target. Additionally, the mental element (*mens rea*) must be established, specifically, that the accused intentionally directed the attack and was aware of the existence of the armed conflict[97]. Each of these elements is subject to interpretative scrutiny at both substantive and procedural levels, in accordance with the Statute, the Elements of Crimes, the Rules of Procedure and Evidence, applicable treaties and general principles of international law (including IHL), compatible national legislation, and the Court's own jurisprudence (Article 21)[98].

Since the entry into force of the Rome Statute in July 2002, the first ICC conviction for crimes against cultural heritage was not issued until 2016, in the landmark *Al Mahdi* case[99]. On that occasion, the Office of the Prosecutor framed the charge around the single war crime of intentionally directing attacks against protected objects under Article 8(2)(e)(iv) of the Rome Statute, concerning the destruction of several buildings of a religious and historical character in Timbuktu (Mali) during the period of Ansar Dine/AQIM's control of the city, in the context of the forcible imposition of Islamic *Sharia* law[100]. The legal classification of the destroyed monuments was meaningfully facilitated by their formal inscription on the UNESCO World Heritage List – a status that served as authoritative evidence of their cultural significance and consequently reinforced their characterisation as protected cultural heritage within the meaning of the relevant criminal provisions[101]. Crucially, the Prosecution refrained from charging Mr Al Mahdi under the more general provision punishing the destruction of civilian property pursuant to Article 8(2)(e)(xii) of the Statute, opting instead to frame the case around the distinctive "culturality" of the targeted property – «Timbuktu's mausoleums and mosques constitute a common heritage for the community»[102] – and the heightened symbolic dimension of the attacks, as reflected by Al Mahdi's own words: «What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry»[103]. Throughout the judgment, the Chamber firmly underscored

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[97] *International Criminal Court, Elements of Crimes*, ICC-ASP/1/3, 9 September 2002, p. 15, 25.

[98] Rome Statute, Article 21: «The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions. 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status».

[99] *Al Mahdi*, ICC-01/12-01/15.

[100] As explained in the judgment, from January 2012, several armed militias in northern Mali launched a civil conflict to seize control of the region. Timbuktu, in particular, fell under the authority of the terrorist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM), which imposed their ideological and religious views on the population, establishing an Islamic judicial system, law enforcement apparatus, and mechanisms to control the media and public morality. *Ibid.*, para 31, p. 16 *et seq.*

[101] *Ibid.*, para 46, p. 26.

[102] *Ibid.*, para 34, p. 18.

[103] *Ibid.*, para 38, p. 22.

the gravity of the offence, consistently affirming the value-laden essence of cultural heritage – a quality that amplifies the harm caused to unique symbols, deeply rooted in Malian history and inherently transcending national boundaries to the detriment of humanity as a whole.

The legal reasoning underlying the *Al Mahdi* judgment affirms and elevates the recognition of cultural heritage as part of humanity's shared legacy, deserving autonomous protection under international criminal law[104]. While the case was expected to pave the way for a coherent and sustained jurisprudential trajectory in this field, such a development has, despite initial optimism, yet to materialise.

One unresolved issue concerns the protection of religious or cultural buildings not designated as UNESCO World Heritage Sites, unlike the mausoleums of Timbuktu[105]. This question especially arose in the *Ntaganda* case[106], where the defendant, a militia leader, was convicted of multiple war crimes and crimes against humanity for his role in military operations in the Ituri district of the Democratic Republic of Congo during the early 2000s – a conflict the Court classified as non-international in nature[107]. Among the charges, Mr Ntganda was accused of the war crime of intentionally directing attacks against protected objects under Article 8(2)(e)(iv) of the Statute, particularly for the pillage of a hospital in Mongbwalu and the attack on a church and a health centre in Sayo[108].

Notwithstanding the Prosecutor's legal characterisation, the Trial Chamber significantly narrowed the defendant's criminal liability. It excluded the Mongbwalu incidents and the church attack from the scope of Article 8(2)(e)(iv), based on a restrictive interpretation of the notion of "attack"[109]. The Chamber held that, since the term is not defined in either the Rome Statute and the Elements of Crimes, it must be construed in accordance with Article 49 of Additional Protocol I of the 1949 Geneva Convention as referring to «acts of violence against the adversary, whether in offence or defence». It thus applied the definition developed in relation to Article 8(2)(e)(i), concerning attacks against civilians, where protection does not depend on a "special status". In contrast, it suggested that only objects holding such a special status might fall under alternative IHL provisions that extend safeguards beyond the conduct-of-hostilities framework[110].

The Prosecutor challenged this interpretation on appeal, arguing that Article 8(2)(e)(iv) embodies a "special" and broader concept of attack, independent from the traditional notion tied to hostilities, given the unique cultural value of the protected objects[111]. Once again, it is the object's symbolic and value-laden nature – its inherent "culturality" – that determines the scope of protection and informs the applicable legal regime[112].

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[104] See K. WIERCZYŃSKA ET AL., *The Al Mahdi Case: From Punishing Perpetrators to Repairing Cultural Heritage Harm*, *supra*, p. 133.
[105] E. A O'CONNELL, *Criminal Liability for the Destruction of Cultural Property*: The Prosecutor v. Bosco Ntaganda, in *DePaul Journal for Social Justice*, 15, 2022, p. 36 (available at https://via.library.depaul.edu/jsj/vol15/iss1/3, accessed 19 May 2025).
[106] *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Trial Chamber VI, Judgment, 8 July 2019; *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06 A A2, Appeals Chamber, Judgment, 30 March 2021.
[107] *Ntaganda*, Judgment, ICC-01/04-02/06, 8 July 2019, paras 321-323, 726-730.
[108] *Ntaganda*, Prosecution Closing Brief, para. 802.
[109] *Ntaganda*, Judgment, paras 761, 1137-1148.
[110] *Ibid*., para 1136, 502, note 3147.
[111] *Ntaganda*, Prosecutor's Appeal Brief.
[112] *Supra* section 2.

To clarify the interpretative uncertainty, and pursuant to Rule 103 of the Rules of Procedure and Evidence[113], the Appeals Chamber invited observations from *amici curiae*, including legal scholars and expert associations[114]. The views presented diverged significantly: some advocated for a uniform construction of "attack" across IHL war crimes, while others supported the Prosecutor's argument that cultural property warrants a broader, context-sensitive interpretation[115]. Ultimately, the Appeals Chamber – by majority – rejected the appeal, endorsing the narrow reading of "attack"[116]. However, Judge Ibáñez Carranza delivered a dissenting opinion, finding the majority's reasoning incompatible with the object and purpose of Article 8(2)(e)(iv), which is intended to valorise a specific guarantee[117].

The inability to reach a unified interpretation and the depth of the disagreement underscore the complexity and multifaceted nature of cultural heritage crimes. A particularly troubling aspect of the majority's reasoning lies in its failure to recognise the autonomous status of cultural property. By deferring to general doctrines and omitting engagement with the broader system of cultural protection under IHL – including the 1899/1907 Hague Regulations and the 1954 Hague Convention – it marks a departure from the approach adopted in *Al Mahdi*. Equally problematic is the implication that an object's "special status" may determine the level of protection granted under Article 8(2)(e)(iv), in the absence of any defined criteria. Such ambiguity risks generating arbitrary disparities and may compromise the safeguarding of culturally significant, yet less formally recognised, sites.

The more recent *Al Hassan* case – arising from the same events in Mali as *Al Mahdi*– could have served as a pivotal moment for doctrinal clarification; instead, it proved a missed occasion. The Court, in a judgment spanning over 822 pages, hastily dismissed the analysis of the applicable legal framework for the charge under Article 8(2)(e)(iv) of the Statute, on the grounds that the Prosecution had apparently failed to meet the evidentiary threshold required to establish a sufficient link between the defendant's conduct and the destruction of the Timbuktu mausoleums[118]. *Verbatim*: «the Chamber will not set out the applicable law

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113 ICC Rules of Procedure and Evidence, Rule 103: «1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate. 2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1. 3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations».

114 *Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06-2569, Trial Chamber VI, Decision on the Requests for Leave to File Observations Pursuant to Rule 103, 24 August 2020.

115 For relevant *amicus curiae* submissions pursuant to Rule 103 in *Ntaganda*, see: Professor M. A. NEWTON, https://www.legal-tools.org/doc/qkqjk3/; Professor R. O'KEEFE, https://www.legal-tools.org/doc/w99h9o/; ALMA – Association for the Promotion of IHL, https://www.legal-tools.org/doc/1wdt2r/; Professor CORN ET AL., https://www.legal-tools.org/doc/67wjw8/; P. LEVINA, K. VAID, https://www.legal-tools.org/doc/8713uj/; Dr JACHEC-NEALE, https://www.legal-tools.org/doc/xhkako/; Peta-Louise Bagott, https://www.legal-tools.org/doc/e2cpwo/; Public International Law & Policy Group, https://www.legal-tools.org/doc/apcpld/; ANTIQUITIES COALITION, BLUE SHIELD INTERNATIONAL AND GENOCIDE WATCH, https://www.legal-tools.org/doc/79p5u9/; Professor HEYNS ET AL., https://www.legal-tools.org/doc/d355i9/; CLANCY and Dr KEARNEY, Corrected Version, ICC-01/04-02/06-2592, https://www.legal-tools.org/doc/khz0ez/.

116 *Ntaganda*, ICC-01/04-02/06 A A2, *supra*, paras 1163-1164.

117 *Ibid.*, paras 1165-1167.

118 *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Trial Chamber X, Judgment, 26 June 2024.

for the war crime of attacking protected objects»[119]. In light of the overall depth of legal reasoning throughout the decision regarding the other charges – further enriched by separate and partly dissenting opinions – this disengagement from further analysis of the substantive legal framework is particularly striking.

In this regard, the publication of the Policy on Cultural Heritage by the ICC Office of the Prosecutor in 2021 should be positively welcomed as a significant step towards addressing cultural heritage crimes from both an investigative and prosecutorial perspective[120]. Notably, the document deliberately adopts the term «cultural heritage», as it «properly reflects the rich corpus of human achievement that the Statute and international law seek to protect», thereby endorsing a broader and more inclusive understanding of the concept, as expressed in *Al Mahdi*. The policy – distancing itself from the findings in the *Ntaganda* case – also aknowldges the distinctive nature of the crimes under Articles 8(2)(b)(ix) and 8(2)(e)(iv), «reflecting the recognition that cultural property has significance additional to other civilian objects». In delineating their scope of application, it expressly refers to jurisprudence of the ICTY and to the principal IHL provisions on cultural heritahe protection, including the 1954 Hague Convention[121].

Taken together, the evolution of international legal practice signals the growing recognition of cultural heritage as a matter of international criminal concern. While significant advances have been made in codifying and enforcing legal norms protecting cultural property, the persisting fragmentation of judicial responses reveals the need for a more systematic and principled development of case law, capable of effectively translating rhetorical commitments into robust legal standards. Otherwise, the advancement in criminal protective mechanisms – represented by the introduction of cultural heritage crimes as an autonomous category within the catalogue of war crimes – risks remaining largely theoretical, as heritage offences are, in practice, absorbed into the evidentiary or constituent elements of other international crimes, and thus only indirectly prosecuted.

6. *Conclusion*

The protection of cultural heritage in armed conflicts has become a central concern for the international legal community. Significant advances have been made in codifying protections and mechanisms of accountability, which primarily rely on domestic criminal systems, as mandated by international humanitarian law, and, subsidiarily, on direct international enforcement through the International Criminal Court. However, obstacles to concrete protection remain. While legal frameworks increasingly recognise cultural heritage as a universal interest with intergenerational value, intrinsically linked to fundamental human rights, the effectiveness of its protection is undermined by definitional ambiguities and limitations in implementation – protection, in particular, being rarefied in the case of intangible heritage. On the other hand, empirical reality demonstrates that even where the existing protective mechanisms *could* be applied to address ongoing destruction, their ultimate activation depends on consensus and cooperation among States. The massive impoverishment of cultural heritage in territories afflicted by active military hostilities, such

[119] *Ibid*., para 1181, p. 580.
[120] Policy on Cultural Heritage, (n. 88) paras 42-47.
[121] *Ibid*., paras 42-47.

as Ukraine and Palestine, once again exposes the structural weakness of the international legal framework in the absence of concrete political will to engage existing norms to ensure accountability[122].

When it comes to warranting respect for fundamental human rights – including cultural rights – international law reveals its fragility. From this perspective, the irreducible minimum owed to society is the removal of ambiguities from regulatory frameworks. In this sense, the construction of a coherent international legal system for the protection of cultural heritage remains a distant objective, necessarily beginning with the clarification of the conceptual foundations of the subject matter – a crucial step within the criminal law paradigm.

In any case, in the field of cultural heritage, preventive peacetime measures remain paramount: the irreversible nature of cultural destruction renders punitive, *post-facto* legal responses alone insufficient. Moreover, not every act against cultural heritage – in its broader meaning – can, or should, be incorporated into criminal law provisions. A pan-criminalisation approach hardly resolves underlying issues and indeed poses a perilous risk to individual fundamental rights, especially in light of the general principles of penal law. It is also necessary to consider the tensions arising from the introduction of international duties to criminalise in relation to State sovereignty – a principle that should be preserved not out of anachronistic nationalism, but insofar as it guarantees substantive democratic engagement in the decisions of criminalisation.

[122] See J. POWDERLY, A. STRECKER, *Afterword: Heritage Destruction and the War on Ukraine*, in *Heritage Destruction, Human Rights and International Law*, Leiden, Boston, 2023, pp. 423-454.