

International Law and Intentional Destruction of Cultural Heritage

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Abstract The international legal protection of CH in armed conflict is based on a variety of treaties complementing and mutually supporting each other. Its fundamental principles are firmly anchored in customary international law, promote harmonization of the domestic legal systems and are judicially enforceable. Intangible Cultural Heritage, however, is not included in the comprehensive system of protection of movable and immovable cultural property. In order to see the system in its whole and to make it effectively applied and enforced it is necessary to strengthen the relationship between the protection of cultural property and the protection of civilians in the law of armed conflict.

Summary 1 Cultural Property and Cultural Heritage in International Law. – 2 Protection Afforded by International Law in Armed Conflict. – 3 Patterns of Destruction of Cultural Property and CH in Recent Conflicts. – 4 Judicial Enforcement of Protection. – 5 Strengths and Weaknesses of the International Protection.

Keywords Destruction. Cultural. Heritage.

1 Cultural Property and Cultural Heritage in International Law

While the concepts of cultural property and CH are strictly connected, their relationship in international law is far from being settled (Blake 2000, 62-65). Indeed the 1954 Hague Convention at art. 1 defines cultural property as “*movable or immovable property of great importance to the CH of every people*” (emphasis added). This includes monuments of architecture, art or history; archaeological sites; groups of buildings of historical or artistic interest; works of art, manuscripts, books; buildings dedicated to preserve or exhibit the movable cultural property as well as centres containing monuments. The 1970 UNESCO Convention at art. 2 in turn recognizes that “the illicit import, export and transfer of ownership of *cultural property* is one of the main causes of the *impoverishment of the cultural heritage* of the countries of origin of such property” (emphasis added). Accordingly, the category of CH is broader than, and contains that of cultural property (Frigo 2004, 369). Both the above mentioned conventions define cultural property to a greater or lesser degree in their

respective field of application; neither of the two, however, gives a definition of CH.

The category of CH has acquired autonomy through the 1972 UNESCO Convention focusing on the 'outstanding universal value' of monuments, buildings or sites from the historical, artistic or anthropological point of view (art. 1). Thereby CH is characterized by universality and exceptional importance in terms of history. This aspect, however, has been recently redefined in the light of the significance of heritage for the contemporary generation, as "an evolutionary notion, possessing a multifaceted construct" (Loulanski 2006, 208). Eventually, the 2003 UNESCO Convention has clarified that CH embraces immaterial elements such as "the practices, representations, expressions, knowledge, skills - as well as the instruments, objects, artefacts and cultural spaces associated therewith" of communities, groups and, in some cases, individuals, thereby distinguishing the concept from the mere tangible property (art. 2(1)). According to this Convention CH does not need to be of 'outstanding universal value'; instead it 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" (art. 2(1)). The 2003 UNESCO Convention gives consideration solely to such intangible CH as is compatible with existing international human rights law, as well as with mutual respect among communities, groups and individuals, and sustainable development. Therefore "the issue of preserving CH is linked to cultural rights as a form of human rights" (Logan 2007, 38) insofar as "cultural property may be seen as an essential dimension of human rights, when it reflects the spiritual, religious and cultural specificity of minorities and groups" (Francioni 2011, 10).

An in-depth analysis of the concepts of cultural property and CH in international law would go beyond the scope of the present contribution, which aims to focus on the protection provided by international law against the intentional destruction of CH in armed conflict. For this purpose, the notion of CH essentially refers (although is not limited) to movable and immovable cultural property of greater importance, which is protected by a number of treaties as well as by customary international law.

2 Protection Afforded by International Law in Armed Conflict

Some type of cultural property has been protected from the evils of war since the end of the nineteenth century. Art. 27 of the 1907 Hague Regulations, which are applicable in international armed conflict, provides that "[i]n 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).¹ This provision complements art. 23(g) prohibiting destruction of enemy’s property unless “imperatively demanded by the necessities of war”. It constitutes an obligation of means (“*all necessary steps*”) making the protection of cultural property dependent on whether such property is used for military purposes and subjecting it to military operational requirements (“*as far as possible*”). Art. 56 of the above Regulations further protects “institutions dedicated to religion, charity and education, the arts and sciences” as well as “historic monuments, works of art and science” by forbidding their destruction or wilful damage in occupied territories. It is undisputed that the 1907 Hague Regulations have acquired the status of customary international law (Dinstein 2010, 15).

The 1954 Hague Convention provides for a twofold obligation *to safeguard* and *to respect* cultural property (art. 2). *Safeguarding* entails measures to be made by states parties in time of peace for the protection of cultural property situated within their own territory against the foreseeable effects of an armed conflict (art. 3). *Respecting* in turn involves a two-pronged obligation (art. 4(1)) *i.e.* “refraining from any use of the property [...] for purposes which are likely to expose it to destruction or damage in the event or armed conflict” and “refraining from any act of hostility, directed against such property”. This applies to cultural property situated within a State’s own territory as well as within the territory of other States parties to the Convention, without requiring reciprocity. It includes the prohibition of theft, pillage or misappropriation of cultural property. Requisitions of movable cultural property and reprisals against cultural property are also prohibited (art. 4(3)(4)).²

While the 1954 Hague Convention as a whole applies in international armed conflict and occupation of territory, its provisions relating to respect of cultural property also apply in non-international armed conflict binding on all parties to the conflict, *i.e.* on non-state actors as well (art. 19). Even if legally speaking such an extension marked a significant improvement in the protection of cultural property by international law, subsequent practice was not very encouraging. Moreover, a waiver of the obligation to respect is granted by art. 4(2) when “military necessity *imperatively* requires such a waiver” (emphasis added). Although this exemption appears substantially more restrictive than the “as far as possible” condition of the 1907 Hague Regulations, it still allows belligerents a wide margin

1 Art. 5 of the Convention (IX) Concerning Bombardment by Naval Forces in time of War of 18 October 1907 contains similar language.

2 In order to facilitate its recognition cultural property may bear a distinctive emblem (1954 Hague Convention arts. 6, 16(1) and 17(1)).

of discretion and for this reason it has been widely criticized by legal commentators (Venturini 2010, 55 and literature cited in note 38). A further flaw of the 1954 Hague Convention is the assumption that the traditional (but rarely used) system of the Protecting Powers would be adequate to ensure its implementation in armed conflict (art. 21).

The 1954 Hague Convention (arts. 8 and 9) also establishes a system for ensuring immunity from acts of hostility and from military uses to refuges sheltering movable cultural property and to centres containing “monuments and other immovable cultural property of very great importance”. But even there a derogation is provided for in “exceptional cases of unavoidable military necessity” and for such time as that necessity continues (art. 11(2)). As a result, military necessity constitutes a significant limiting factor on the effectiveness of the protection of cultural property in armed conflict (Toman 1996, 77-81, 144-148; O’Keefe 2006, 126-131, 158-161; Zagato 2007, 73-83; Forrest 2010, 76-78 and 114-115).

Besides the Hague Convention the more recent and relevant treaties dealing with protection of cultural property and CH in armed conflict are the two 1977 Additional Protocols to the 1949 Geneva Conventions and the 1999 Hague Protocol. AP I is applicable to international armed conflict (art. 1(3)); AP II applies to non-international armed conflict (art. 1(1)), while the 1999 Hague Protocol applies to both international and non-international armed conflict (arts. 3(1) and 22(1)).

The 1977 Additional Protocols prohibit any acts of hostility directed against the historic monuments, works of art or places of worship constituting the cultural or spiritual heritage of peoples and to use such objects in support of the military effort; AP I also prohibits reprisals against such objects (art. 53 AP I; art. 16 AP II). Interestingly a new criterion of ‘spirituality’ is introduced which would normally apply to places of worship, however it does not appear to create a new category of cultural objects (Sandoz, Swinarski, Zimmermann 1987, 646 and 1469-1479; O’Keefe 2006, 209-217).

The 1977 Additional Protocols do not expressly state which are the consequences of using cultural property in support of the military effort. Although the prevailing view considers that any use of a civilian object for military purposes would have the effect of turning it into a military objective, there are situations where the special importance of cultural or spiritual heritage recommends respect notwithstanding their use for military purposes. For example, Dinstein recalls that in 2002 the Israeli armed forces refrained from storming the Church of the Nativity in Bethlehem that had been taken over by a group of Palestinian combatants (2010, 183-184). Neither do the relevant provisions of the 1977 Additional Protocols make reference to military necessity. They are nevertheless without prejudice to the provisions of the 1954 Hague Convention; therefore, one can infer that the justification of imperative military necessity is actually still

valid (O’Keefe 2006, 251-252; Forrest 2010, 108-110). This is confirmed by the fact that the 1999 Hague Protocol retains the waiver, although subject by art. 6 to further restrictive conditions: *imperative* military necessity may only be invoked to direct an act of hostility against cultural property when and for as long as it has, by its function, been made into a military objective and there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective; a waiver may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage; the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise; in case of an attack an effective advance warning shall be given whenever circumstances permit (Gioia 2001, 35-36; O’Keefe 2006, 251-254; Toman 2009, 112-120; Chamberlain 2010, 45-49).

The updating of the 1954 Hague Convention by the 1999 Hague Protocol also led to the stipulation of rules on precautions in attack and precautions against the effects of hostilities (arts. 7 and 8) corresponding to those that are found in AP I. Further developments reflected in the 1999 Hague Protocol include a new regime of enhanced protection of cultural property of the greatest importance for humanity (arts. 10-12), the prosecution of serious violations entailing individual criminal responsibility (arts. 15-19) as well as an institutional machinery (arts. 24-28). Monitoring procedures (arts. 34 to 36), however, were not adequately reinforced.

Beyond treaty law, customary international law also plays a role in the protection of cultural property and CH in armed conflict. Probably the most credible attempt to codify the core provisions on protection of cultural property applicable in international and non-international armed conflict has been made by the ICRC in its *Customary international humanitarian law* (Henckaerts, Doswald-Beck 2005). According to Rules 38 to 40 of the study two different categories of cultural property are subject to different kinds of protection. Buildings dedicated to religion, art, science, education or charitable purposes and historic monuments deserve special care in order to avoid damage, unless they are military objectives; seizure, destruction or wilful damage is prohibited. Property of great importance to the CH of every people must not be attacked unless imperatively required by military necessity and must not be used in such a way to expose it to destruction or damage unless imperatively required by military necessity; theft, pillage or misappropriation is prohibited.³ This blending of the 1907

3 https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule38 (2017-12-15).

Hague Regulations and the 1954 Hague Convention clearly acknowledges the needs of military operations and the role of military necessity as limitative elements restricting the protection of cultural property in armed conflict; in that regard, however, it has been argued that the distinction between the two categories of cultural property finds no support in the existing law (O'Keefe 2006, 212).

3 Patterns of Destruction of Cultural Property and CH in Recent Conflicts

In spite of the elaborate legal structure that has been developed by international treaties and customary international law regarding protection of cultural property and CH, intentional destruction has been increasingly frequent in contemporary armed conflicts, depending on either use of cultural property for military purposes, or collateral damage resulting from attack against military objectives, direct targeting (often aimed at 'cultural cleansing') or looting, theft and pilferage for the purposes of illegal trade in cultural objects. Last, but not least, destruction of cultural property and CH not only affects material aspects; it also takes place by depriving individuals and communities of the possibility of maintaining their cultural identity. Today millions of people are internally or internationally displaced by armed conflict worldwide and for most of them displacement involves the loss of their CH.

Museums are especially vulnerable. Looting, theft and pilferage during armed conflict are attributable not only to vandals, but also (and often mainly) to professional thieves in the pay of antique dealers whereas the local government or the occupying power fail to ensure adequate protection. To give but a few examples, before the Nigerian civil war the National Museum Oron, an institution belonging to the Nigerian federal government, hosted the largest single collection of Ekpu ancestral figures. During the conflict between 1967 and 1970 these wooden carvings suffered looting, theft and pilferage, mutilations and destruction notwithstanding Nigeria being party to the 1954 Hague Convention since 1961. At the end of the conflict only a little more than a hundred of the previously over 800 Ekpu statuettes displayed in the museum were recovered (Kasai Kingi 2010, 12-13). In Afghanistan during military operations conducted by the Pakistan Armed Forces against the Taliban since 2007, a number of suicide attacks and bombings badly damaged the Swat Museum in the Swat Valley housing artefacts and other relics representing the CH of the millennial age-old Gandhara civilization (Khan 2010, 16-17). While Afghanistan is not a party to 1954 Hague Convention, Pakistan ratified it as early as March 1959. In April 2003, the National Archaeological Museum and the National

Library in Baghdad were seriously damaged and looted when the 'Coalition of the Willing' captured and occupied the city (O'Keefe 2006, 330; Paul, Nahory 2007, 14-15; Forrest 2010, 61-63; Toman 2009, 460-461). At that time neither the USA nor the UK were parties to the 1954 Hague Convention, while Iraq had ratified it as early as 1967 (the United States subsequently became a party in 2009). In February 2015, the fighters of the so-called Islamic State destroyed ancient statues and artefacts of the Mosul Museum causing an outcry among the international community.⁴ Syria, where destruction occurred, has been a party to the 1954 Hague Convention since 1958.

Further categories of cultural establishments that suffered gravely in recent conflicts are religious and educational institutions as well as monuments and historical architectures. From 1991 until 1995 the conflict in the Former Yugoslavia⁵ caused widespread destruction of and damage to mosques, catholic churches, synagogues and educational institutions that were systematically destroyed because of their religious significance to the ethnicities targeted. Historic buildings and monuments also paid a heavy price, the most infamous of cases being the bombardment of the Old Town of Dubrovnik in 1991 and the destruction of the sixteenth century stone bridge in Mostar in 1993 (M'Baye 1994, 4-8; O'Keefe 2006, 183-184; Forrest 2010, 57-58). In 2003 military operations of the 'Coalition of the Willing' in Iraq have seriously damaged historic sites, mosques, landmark buildings and old city neighbourhoods (Paul, Nahory 2007, 16). In such cases the destruction of CH may either be referred to as collateral damage resulting from an attack against military objectives, or the consequence of direct targeting. In the first hypothesis there is no unlawful destruction if the required precautions in attack were taken, while in the second case attack is permitted only if cultural property is used for military purposes. For example, during April and May 1999 a number of historic buildings in the centre of Belgrade hosting the General Staff of the Armed Forces and the Ministry of Defence were bombed as legitimate targets or damaged by the collapse of adjacent buildings, detonations and shock waves (Radin 2010, 1).

Occasionally the balance between protection of CH and military necessity is in favour of the former: during the 1990-1991 Persian Gulf War, the

4 <http://whc.unesco.org/en/news/1239/> (2017-12-15).

5 The 1954 Hague Convention had been binding on the Socialist Federal Republic of Yugoslavia as a state party since 1956, and continued to apply to Croatia and Bosnia and Herzegovina after their independence following their deposit of declarations of succession (cf. ICTY Case No.IT-95-14/2-T, Prosecutor v. Kordić and Čerkez, Trial Judgement of 26 February 2001, para. 359). On 22 May 1992, an Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina was concluded providing that hostilities would be conducted in accordance with art. 53 of AP I (para. 2(5)): https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule38 (2017-12-15). Needless to say, the Agreement was massively violated along the entire conflict.

Coalition air forces did not attack two Iraqi fighter aircraft placed out of action adjacent to the temple of Ur because of the limited value of their destruction when weighed against the risk of damage to the temple (Department of Defense, U.S. Military 1992, 615). In other cases, the recklessness of the armed forces led to the irreparable loss of priceless relics of the past. From 2003 to 2005 US and Polish troops camped on a military base built within the site of ancient Babylon. The construction of trenches and military fortification severely damaged the archaeological material from the site, including shards, bones, and ancient bricks (Paul, Nahory 2007, 17-18; Forrest 2010, 82). Not long after, in late 2007 history repeated itself in Colombia where a company of a national army battalion fighting to recover territory from irregular forces camped within the grounds of the Ciudad Perdida Park (Sierra Nevada) for more than two years. The reckless use of the area generated soil displacement, erosion and movement of the structural elements of the fragile archaeological remains representative of the ancient Tairona culture (Bateman Vargas 2010, 6-7). Colombia has been a party of the 1954 Hague Convention since 1998; it has subsequently ratified the 1999 Hague Protocol in 2010.

More recently the world has been very deeply shocked by the destruction of Syria's CH. During the ongoing conflict the 2,000-year-old fortified city of Hatra, the archaeological site of Nimrud and major CH landmarks in Palmyra have been systematically targeted by the Islamic State in furtherance of a plan of 'cultural cleansing' but also with the practical purpose of supporting its recruitment efforts and strengthening its operational capability by the illicit traffic of cultural items.⁶

These appalling events, among many others, demonstrate that intentional destruction of CH in armed conflict occurs irrespective of the nature of the conflict, be it an international armed conflict or a non-international one. On the one hand, the legal instruments to which the parties to a conflict are bound are often and widely neglected by both state armed forces and non-state armed groups. On the other hand, because of its vagueness, customary international law does not seem adequate to mitigate, let alone to prevent, the gravest consequences of armed conflict on cultural property and CH.

4 Judicial Enforcement of Protection

The unlawful destruction of cultural property and CH in recent conflicts has raised the issue of responsibility and liability for damage. The 2003 UNESCO Declaration at art. VI echoed customary international law by

⁶ <http://www.un.org/press/en/2015/sc11804.doc.htm> (2017-12-15).

saying that “A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law”.⁷ An example of international responsibility for destruction of CH is shown by the case of the Stela of Matara (a monument of great historical and cultural significance for the Eritrean people) that was wrecked by an explosion on 30 May 2000 during the war between Eritrea and Ethiopia, in an area controlled by Ethiopian armed forces which had established a camp close to the obelisk. In 2004 the Eritrea-Ethiopia Claims Commission concluded that “Ethiopia as the Occupying power in the Matara area [...] is responsible for the damage even though there is no evidence that the decision to explode the Stela was anything other than a decision by one or several soldiers”.⁸ The case-law on State responsibility is, however, limited.

Destruction of CH in armed conflict may also entail individual criminal responsibility. Art. 147 of the 1949 GC IV recognizes “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” as grave breaches of the Convention, and as such they have been incorporated into the ICTY Statute (art. 3(d)). According to the Rome Statute of the ICC “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes and historic monuments [...] provided they are not military objectives” is a crime in both international and non-international armed conflict (arts. 8(2)(b)(ix) and 8(2)(e)(iv)). In an effort to remain in strict compliance with customary international law neither statute explicitly refers to cultural property or CH. In this respect, it has been argued that this “dilutes the concept of cultural property as a distinct and autonomous type of civilian property” (Carcano 2013, 87). The 1999 Hague Protocol instead plainly sets out the principle *aut dedere aut judicare* persons alleged to have committed serious violations of the rules protecting cultural property (arts. 15-17). Lastly, under art. 7 of the law establishing the ECCC, the Chambers have jurisdiction to try those responsible for the destruction of cultural property during the period from 17 April 1975 to 6 January 1979.⁹

7 <http://unesdoc.unesco.org/images/0013/001331/133171e.pdf#page=68> (2017-12-15).

8 EECC Partial Award, Central Front - Eritrea's Claims 2, 4, 6, 7, 8 & 22, 28 April 2004, para. 112.

9 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

The jurisprudence of the ICTY has addressed and interpreted the fundamental tenets of individual criminal responsibility for the destruction of cultural property in several important cases (Abtahi 2001, 9-28; Carcano 2013, 81-86 and 91-94; Lenzerini 2013, 43-49).

In its judgment in the Blaškić case in 2000 (dealing mainly with destruction of institutions dedicated to religion) the ICTY TC held that “[t]he damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts”. In addition, the TC considered “the institutions must not have been in the immediate vicinity of military objectives”.¹⁰ This latter requirement was rejected, and rightly, by later judgments such as Naletilić and Martinović holding that the mere fact that an institution is in the “immediate vicinity of military objective” cannot justify its destruction.¹¹

In its 2004 judgment on the Kordić and Čerkez case the ICTY AC interpreted the category of “immovable objects of great importance to the CH of peoples” in the light of the ICRC Commentary on art. 53 AP I (Sandoz, Swinarski, Zimmermann 1987, 646 and 1469-1479) referring to the term “cultural or spiritual heritage” as covering objects “whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people”.¹² In the Brđanin case the Tribunal found that the deliberate destruction by the Bosnian Serbs of churches, mosques, and minarets had been carried out not because they contained any military threat but because of their religious significance to the Bosnian Croat and Bosnian Muslim ethnicities.¹³ Some judgments also found that discriminatory destruction of religious sites and cultural monuments may constitute persecution as a crime against humanity¹⁴ and may even be considered as evidence of an intent to commit genocide.¹⁵

The naval bombardment and shelling of Dubrovnik were considered in the Jokić and in the Strugar cases. Both accused, officers in the Yugoslav

URL https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (2017-12-15).

10 Blaškić Trial Judgment no. IT-95-14-T, 3 March 2000, para. 85.

11 Naletilić and Martinović Trial Judgment no. IT-98-34-T, 31 March 2003, paras. 303-304.

12 Kordić and Čerkez Appeal Judgment no. IT-95-14/2-A, 17 December 2004, para. 90.

13 Brđanin Trial Judgment no. IT-99-36-T, 1 September 2004, paras. 596-599 and Appeal Judgment no. IT-99-36-A, 3 April 2007 paras. 340-341.

14 Blaškić Trial Judgment no. IT-95-14-T, 3 March 2000, para. 227; Kordić and Čerkez Trial Judgment no. IT-95-14/2-T, 26 February 2001, paras. 206-207; Milutinović Trial Judgment no. IT-05-87-T, 26 February 2009, para. 205; Stanišić & Župljanin Trial Judgment no. IT-08-91-T, 27 March 2016, para. 88.

15 Krstić Trial Judgment no. IT-98-33-T, 2 August 2001, para. 580.

armed forces, were found guilty and sentenced for the wanton destruction and damage done to the historic buildings of the Old Town, a UNESCO World Cultural Heritage site pursuant to the 1972 UNESCO Convention.¹⁶

The first case in which war crimes against buildings dedicated to religion and historic monuments were the main accusation was recently decided by a TC of the ICC. Ahmad Al Mahdi Al Faqi, one of the leaders of the Islamic forces that had taken control of Timbuktu during the non-international armed conflict of 2012 in Mali, has been convicted of the war crime of attacking protected objects as a co-perpetrator under arts. 8(2)(e) (iv) and 25(3)(a) of the ICC Statute and sentenced to nine years of imprisonment.¹⁷ The Islamist leader had ordered and carried out the destruction of several buildings of a religious and historical character, known as the mausoleums of saints of Timbuktu. The Trial Chamber found that these structures were places of prayer and pilgrimage for the local inhabitants and as such they constituted a common heritage for the community; most of them were also included in the UNESCO WHL.¹⁸

Since the charges met squarely the requirements of art. 8(2)(e)(iv), the TC did not further elaborate on the character of this type of crime. Interestingly enough, while during the conflict the accused had justified the attacks as ways of eradicating superstition, heresy and practices leading to idolatry,¹⁹ after having been surrendered to the Court by the authorities of Niger on 26 September 2015 he made an admission of guilt before the TC, which considered the admission of guilt “to be genuine, led by the real desire to take responsibility for the acts he committed and showing honest repentance” and expressing “deep regret and great pain” for his acts.²⁰

Clearly the prosecution of crimes related to cultural property and CH is not the exclusive competence of the international criminal tribunals. According to art. VII of the 2003 UNESCO Declaration “States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not

¹⁶ Jokić Sentencing Judgment no. IT-01-42/1-S, 18 March 2004, paras. 42, 46-53; Strugar Appeal Judgment no. IT-01-42-A, 17 July 2008, para. 393.

¹⁷ The Prosecutor v. Ahmad Al Faqi Al Mahdi, no. ICC-01/12-01/15, TC VIII, Judgment and Sentence, 27 September 2016.

¹⁸ The Prosecutor v. Ahmad Al Faqi Al Mahdi, no. ICC-01/12-01/15, TC VIII, Judgment and Sentence, 27 September 2016, para. 34.

¹⁹ The Prosecutor v. Ahmad Al Faqi Al Mahdi, no. ICC-01/12-01/15, TC VIII, Judgment and Sentence, 27 September 2016, para. 38(viii).

²⁰ The Prosecutor v. Ahmad Al Faqi Al Mahdi, no. ICC-01/12-01/15, TC VIII, Judgment and Sentence, 27 September 2016, paras. 100 and 103.

it is inscribed on a list maintained by UNESCO or another international organization". Interestingly, in 2006 the Military Garrison Court of Ituri in the Democratic Republic of Congo directly (albeit in a perfunctory manner) applied art. 8(2)(b)(ix) of the Rome Statute pursuant to the Congo constitution which gives primacy of international treaties over domestic law (Trapani 2011, 51-55). In 2007 the Iraqi High Tribunal discussed more in depth the elements of the crime of intentionally directing attacks against religious or educational buildings, holding that their destruction or confiscation must be considered as premeditated if it was possible to clearly recognize their nature and provided that they were not used for military purposes or located in the vicinity of military targets (a revival of the restrictive interpretation of the ICTY Blaškić Trial judgment).²¹ Also in 2007 the Constitutional Court of Colombia held that the rules aimed at protecting cultural property are *lex specialis* in relation to the principles of distinction and precaution protecting the general category of civilian property.²²

It has to be noted that the *ad hoc* international criminal tribunals are set to complete their cases in the years ahead and the judicial enforcement of the international protection of cultural property and CH may not remain exclusively with the ICC. For this reason, the role of domestic jurisdictions is vital and it is likely to increase with time.

5 Strengths and Weaknesses of the International Protection

The international legal protection of cultural property and CH in armed conflict has a number of positive aspects. Firstly, it is based on a variety of treaties complementing and mutually supporting each other and its fundamental principles are firmly anchored in customary international law, binding on all States in the international community. Secondly, the relevant treaties commit States parties to implementing several provisions in time of peace in order to prepare for the eventuality of a conflict, thus increasing awareness of the need for protection and promoting harmonization of the domestic legal systems. Thirdly, the rules on protection are judicially enforceable and the decisions of international courts and tribunals as well as those of the domestic jurisdictions are playing and will continue to play

21 Iraqi High Tribunal, Special Verdict pertaining to case No 1/C Second/2006, Al Anfal, 8, 20, 35. URL http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Iraq/Anfal_verdict.pdf (2017-12-15).

22 Colombia, Constitutional Court, Constitutional Case -291/07, Judgment of 25 April 2007, 121: cf. ICRC Customary International Law, Practice Relating to Rule 38. Attacks against Cultural Property, para. 5. National Case-law https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule38 (2017-12-15).

an important role, substantially contributing to their interpretation and application.

Unfortunately, these strengths are balanced by some critical weaknesses. States' participation in the various treaties on the protection of cultural property and CH is far from universal and, even worse, the holdout States are the ones most often involved in armed conflicts. Customary international law is binding on all States but it is much less detailed than treaties and it notably does not include implementing rules or procedures. To a greater or smaller extent, both treaties and customary international law allow derogations in cases of military necessity, which hinders a full implementation of the protecting rules. Non-state armed groups are not parties to the treaties protecting cultural property and CH during armed conflict and they hardly share the values that have prompted the development of the international legal system of protection. As a consequence, it is difficult to maintain that the legal obligations concerning the protection of cultural property and CH in non-international armed conflict are equally binding on the parties to the conflict. And although the punishment of those responsible for the intentional destruction of protected assets satisfies the requirements of justice, criminal prosecution is in no way a substitute for substantive protection.

Last but not least, it should be noted that both existing treaties and customary international law on the protection of cultural property and CH during armed conflict focus on tangible goods. Therefore, intangible CH is not included in the comprehensive system that has been established for the protection of movable and immovable cultural property. However, international law on the protection of cultural property and CH in armed conflict must not be seen in isolation from the main body of international humanitarian law, which contains the fundamental rules on the protection of civilians - the ultimate owners of CH. These include, *inter alia*, the prohibition of forcible displacements and of unlawful deportations, contributing to preserve the link between individuals and groups and their CH. Strengthening the relationship between the protection of cultural property and the protection of civilians in IHL is thus the necessary prerequisite to see the system in its whole and to make it effectively applied and enforced.

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