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Protection of Cultural Heritage in International Criminal Law

Dissertation

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I hereby declare, that I worked out dissertation Protection of Cultural Heritage in International Criminal Law on my own and I referred to all used sources.

In Ostrava, 26 October 2021.

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Signature

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List of Abbreviations

ANSA – armed non-state actors

API - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

APII - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

BiH – Bosnia and Herzegovina

ICC – International Criminal Court

ICESCR - International Covenant on Economic, Social and Cultural Rights

ICL – International Criminal Law

ICRC – International Committee of the Red Cross

ICTY – International Criminal Tribunal for the former Yugoslavia

IHC - Convention for the Safeguarding of the Intangible Cultural Heritage

IHL – International Humanitarian Law

ILC – International Law Commission

ISIS – Islamic State of Iraq and Syria

UDHR - Universal Declaration of Human Rights

UN – United Nations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

UNESCO – United Nations Educational, Scientific and Cultural Organization

WWI – First World War

WWII – Second World War

1. Introduction

The aim of this thesis is to examine possible approaches towards protection of cultural heritage under International Criminal Law (ICL). Systematic and large scale destruction of cultural heritage related to armed conflicts in last decades has proven that the topic is current and requires attention. The destruction as result or side effect of armed conflict is not something new and has been already examined by many scholars. Nevertheless there is another emerging trend – destruction of cultural heritage not related to armed conflict. In such cases there are other reasons behind the attacks against cultural heritage – most notably ideological ones. Number of well media covered cases shocked international community and brought many new questions. The most current events are related to rule of so called Islamic State in Syria and Northern Iraq but as we shall present the matter is much older.

The thesis presents new trends in protection of cultural heritage and shows development and conceptual shift in the area. The attitude is based on traditional understanding of International Humanitarian Law (IHL) however later it evolves in order to cover new types of situations. The element that significantly changes whole matter is holistic approach towards cultural heritage understanding and inclusion of human rights protection. The topic then becomes more complex and related to other fields of International Law.

The question is how the ICL can handle this matter. Protection of cultural heritage is not primary purpose of the ICL but on the other hand number of decisions has proven that international tribunals and courts recognize the issue as something that matters. To acquire some idea how the matter is treated under ICL we shall examine relevant decisions of International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Court (ICC). We shall focus on two basic problems. The first one is related to nature of cultural heritage under the protection. Which types of cultural heritage are protected? To answer this question we shall introduce different methods of classification of cultural heritage based on several aspects. The second matter is closely related to the first one. How exactly can be destruction of cultural heritage treated under ICL? To answer this issue we shall examine three types of crimes under jurisdiction of both ICTY and ICC: war crimes, crimes against humanity and genocide. We realize that understanding of protection of cultural heritage as part of human rights protection brings significant changes and opportunities.

The thesis briefly introduces history and development of norms regulating cultural heritage protection during armed conflict and during peacetime alike. Additionally it

examines content of the terms cultural property and cultural heritage and their difference. This issue is related mostly to holistic approach to cultural heritage and human rights protection. The protection of human rights related to cultural heritage constitute another significant topic that is examined. However the most important section of the thesis is oriented to period that starts with conflict in Former Yugoslavia and continues until present days. The period brings the most significant development regarding the issue in ICL and human rights protection law.

Certain parts of the topic of this thesis are already well covered in existing research. This applies to protection of cultural property during armed conflict (authors like Toman and O'Keefe) and relevant case law of the ICTY and the ICC (famous cases like *Jokić* or *Al Mahdi*). The issue of cultural rights and their link to cultural heritage is new and still evolving and thus was not examined very comprehensively so far. The area has been extensively developed by the office of Special Rapporteur in the Field of Cultural Rights in recent years. The Rapporteur was focused, among other things, on link between cultural rights and cultural heritage. In several reports she also mentioned and briefly examined relationship between attacks against cultural heritage that constitute violation of cultural rights and ICL. For purposes of this topic she recalled *Al Mahdi* case on several occasions. However the area of cultural rights is still underdeveloped in general and mostly related to area of human rights protection. The content of the terms cultural property and cultural heritage and their differences was examined in several notable articles, the most importantly by Prott and O'Keefe but it has never been related to ICL. What makes the thesis different is unification of all those elements. There are not many publications that would cover influence of human rights based approach towards cultural heritage on prosecution of attacks against cultural heritage under the ICL. Unification of those elements brings new opportunities for both prosecution and protection.

Regarding sources of the thesis we have to mention several categories. Firstly international treaties and conventions that provide base for the research. Their interpretation is based on various commentaries. Later other relevant documents and decisions issued by international organisations and bodies such as UN, UNESCO and Special Rapporteur in the Field of Cultural Rights. For the ICL section of the thesis are the most significant sources decisions of the ICTY and the ICC in cases related to attacks against cultural heritage. Case law of the ICTY and the ICC was also commented by number of scholars in various articles and books.

The thesis outlines the issue of cultural heritage protection from two perspectives: IHL perspective and human rights protection based perspective. In order to present the first perspective it examines relevant IHL treaties and scope of term cultural property. For purposes of the second perspective the thesis examines several UNESCO Conventions, human rights treaties relevant for protection of cultural rights and term cultural heritage. It explains relationship between community or individuals and their cultural heritage. It also aims to present continual shift from IHL based protection towards human rights based protection. The shift is introduced more precisely in the ICL section. Different decisions of both the ICTY and the ICC are studied and elements important for both mentioned perspectives are selected, compared and discussed. The thesis presents that despite wording of relevant documents human element of cultural heritage is recognized by the ICTY and the ICC and protection of cultural heritage is often based on human rights protection. The idea is introduced on example of three different crimes under ICL – war crimes, crimes against humanity and genocide. In all three cases attacks against cultural heritage can be prosecuted while reflecting significance of targeted cultural heritage for community or individuals related to it.

The thesis is divided into four sections (chapters). The first section presents historical development of protection of cultural property during armed conflict and also efforts to protect cultural heritage mostly under governance of UNESCO. The second section introduces terms cultural property and cultural heritage, explains their differences and points out practical consequences of them. It also presents several ways how cultural heritage can be subdivided into different categories. The third section is human rights oriented and introduces link between cultural heritage and community or individuals. It explains concept of cultural genocide as created by Raphael Lemkin and also searches for this human element in various UNESCO conventions. Finally the idea is presented on several practical examples that are related to case law of the ICTY and the ICC. The last section is ICL oriented and examines prosecution of attacks against cultural heritage under war crimes, crimes against humanity and genocide. It shows some common elements and also stresses importance of type of targeted cultural heritage for prosecution. The first three sections serve as theoretical ground for the last section that introduces different options of prosecution depending on nature of attack and targeted object.

There is no need to mention that only examination and clarification of existing rules, principles and case law can ensure that future development in the field will be consistent and

well based. And this is aim of the thesis – not only introduce present approach towards cultural heritage protection under ICL but also understand *how* and *why* the relevant law is evolving. Trends that are currently emerging will play crucial role in future cases and proper knowledge of their roots is inevitable to address them. It is certain that future will bring more cases of cultural heritage destruction nevertheless if the law will be able to address them properly it could theoretically help to decrease their total number and serve as general prevention.

2. Development of Cultural Heritage Protection through History

2.1. Introduction

The aim of this chapter is to present continual development of understanding of objects of cultural value and their protection in human history. Starting from ancient times the chapter focuses on protection of cultural objects both during armed conflict and peacetime and examines different conventions and progress of protection.

Destruction of objects that we would describe nowadays as cultural property or cultural heritage is integral part of human history. However circumstances under which the destruction appears may vary significantly. The most obvious event when such actions against cultural heritage can happen is war. War always brings destruction and its impact on cultural heritage can have many different forms. Devastation of the objects can be direct result of fighting and military operations. Cultural heritage can be directly targeted or its destruction can be collateral damage. It can be also destroyed as victorious act of conqueror who aims to punish or humiliate defeated party. Another consequence of war that influences cultural heritage is right to booty of victor. There is a lot of examples of movable cultural heritage that travelled long way as spoils of war with victor who decided to move it to new location. Nevertheless the war is not the only event that results in horrifying consequences for cultural heritage.

When we examine history we realize that there is no need for war in order to cause systematic and large scale destruction of cultural heritage. Iconoclasm can be certainly viewed as kind of war as well with its systematic attacks against sites that do not meet religious conceptions of perpetrators. Very few people note that Europe is perfect example of this claim. How many temples or shrines of pre-Christian deities can we find around the continent? Not too many indeed, majority of them are transformed into churches or ruined. With some exceptions it is hard to believe that there even existed some pre-Christian religions in Europe. Traces of old religions remained preserved in intangible forms however their tangible expressions have been methodically erased.¹ Why does it matter? Because it illustrates how can be real impact of iconoclasm on our cultural heritage and expressions. The events that happened in Middle East region in last decade and brought doom of many iconic sites are not something new and unseen in fact, we just forget.

¹ RUSSELL, Gerard. *Heirs to Forgotten Kingdoms*. London: Simon & Schuster UK Ltd, 2015. Introduction.

While keeping this in mind we have to mention that there emerged opposite trend as early as in ancient times. The objects dedicated or related to deity or religion enjoyed special status and significantly higher level of protection (especially during armed conflict) comparing to ordinary property. As Toman² points out this phenomenon is not something geographically limited. We can find similar rules in all relevant cultures around the world starting from ancient Rome, through Islamic Law, medieval Japan or pre-colonial Africa. Such attitude can be justified by fact that objects of sacred nature were viewed as property or even shelter of god, the supernatural entity with unlimited power that should be treated with respect. In the same time the sacred property was often expression of artistic skills and objects of extraordinary beauty that were pride of city where it was located or even of whole culture. Thus, protection of shelter of supernatural entity resulted in protection of aesthetic values.

2.2. Cultural Heritage Destruction from Ancient Times to 19th century

Roman conquest of new territories was usually accompanied by massacres, destruction and pillage. The famous Cato's "*Ceterum autem censeo Carthaginem esse delendam*"³ expresses it clearly and later total destruction of Carthage at the end of Third Punic war in 146 BC only shows practical consequences of this attitude. Another well-known example of Roman's destructive approach towards objects of cultural value is destruction of Jerusalem Second Temple as retaliation for Jewish revolt in 70 AD. This example is interesting from one more reason: its artistic record remained preserved until these days on Arch of Titus in Rome. The structure was built in 81 AD by Emperor Domitian after death of his older brother Titus who defeated the Jewish rebellion and brought back to Rome huge spoils of war. Panels on the arch depict triumphal procession with items from the Second Temple including large menorah that later became symbol of Jewish diaspora.

Although it might look like Romans did not recognize different nature of sacred objects it is not true. Number of scholars opposed pointless destruction. We can observe Romans perception of sacred objects in *Verrines* – Cicero's speeches in case against Gaius Verres. Cicero makes clear distinction between ordinary war booty and religious images and

² TOMAN, Jiri. *Protection of Cultural Property in the Event of Armed Conflict*. New York: Routledge, 2016. pp. 5-6.

³ Furthermore, I consider that Carthage must be destroyed.

objects that should not be seized.⁴ As Miles stresses this idea became in 18th and 19th century important for development of concept of cultural property.⁵

Middle Ages did not bring any significant development in the field. Property was looted and destroyed during conflicts without any consideration. The Church tried to protect sacred places of worship at least at Synod of Charroux (989)⁶ however the real consequences were minimal.

The first significant attempts to protect objects of cultural value, the most importantly works of art, appeared with emerging Renaissance. The idea of humanism and interest in ancient history and its remains formed opinions that cultural property should be treated differently during armed conflict. Opinions of Hugo Grotius, the father of international law, were largely influenced by Thirty Years War and massive destruction that it brought to Europe. He based his attitude on traditional approach: "*It is permitted to harm an enemy both in his person and in his property...*"⁷ Later he continues: "... *the law of nation itself does not exempt things that are sacred, that is, things dedicated to God or to the gods.*"⁸ However in case when churches do not impose threat to belligerent party they should be spared.⁹ Same applies to memorials that should be spared from destruction or damage.¹⁰

Emmerich de Vattel is more specific in this question:

For, whatever cause a country is ravaged, we ought to spare those edifices which do honour to human society, and do not contribute to increase the enemy's strength, - such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste...¹¹

However he continues:

⁴ MILES, Margaret, M. Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art. *International Journal of Cultural Property*, 2002, Vol. 11, No. 1, pp. 28-49.

⁵ Ibid.

⁶ TOMAN: *Protection of Cultural Property...*, p. 4.

⁷ GROTIUS, Hugo. *De Jure Belli Ac Pacis Libri Treos*. Oxford: Clarendon Press, 1925. Book III, pp. 646-647 (III/IV/III).

⁸ Ibid. p. 658 (III/V(II/1)).

⁹ Ibid. III/XII/VI

¹⁰ Ibid. III/XII/VII

¹¹ VATTEL, Emmerich de. *Law of Nations or the Principles of Natural Law*. Philadelphia: T. & J. W. Johnson, Law Booksellers, 1839. pp. 367-368.

Nevertheless, if we find it necessary to destroy edifices of that nature, in order to carry on the operations of war, or to advance the works in a siege, we have an undoubted right to take such a step. The sovereign of the country, or his general, makes no scruple to destroy them, when necessity or the maxims of war require it.¹²

Vattel introduces here principle of military necessity: certain types of property shall be spared as long as military necessity does not require opposite. Another important point is that he justifies special treatment of some types of objects not because of their spiritual or religious nature but aesthetic value. It is protection of beautiful objects that do honour human society.

O'Keefe notes that 19th century is the period that brings real systematic development of rules concerning cultural property protection and restitution.¹³ He points out that the development is related to French Revolution and consequent Napoleonic Wars that marked turning point in both domestic and international protection of monuments and works of art. To protect national monuments of France from consequences of the revolution Commission on Monuments was established in 1790. At the international level the issue of cultural property became important with Napoleon's military victories. Large collections of artworks from defeated enemies were moved to France.¹⁴

One of the most famous cases that well illustrates fate of cultural objects during armed conflict is related to Horses of Saint Mark.¹⁵ Byzantine bronze statues of four horses from classical period were originally located in Hippodrome of Constantinople. They were looted by Venetians when plundering the city during Fourth Crusade in 1204 and transported to Venice. There they were installed on terrace of facade of Basilica di San Marco where they remained until 1797. When forces of Napoleon took the city he ordered to send the statues to Paris where they were later located on Arc de Triomphe du Carrousel. However in 1815 after final defeat of Napoleon the horses were returned to Venice together with many other works of art taken during previous conquest. This story does not show only happy ending but marks

¹² Ibid.

¹³ O'KEEFE, Roger. *The Protection of Cultural Property in Armed Conflict*. Cambridge: Cambridge University Press, 2010. p. 13.

¹⁴ Ibid. p. 15.

¹⁵ Basilica di San Marco. *The Quadriga of St. Mark's* (online). Basilica di San Marco, visited 22 February 2021. Available: <<http://www.basilicasanmarco.it/basilica/scultura/la-decorazione-delle-facciate/quadriga-marciana/?lang=en>>.

significant turn in international law. The return of stolen artworks was promoted by Duke of Wellington himself who viewed Napoleon's looting as violation of laws of modern war.¹⁶

2.3. Protection of Cultural Property during Armed Conflict in 19th Century

2.3.1. The Lieber Instructions

The document known as Lieber Instructions after its author Francis Lieber, professor of Columbia University, is considered as first attempt to comprehensively outline rules governing armed conflict. The document also deeply influenced future efforts to codify laws of armed conflict. The 1863 instructions for the government of armies of the United States of America in the field created during American Civil War address number of different topics including cultural property.

First of all the Instructions distinguishes public and private property. Victorious army has right to appropriate public money and other public property¹⁷ however Article 34 establishes set of exceptions:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character -- such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.¹⁸

This is followed by provisions of Article 35 that establishes protection of cultural property:

Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.¹⁹

The two trends: protection of private property (and even some public property that should be treated as private) and recognition of special status of certain property as cultural property are two elements that shaped current International Humanitarian Law. Protection of

¹⁶ HERMAN, Alexander. *Art restitution and the Duke of Wellington* (online). Institute of Art & Law, 24 July 2015, visited 22 February 2021. Available: <<https://ial.uk.com/art-restitution-and-the-duke-of-wellington/>>.

¹⁷ Instructions for the Government of Armies of the United States in the Field (Lieber Code). 1863. Art. 31.

¹⁸ Ibid. Art. 34.

¹⁹ Ibid. Art. 35.

private property is intrinsic part of protection of civilian population. Institutions such as schools, hospitals or museums are public property by their nature however they serve primarily to civilian population so they are protected equally to private property of civilians. The same applies to cultural property and as Vattel previously argued their destruction does not bring any advantage.²⁰ The Article 35 imposes duty to *secure* enumerated objects and institutions against all avoidable injury that applies to both parties to the conflict.

Another issue related to cultural property is questioned in Article 36. The Lieber Instructions do not abolish right to booty but there are certain limitations:

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace. In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.²¹

The Article explicitly forbids private appropriation and wanton destruction of mentioned property. That confirms attitude introduced in Articles 34 and 35 that recognize cultural property as category with higher level of protection since civilian population benefits from it. Importantly the Instructions also provide penal sanctions for violation of mentioned rules:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.²²

Another significant achievement of the Lieber Instructions is defining of military necessity in Article 14:

²⁰ VATTEL: *Law of Nations...*, p. 368.

²¹ Lieber Code. Art. 36.

²² Ibid. Art. 44.

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.²³

This provision links curiously with protection of cultural property. Military necessity allows destruction of property²⁴ however it does not provide any waiver of military necessity for the protection of cultural property. Thus as Ehlert argues cultural property is protected permanently even when military necessity requires destruction.²⁵

2.3.2 The Brussels Declaration

Henry Dunant, one of the founders of the International Red Cross was well aware of threats to cultural property during armed conflict. On his initiative international Brussels Conference was held in summer 1874. The Conference adopted project of international Declaration concerning the laws and customs of war. The Declaration was not ratified however deeply influenced future codifications in the field.

The Article 8 of the Declaration follows pattern established in the Lieber Instructions while distinguishing private and public property and stressing protection of cultural property:

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 or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.²⁶

In case of sieges and bombardments “*all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.*”²⁷ The Article 17 also imposes duty “*to indicate presence of such buildings distinctive and visible signs to be communicated to the enemy beforehand.*”²⁸ Unlike the Lieber Instructions the Declaration include waiver of military necessity for the protection of

²³ Ibid. Art. 14.

²⁴ Ibid. Art. 15.

²⁵ EHLERT, Caroline. *Prosecuting the destruction of cultural property in international criminal law*. Leiden: Brill - Nijhoff, 2014. p. 20.

²⁶ Project of an International Declaration concerning the Laws and Customs of War (Brussels Declaration). 1874. Art. 8.

²⁷ Ibid. Art. 17.

²⁸ Ibid.

cultural property however the general rule prohibits “*any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war.*”²⁹

2.3.3. The Oxford Manual of the Institute of International Law

The Laws and Customs of War on Land adopted at session in Oxford in 1880 is integral part of development of rules concerning protection of cultural property during the armed conflict. It almost word for word repeats relevant provisions of the Brussels Declaration. The most important element of cultural property protection is distinction between private and public property and prohibition of destruction or wilful damage of certain types of institutions and cultural objects.³⁰ The exception of military necessity is included.³¹ Finally there is also reference to punishments specified in penal law in case of violation of provided rules.³²

2.3.4. The International Peace Conferences in 1899 and 1907

The two international peace conferences held in 1899 and 1907 respectively established IHL as we know it nowadays. The most important outcomes of the conferences were Convention IV Respecting the Laws and Customs of War on Land and Convention IX Concerning Bombardment by Naval Forces in Time of War. As Toman points out protection of cultural property is covered by both provisions protecting property of civilians in general and special provisions concerning cultural property.³³

The Regulations of 1907 annexed to Convention No. IV contains two articles focused particularly on cultural property protection. The Article 27 states:

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.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.³⁴

²⁹ Ibid. Art. 13(g).

³⁰ The Laws of War on Land (Oxford Manual). 1880. Art. 53.

³¹ Ibid.

³² Ibid. Art. 84.

³³ TOMAN: *Protection of Cultural Property...*, p. 10.

³⁴ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (1907 Hague Regulations). 1907. Art. 27.

Similarly to earlier documents the protection is limited by reservation of military necessity. The commanders of besieging forces have to respect the provisions as long as two conditions are met: (1) the protected buildings are not used for military purposes, (2) the protected buildings are indicated by distinctive and visible signs. The besieging forces also have to be notified about the signs in advance. Finally the expression “*buildings dedicated to religion*” covers buildings of all religious persuasions and replaced word “*churches*”.³⁵

The Article 56 states:

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.³⁶

The Article limits authority of occupying power with respect to certain types of property. It complements the Articles 53 and 55 and provides to certain types of property same protection as to private property. Interestingly enumerated institutions do enjoy even greater protection since “*all seizure of, destruction or wilful damage*” is prohibited whereas property of municipalities is liable to requisition because it is protected as private property only.

The Article 5 of Convention No. IX concerning Bombardment by Naval Forces in Time of War follows the similar pattern:

In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes. It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.³⁷

³⁵ TOMAN: *Protection of Cultural Property...*, p. 11.

³⁶ 1907 Hague Regulations. Art. 56.

³⁷ Convention (IX) concerning Bombardment by Naval Forces in Time of War. 1907. Art. 5.

The definition of cultural property and protected institutions in the Article 5 is similar to the one provided in the Article 27 of Convention No. IV. The protection is once again limited by reservation of military necessity. Additionally the Article establishes duty to indicate protected places by described signs that shall be visible and large enough. The Article 5 of Convention No. IX was in 1913 reproduced in Oxford Manual of the Institute of International Law in the Article 28.³⁸ The Manual is similar to the one created in 1880 but it concerns naval warfare.

2.4. The First World War and the Inter-war period

The First World War did not bring nearly that big destruction as the Second World War nevertheless it was the first conflict that was extensively influenced by mechanisation and industrialisation of warfare. Modern weapons were able to cause mass and large scale destruction however they were not accurate enough to avoid destruction of civilian objects. At the same time the destruction of certain types of property became more important than ever. The war was mechanized and based on heavy industry thus the destruction of factories and infrastructure of enemy became necessity to achieve advantage.

It is not surprising that under such conditions the protection of cultural property was hard to accomplish. According to Toman the existing rules were too brief to result in real and effective protection.³⁹ The protection of cultural property was not priority as well. There is number of examples of famous cultural property destruction during the WWI. The most notorious are torching of Leuven university library or destruction of cathedral in Rheims by shelling and subsequent fire. Although there appeared some efforts to create more effective system of cultural property protection during the War they did not result in any concrete outcome.

2.4.1. The Hague Rules Concerning the Control of Radio in Time of War and Air Warfare

The Washington Conference on the Limitation of Armaments adopted in 1922 resolution recommending the appointment of Commission of Jurists in order to prepare rules relating to usage of radio in time of war and air warfare. The Commission met later in Hague to examine if the existing principles of international law were sufficient to govern the matter. It prepared rules for the control of radio in time of war (Part I of the report) and rules of air warfare (Part II of the report). The rules were not adopted in legally binding form however

³⁸ Compare to Manual of the Laws of Naval War. 1913. Art. 28.

³⁹ TOMAN: *Protection of Cultural Property...*, p. 14.

their importance was still high since they represented “*authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.*”⁴⁰ The rules were just recommendations however they corresponded to the customary rules and general principles derived from 1907 Hague Regulations.⁴¹

The rules brought two significant changes. For the first time they made distinction between general protection and special protection. Secondly they also replaced criterion of *defence* with concept of military objective. The Article 25 of the Rules corresponds to the Article 27 of 1907 Hague Regulations and establishes general protection:

In bombardments by aircraft, all necessary steps should be taken by the commander to spare, as far as possible, buildings dedicated to public worship, art, science, and charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are gathered, provided that such buildings, objectives and places are not being used at the same time for military purposes. Such monuments, objects and places must be indicated, during the day, by signs visible from the aircraft. Using such signs to indicate buildings, objects or places other than those hereinbefore specified shall be considered a perfidious act. The signs of which the above mentioned use is to be made, shall be, in the case of buildings protected under the Geneva Convention, the red cross on a white ground and, in the case of the other protected buildings, a large rectangular panel divided diagonally into two triangles, the one white and the other black.

A belligerent who desired to ensure by night the protection of hospitals and other above mentioned privileged buildings, must take the necessary steps to make the aforesaid special signs sufficiently visible.⁴²

The following Article 26 establishes special protection for *important historic monuments* and sets detailed rules to accomplish the objective:

The following special rules have been adopted to permit the States to ensure a more efficient protection of monuments of great historic value situated on their territory provided they are disposed to abstain from using for military purposes not only such

⁴⁰ OPPENHEIM, L., LAUTERPACH, H. *International Law*. Vol. II, 7th edition, London: Longmans, 1952. p. 519.

⁴¹ TOMAN: *Protection of Cultural Property...*, p. 15.

⁴² Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare. 1922. Art. 25.

monuments and also the area surrounding them and to accept a special system for control to this end.

1. A State, if it deems it suitable, may establish a protected area around such monuments situated on its territory. In time of war, such areas shall be sheltered from bombardments;

2. Monuments around which such area is to be established, shall already be, in time of peace, the object of a notification addressed to the other Powers through the diplomatic channel; the notification shall also state the limits of such areas. This notification cannot be revoked in time of war;

3. The protected area may include, in addition to the space occupied by the monument or the group of monuments, a surrounding zone, the width of which may not exceed 500 metres from the periphery of the said space;

4. Marks well visible from the aircraft, both by day and by night, shall be employed to enable the belligerent aeronauts to identify the limits of the areas;

5. The marks placed on the monuments themselves shall be those mentioned in Article 25. The marks employed to indicate the areas surrounding the monuments shall be fixed by every State which accepts the provisions of this Article and shall be notified to the other Powers together with the list of the monuments and areas;

6. Every improper use of the marks referred to in paragraph 5 shall be considered an act of perfidy;

7. A State which accepts the provisions of this Article should abstain from making use of the historic monuments and the zone surrounding them for military purposes or for the benefit of its military organization in any manner whatsoever and should also abstain from committing, in the interior of such monument or within such zone, any act for military purposes;

8. A commission of control, composed of three neutral representatives accredited to the State which has accepted the provisions of the present Article, or of their delegates, shall be appointed for the purpose of ascertaining that no violation of the provisions of Paragraph 7 has been committed. One of the members of this commission of control

shall be the representative, or his delegate, of the State which has been entrusted with the interests of the other belligerent.⁴³

2.4.2. The Roerich Pact

The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments from 1935 is another significant attempt to protect cultural property during armed conflict. The Roerich Pact has been ratified by number of states in North and South America and is still in force. Formation of the Pact was based on suggestion of Nicholas Roerich, Russian painter, philosopher and traveller. His idea was to achieve "Peace of Civilizations" through protection of cultural property. The draft was prepared by Georges Chklaver of the Institut des Hautes Etudes Internationales, University of Paris and later discussed by International Museums Office and League of Nations. The final text of the Pact was drawn up by Governing Board of the Pan-American Union and signed in April 1935.

The Pact views protected property (historic monuments, museums, scientific, artistic, educational and cultural institutions) as neutral and thus respected and protected by belligerents.⁴⁴ It establishes protection both during the conflict and peacetime and equally protects personnel of mentioned institutions.⁴⁵ The Pact also creates distinctive flag (red circle with a triple red sphere in the circle on a white background)⁴⁶ similarly to Hague Regulations. The Article 5 of the Pact also contain waiver of protection in case the protected property is used for military purposes⁴⁷ however the Pact does not contain reservation of military necessity.

2.4.3. The Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War

Although it might look like there was not achieved any significant progress in protection of cultural property during the Inter-war period it is not quite true. The destruction brought by Spanish Civil War resulted in activity of League of Nations. Under initiative of International Museums Office was created Committee of Experts that prepared The Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Time of War. The Draft has never come into force however it became very

⁴³ Ibid. Art. 26.

⁴⁴ Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact). 1935. Art. 1.

⁴⁵ Ibid.

⁴⁶ Ibid. Art. 3.

⁴⁷ Ibid. Art. 5.

useful while drafting 1954 Hague Convention.⁴⁸ It contained majority of principles later used in 1954 Hague Convention and introduced system of protection that was later recognized as well.

2.5. The Second World War

The WWII brought unparalleled scale of destruction. Modernization of weaponry and use of aviation caused destruction of whole historic cities. At the same time movable cultural property suffered from systematic looting as Nazi Germany was systematically removing valuable pieces of art from occupied territories. However the destruction was not result of military operations only. In many cases cultural property was intentionally destroyed to inflict damage to certain nation or community.⁴⁹ The most obvious example is destruction of Jewish cultural property committed simultaneously with physical elimination of Jews.

It is also important to keep in mind that cultural property destruction during military operations was not mere collateral damage but one of purposes of the operations in fact. After bombing of Lübeck in spring 1942 that caused significant damage to historic city centre Nazi propaganda introduced Baedeker Blitz (Baedeker Raids).⁵⁰ The Raids were called after Baedeker guidebook (often used by German tourist before the war) that indicated the most interesting landmarks of historic British cities. The Nazi propaganda claimed that every building in Britain marked with three stars will be bombed. Although the Luftwaffe did not manage to reach this goal number of valuable historic buildings in York, Bath, Norwich, Exeter and Canterbury were destroyed or heavily damaged. In return strategic air operations of Allies turned into rubble majority of big cities in western part of Germany.

On the other hand there emerged opposite trend. During the Allies' campaign in Italy special attention was paid to protection of especially important historic cities like Rome, Florence, Siena or Venice. The bombing was reduced to minimum and strictly restricted to few important logistic objects. In some cases Allies even decided not to bomb the city at all.

The shock from consequences of the war induced efforts of international community to create legal tools that should prevent something similar in future conflicts.

⁴⁸ TOMAN: *Protection of Cultural Property...*, for more details see footnote no. 35 in Part I.

⁴⁹ Reflected by Raphael Lemkin in his concept of genocide.

⁵⁰ See TERRAINE, John. *The Right of the Line*. London: Hodder & Stoughton, 1958.

2.6. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

The 1954 Hague Convention was drafted in close cooperation with UNESCO. The aim was to achieve *realistic protection* meaning that drafters struggled to find balance between high level of protection and military needs.⁵¹ In case the protection would be unlimited (and ideal) it would be hardly realistic at the same time. Thus the decision was to establish more modest however enforceable protection that would find compromise between military necessity and cultural property protection. The 1954 Hague Convention finally came into force in 1956 and still represents the most important tool protecting cultural heritage during armed conflict.

The Preamble recalls horrors and destruction of WWII in the first paragraph. In the second paragraph it introduces the approach characteristic for whole Convention. It is based on cultural internationalism and states that “*damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.*”⁵² Importantly it is for first time when the term ‘*cultural heritage*’ is used in document considering protection of cultural property during armed conflict. It illustrates closer cooperation with UNESCO and recognition of its concept of ‘*common heritage of mankind*’. The next paragraph continues in the same course: “*the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.*”⁵³ The paragraph again recalls cultural internationalism and stresses that protection of cultural heritage is value important for whole humanity. The Preamble also refers to 1899 and 1907 Hague Conventions that are considered as part of customary law and thus represent important base for further development.

The Article 1 of 1954 Hague Convention represents real turn. For the first time there is clear definition of term cultural property. Comparing to definitions provided in 1907 Hague Regulations the new definition is more comprehensive and does not mix objects of cultural value with institutions not related to culture (such as hospitals or schools). The Article 1 has

⁵¹ Records of the Conference convened by the UNESCO held at The Hague from 21 April to 14 May 1954, para. 3.

⁵² Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (1954 Hague Convention). 1954. Preamble.

⁵³ Ibid.

three subparagraphs whose system of division expresses new and more systematic attitude towards cultural property protection.

All three subparagraphs define term cultural property according to wording of the Article 1 however the situation is bit different in fact. The first subparagraph (a) defines protected cultural objects and represents core of the Article:

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;⁵⁴

The following two subparagraphs protect structures that contain objects defined in subparagraph (a). Thus the structures are usually not protected *per se* but because of their content. In case of subparagraph (b) the wording allows possibility that the mentioned building could meet requirements of subparagraph (a) itself:

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 sub-paragraph (a);⁵⁵

However in case of subparagraph (c) the real purpose of the protection is solely protection of objects stored inside the protected structure:

centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'⁵⁶

Creation of centres containing large amount of cultural property - some kind of safe havens – is viewed as one of the most crucial accomplishments of the 1954 Hague

⁵⁴ Ibid. Art. 1.

⁵⁵ Ibid.

⁵⁶ Ibid.

Convention.⁵⁷ This concept is highly efficient since it allows protection of large amount of important object with relatively small expenses.

The Article 2 defines protection of cultural property for purposes of the Convention. It distinguishes two different types of protection: *safeguarding of* and *respect for* cultural property.⁵⁸ In the UNESCO Draft of the Convention '*safeguarding*' is defined as all positive measures (actions to be taken) whereas '*respect*' has negative character – it expresses duty not to commit prohibited act.⁵⁹

Following two Articles examine more closely notions safeguarding and respect. The Article 3 views safeguarding as set of measures that should be taken during peace to prepare cultural property against foreseeable effect of armed conflict.⁶⁰ This applies to cultural property situated within territory of Contracting Party. Toman proposes measures such as safeguarding and/or protection policy, legislative measures, budgetary provisions, creation of infrastructure of protection and number of different safeguarding activities such as archaeological digging, restoration works or documentation.⁶¹

The Article 4 defines respect for cultural property. Unlike in case of safeguarding measures the respect applies both to cultural property situated within own territory and territory of other Contracting Party as well. The Contracting Party is obliged not to use the property and its immediate surroundings in way that is likely to expose it to destruction or damage during the armed conflict. In general the Party has to refrain from any act of hostility against such property.⁶²

The second paragraph of the Article 4 defines crucial exception however. The obligations mentioned in previous paragraph can be waived in case when military necessity imperatively requires it.⁶³ The provision is considered like the most controversial one since understanding of military necessity may vary significantly. Although military necessity represents the only possible exception of defined rules it presents the most significant problem of protection of cultural property during the armed conflict: finding balance between protection of cultural property and need to execute military actions.

⁵⁷ TOMAN: *Protection of Cultural Property...*, p. 19.

⁵⁸ 1954 Hague Convention. Art. 2.

⁵⁹ TOMAN: *Protection of Cultural Property...*, p. 58.

⁶⁰ 1954 Hague Convention. Art. 3.

⁶¹ TOMAN: *Protection of Cultural Property...*, pp. 62-65.

⁶² 1954 Hague Convention. Art. 4.

⁶³ *Ibid.* para. 2.

The paragraphs 3 and 4 of the Article 4 further strengthen provisions of the paragraph 1. They enumerate conduct prohibited in relation to cultural property – theft, pillage, misappropriation and vandalism. The Contracting Party has duty to prohibit, prevent and if necessary to stop such acts.⁶⁴ Requisition of movable cultural property located in territory of other Contracting Party is forbidden as well. Additionally acts of reprisals targeted against cultural property are prohibited too.⁶⁵

The Article 5 defines duties of Contracting Party in situation when it occupies territory of other Contracting Party. Generally speaking occupying party should cooperate with competent national authorities of occupied country to safeguard and preserve cultural property.⁶⁶

The following two Articles represent rather preventive measures of general protection. The Article 6 introduces possibility of marking cultural property with distinctive emblem to facilitate its recognition. The emblem is described in the Article 16 of the Convention and Article 17 defines its use. The Article 7 tries to ensure respect for provisions of the Convention by introducing them during peacetime to military personnel and members of armed forces and including them into military regulations or instructions.⁶⁷ Toman proposes several options for practical application: articles of laws and decrees that define obligations, instructions and notices distributed to armed forces, military exercises, different courses, meetings with personnel responsible for protection of cultural property.⁶⁸

Another great achievement of the Convention is concept of special protection. The idea is to provide high level of material protection for the most important cultural property of very great importance.⁶⁹ To grant the special protection the property has to be registered in ‘Inter-national Register of Cultural Property under Special Protection’.⁷⁰ There are three types of cultural property eligible for special protection: limited number of refuges intended to shelter movable cultural property in the event of armed conflict, centres containing monuments, other immovable cultural property of very great importance. Two basic conditions to grant the special protection to cultural property have to be fulfilled: 1) it has to

⁶⁴ Ibid. para. 3.

⁶⁵ Ibid. para. 4.

⁶⁶ Ibid. Art. 5.

⁶⁷ Ibid. Art. 7.

⁶⁸ TOMAN: *Protection of Cultural Property...*, pp. 92-93.

⁶⁹ Ibid. p. 97.

⁷⁰ 1954 Hague Convention. Art. 8 para. 6.

be situated in adequate distance from any potential military objective such as port, airport, industrial zone, 2) it is not used for military purposes.⁷¹ However paragraph 5 of the Article 8 creates exception from the first requirement – even in case when the mentioned cultural property is situated near military objective the special protection can be granted if the Party declares that in case of conflict the objective will not be used.

The Article 8 defining special protection is coupled by the Article 9 that defines treatment of cultural property under special protection. The Article 9 establishes immunity of cultural property under special protection which is ensured by prohibition of any act of hostility against such property from moment when it enters International Register.⁷² The only possible exceptions to the rule are defined in the Article 8, paragraph 5 of the Convention. The Article 9 also forbids use of property under special protection and its surroundings for military purposes.

Similarly to general protection cultural property under special protection shall be marked with distinctive emblem that is defined in the Article 16 of the Convention.⁷³

Finally the Article 11 specifies exception of military necessity for cultural property under special protection. The idea is based on reciprocity: if one Party violates obligations under the Article 9 (immunity of cultural property under special protection) the opposing Party is released from obligation to ensure immunity as long as the violation persists. However in case it is reasonably possible cessation of violation shall be asked first. Except for this situation the immunity shall be withdrawn only

in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues. Such necessity can be established only by the officer commanding a force the equivalent of a division in size or larger. Whenever circumstances permit, the opposing Party shall be notified, a reasonable time in advance, of the decision to withdraw immunity.⁷⁴

Although this provision is considered as controversial Toman argues that it is very limitative in fact (especially comparing to military necessity under the Article 4 of the

⁷¹ Ibid. Art. 8 para. 1.

⁷² Ibid. Art. 9.

⁷³ Ibid. Art. 10.

⁷⁴ Ibid. Art. 11 para. 2.

Convention).⁷⁵ It defines number of conditions that have to fulfilled (exceptional cases, unavoidable military necessity, determination of authority responsible for the decision, duty to notify in advance) There appeared many doubts about possible practical application of the provision however Toman proposes that through training and penalties it can be enforced.⁷⁶

With respect to current trends in cultural property targeting during armed conflict there is several other provisions that should be mentioned. The first important issue is scope of application of the Convention. The scope is not limited to conflict of international character and occupation but applies to conflict of non-international character as well. In case such conflict occurs within territory of the Contracting Party each party to the conflict has to follow at least provisions of the Convention ensuring respect to cultural property. The parties can also enlarge protection of cultural property if they are willing to do so.⁷⁷ This option can be supported by UNESCO that might offer its services to parties to conflict.

Closer co-operation with UNESCO is another significant element that illustrates shift in cultural property protection during armed conflict. The Contracting Party can ask UNESCO for technical assistance in organization of the protection of cultural property or in any other matter arising out of application of the Convention.⁷⁸ This provision reflects fact that the protection is not based only on 1954 Hague Convention but should meet wider objectives established by UNESCO activities.

2.7. The 1977 Additional Protocols

The 1949 Geneva Conventions created soon after WWII became soon viewed as unsatisfactory to provide real protection to civilian population during armed conflict. Finally in 1974 Geneva witnessed opening of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. After three years the Conference adopted two new instruments – optional protocols – supplementing the 1949 Geneva Conventions. Additional Protocol I (API: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts) is dealing with international armed conflicts and Additional Protocol II (APII: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the

⁷⁵ TOMAN: *Protection of Cultural Property...*, p. 145.

⁷⁶ *Ibid.* p. 147.

⁷⁷ 1954 Hague Convention. Art. 19.

⁷⁸ *Ibid.* Art. 23.

Protection of Victims of Non-International Armed Conflicts) with non-international armed conflicts. Both Protocols contain brief provisions related to cultural property.

The Article 53 of API – Protection of Cultural Objects and Places of Worship – states:

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.⁷⁹

Similarly the Article 16 of APII - Protection of Cultural Objects and Places of Worship – states:

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.⁸⁰

To fully understand meaning of the Article 53 of API it is necessary to interpret it in context of other provisions of API. The Article 48 of API establishes basic rule – principle of distinction: *“the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”*⁸¹ Then, the Article 52 defines general protection of civilian objects:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

⁷⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API). Art. 53.

⁸⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII). Art. 16.

⁸¹ API. Art. 48.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.⁸²

Thus the general rule presented in the Article 52 is that civilian objects must not be object of attack or reprisals. The Article 53 constitutes special protection in relation to the Article 52. Interestingly neither the Article 53 nor the Article 16 contains exception of military necessity. It is significant that in both Articles the protection of cultural property is viewed as part of protection of civilian population. This is particularly obvious from approach towards protection of places of worship that are included as part of spiritual heritage of peoples irrespective of their cultural value.⁸³ This also explains different wording of the Articles comparing to 1954 Hague Convention.

2.8. The 1999 Second Hague Protocol

In late 1980s it appeared obvious that 1954 Hague Convention was not efficient in protection of cultural property during conflict.⁸⁴ The Convention became neglected: regime of special protection and international controls did not work and Parties had almost no interest to bring provisions of the Convention into force. Moreover with 1977 Additional Protocols number of provisions of the 1954 Hague Convention were replaced by rules provided by the Protocols. Several events also illustrated mentioned problems: Iran – Iraq War caused significant damage to cultural heritage of Iran, Iraq’s invasion and occupation of Kuwait was accompanied by plunder of Kuwaiti cultural institutions and finally civil war in Former Yugoslavia resulted in damage to well-known and important historic sites. UNESCO General Conference pointed out that “*the international system of safeguards of the world cultural*

⁸² Ibid. Art. 52.

⁸³ TOMAN: *Protection of Cultural Property...*, p. 387.

⁸⁴ O’KEEFE: *The Protection of...*, p. 236.

heritage not appear to be satisfactory, as indicated by the ever-increasing dangers due to armed conflicts.”⁸⁵ It was obvious that some action is necessary.

The efforts resulted in Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict held in Hague in March 1999. As result the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted on 26 March 1999. The Second Protocol entered into force in March 2004.

The Preamble of the Second Protocol provides some information about intents of drafters. Not surprisingly it recalls need to improve protection of cultural property during the armed conflict. Additionally it mentions concept of enhanced protection of designated cultural property that represents one of the most significant achievement of the Second Protocol. The Preamble also mentions relationship between the Second Protocol and the Convention: the aim of the Second Protocol is to supplement provisions of the Convention “*through measures to reinforce their implementation.*”⁸⁶ Thus the Second Protocol is not designed to replace the 1954 Hague Convention but to establish appropriate procedures that will help its use in practice. Finally the Preamble stresses that rules governing protection of cultural property in armed conflict should reflect developments in international law however issues not regulated by the Second Protocol will remain ruled by customary law.

The Article 2 of the Protocol clearly states that “*Protocol supplements the Convention in relations between the Parties.*”⁸⁷ The relationship between the Convention and the Protocol is governed by principle *lex posterior derogate priori* which means that in case of conflict between provisions of these two documents the Protocol takes precedence. The supplementary rules in the Protocol mostly cover these areas: safeguarding, respect, precaution in attack and against the effects of hostilities, enhanced protection, criminal responsibility and jurisdiction, scope of application, institutional issues, dissemination and international assistance.

⁸⁵ Resolution 26 C/Resolution 3.9 Reinforcement of UNESCO’s action for the protection of the world cultural heritage, adopted on 6 November 1991. Preamble.

⁸⁶ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (Second Protocol). Preamble.

⁸⁷ Ibid. Art. 2.

The Second chapter of the Protocol introduces general provisions regarding protection of cultural property and directly supplements provisions of the Convention. Regarding safeguarding of cultural property the Article 5 specifies that it shall include:

the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.⁸⁸

According to Toman the purpose of this Article is to provide the Parties examples of measures that can be adopted during peacetime.⁸⁹ However the Article does not change the Article 3 of the Convention only specifies it. The list of the proposed measures is also not-exhaustive while theoretically there are more options.⁹⁰

The Article 6 is dealing with respect for cultural property during the conflict (the Article 4 of the Convention) and it both specifies and modifies provisions of the Convention. The question of military necessity is significantly remade in order to extend protection of cultural property. In its paragraph (a) the Article 6 presents new definition of imperative military necessity:

- a. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
 - i. that cultural property has, by its function, been made into a military objective; and
 - ii. there is no feasible alternative available to obtain a similar military advantage to that⁹¹

The provided condition is binding for attacker who has to meet two requirements: 1) cultural property is military objective by its function; 2) there is no other feasible alternative. This is particularly important since the Convention does not provide any definition of imperative military necessity.

⁸⁸ Ibid. Art. 5.

⁸⁹ TOMAN, Jiri. *Cultural Property in War: Improvement in Protection*. Paris: UNESCO Publishing, 2009. p. 82.

⁹⁰ See e.g. TOMAN: *Protection of Cultural Property...*, p. 64.

⁹¹ Second Protocol. Art. 6 para. a.

The paragraph (b) of the Article 6 examines the situation from the point of view of defender:

b. a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention 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;⁹²

The defending party has control over the property and decides to expose it to destruction or damage in case there is no other way how to obtain military advantage. The two paragraphs are coupled by following two paragraphs (c) and (d) that establish further requirements in order to invoke imperative military necessity. First the decision “*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.*”⁹³ There is similar requirement in the Convention regarding special protection however for issue of military necessity it is new aspect. Second, the effective advance warning shall be given in case of attack based on decision according to paragraph (a) of the Article 6.⁹⁴

New rules regarding protection of cultural property in occupied territory provided in the Article 9 represent important development. The Article contain list of prohibited activities, moreover the occupying Party has even duty to prevent such activities in 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.⁹⁵

Prohibition and prevention of archaeological excavations is viewed as the most crucial development. The lack of such provision in the Convention has been criticized especially since UNESCO in Recommendation on International Principles Applicable to Archaeological

⁹² Ibid. Art. 6 para. b.

⁹³ Ibid. Art. 6 para. c.

⁹⁴ Ibid. Art. 6 para. d.

⁹⁵ Ibid. Art. 9.

Excavations⁹⁶ in 1956 stressed importance of protection of such cultural property. On the other hand the ban is not absolute: some of the prohibited activities can be carried out in close co-operation with competent national authorities of the occupied territory.⁹⁷

Nevertheless the greatest achievement of the Second Protocol is concept of enhanced protection introduced in its third chapter. The concept is directly inspired by 1972 UNESCO Convention⁹⁸ and its approach to cultural heritage protection. The Article 10 of the Second Protocol states that cultural property may be placed under enhanced protection in case it meets 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.⁹⁹

Wording of the paragraph (a) is clearly inspired by 1972 UNESCO Convention. Although the paragraph speaks about cultural heritage it refers to cultural property as defined in the Article 1 of the 1954 Hague Convention. It seems tempting to link mentioned cultural heritage of greatest importance to humanity to UNESCO World Heritage List that also includes the most important cultural heritage however the idea has been abandoned during preparatory works.¹⁰⁰ As pointed out by Boylan¹⁰¹ the two conventions (1972 UNESCO Convention and 1954 Hague Convention) have very different purpose and background and thus inscription of cultural property into one of them should not be motivated by effort to include the property into the second one as well.

The requirement of the second paragraph (b) might also seem problematic. The standard of domestic protection might vary between different states not mentioning problems that may appear in federal states. The last condition in paragraph (c) contains two requirements in fact: 1) the property is not used for military purposes and does not shield

⁹⁶ Recommendation on International Principles Applicable to Archaeological Excavations. 1956. Preamble.

⁹⁷ Second Protocol. Art. 9 para. b.

⁹⁸ TOMAN: *Cultural Property in...*, p. 173.

⁹⁹ Second Protocol. Art. 10.

¹⁰⁰ TOMAN: *Cultural Property in...*, p. 188.

¹⁰¹ *Ibid.* p. 189.

military sites and 2) the Party that has control over the property declares that it will not be used in this way. The first requirement ensures that the property does not constitute military objective while the second one applies especially for future use of the property.

The Article 11 describes process of granting enhanced protection.¹⁰² Importantly it is up to every Party to submit list of property for that it requires granting of enhanced protection. Thus selection of concrete cultural property is fully under consideration of the Party. The list of proposed cultural property is submitted to the Committee for the Protection of Cultural Property in the Event of Armed Conflict created by the Article 24 of the Second Protocol. The submission is considered by the other Parties, the Committee and non-governmental organisations (NGOs). The final decision is delivered by the Committee and based on criteria mentioned in the Article 10. The immunity of cultural property under enhanced protection is ensured by Parties *“by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action.”*¹⁰³

Finally the Article 13 deals with loss of enhanced protection. There are two options: 1) protection may be suspended or cancelled in accordance with the Article 14, or 2) the property becomes military objective by its use.¹⁰⁴ The first option is described in the Article 14. The Committee may suspend enhanced protection (or even cancel the status of the property) in case when the property does not meet criteria from the Article 10 anymore or when the requirements of the Article 12 are seriously violated by use of the property to support military action. However the Party has right to present its own point of view before the decision is made in such cases.¹⁰⁵ The second option allows the property to become object of attack however number of conditions is established:

- a. the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);
- b. all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;
- c. unless circumstances do not permit, due to requirements of immediate self-defence:

¹⁰² Second Protocol. Art. 11.

¹⁰³ Ibid. Art. 12.

¹⁰⁴ Ibid. Art. 13.

¹⁰⁵ Ibid. Art. 14.

- i. the attack is ordered at the highest operational level of command;
- ii. effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and
- iii. reasonable time is given to the opposing forces to redress the situation.¹⁰⁶

The Second Protocol also brings significant development in issue of criminal responsibility for violation of its provisions. The Article 28 of the Convention offers only very vague statement regarding penal or disciplinary sanctions. Conversely the Article 15 of the Protocol provides list of acts that constitute offence under the Protocol:

- 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.¹⁰⁷

The offence has to be committed intentionally and in violation of the Convention or the Protocol. The prosecution of such acts is fully under domestic jurisdiction: each Party has to adopt measures necessary to establish criminal offences under its domestic law and make the offences punishable by penalties. Following Articles provide more details regarding criminal responsibility and prosecution: the question of jurisdiction (Article 16), prosecution (Article 17), extradition (Article 18) and mutual legal assistance (Article 19).

Another important improvement that proved to be significant is applicability of the Second Protocol to non-international armed conflict that occurs within territory of the Party.¹⁰⁸ International Committee of the Red Cross defines armed conflict of non-international

¹⁰⁶ Ibid. Art. 13.

¹⁰⁷ Ibid. Art. 15.

¹⁰⁸ Ibid. Art. 22.

character as “*protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.*”¹⁰⁹ More recent cases of cultural property destruction proved that involvement of non-state actors is highly relevant issue and modern conflicts are characterized by participation of number of different non-state groups.¹¹⁰

2.9. UNESCO Conventions

Second important area related to protection of cultural heritage that should be discussed is protection under conventions of UNESCO. This area deals with protection during peacetime and thus it is not surprising that general approach and objectives of protection are different. The protection is more complex and based on holistic understanding of term cultural heritage. It relates cultural heritage with human rights and includes both tangible and intangible elements of culture. In recent years the border between protection of cultural heritage under IHL and instruments of UNESCO is getting more fluid. It is certain that general approach of UNESCO influences both IHL and ICL which illustrated *Al Mahdi* case where UNESCO co-operated with ICC.

2.9.1. 1972 UNESCO Convention

The Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 UNESCO Convention) is not designed to protect cultural heritage during armed conflict. However in its Preamble we can find certain reference to armed conflict. It states that “*the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction.*”¹¹¹ Toman includes among traditional causes of decay armed conflicts as well.¹¹² Nevertheless the rest of Preamble is clearly human rights oriented. The attitude of the 1972 UNESCO Convention is based on universalism – the second recital of the Preamble states that “*deterioration or disappearance of any item of the cultural or natural heritage constitutes a*

¹⁰⁹ How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008.

¹¹⁰ See generally LOSTAL, Marina, HAUSLER, Kristin, BONGARD, Pascal. *Culture Under Fire: Armed Non-State Actors and Cultural Heritage in Wartime*. Geneva Call, 2018.

¹¹¹ Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 UNESCO Convention). 1972. Preamble.

¹¹² TOMAN: *Protection of Cultural Property...*, p. 369.

harmful impoverishment of the heritage of all the nations of the world”¹¹³ that shapes notion of common heritage of mankind. The main aim of the Convention is protection of heritage of outstanding universal value: “*parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.*”¹¹⁴ Thus the Convention assumes that whole international community has to cooperate in protection of the heritage of outstanding universal value.

The 1972 UNESCO Convention introduces its own definitions of cultural and natural heritage (they shall be discussed in following chapter) and establishes modes of national and international protection. Each State Party to the Convention has the duty to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage.¹¹⁵ The Convention also establishes Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage as executive body that is responsible for maintenance of World Heritage List where sites under protection of the Convention are listed.

More importantly the Committee also updates the List of World Heritage in Danger that lists heritage from World Heritage List that is

threatened by serious and specific dangers such as threat of disappearance caused by accelerated deterioration, large- scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods and tidal waves.¹¹⁶

The List of World Heritage in Danger illustrates synergy between IHL and UNESCO. There are several examples when the heritage endangered by armed conflict was included into the List: most notably Old Town in Dubrovnik during conflict in Former Yugoslavia and more currently sites in Libya, Syria and Iraq endangered by ongoing hostilities.¹¹⁷

¹¹³ 1972 UNESCO Convention. Preamble.

¹¹⁴ Ibid.

¹¹⁵ Ibid. Art. 4.

¹¹⁶ Ibid. Art. 11 para. 4.

¹¹⁷ UNESCO. List of World Heritage in Danger (online). UNESCO, visited 23 February 2021. Available: <<https://whc.unesco.org/en/danger/>>.

2.9.2. Convention for the Safeguarding of the Intangible Cultural Heritage

This Convention (Intangible Heritage Convention) from 2003 has fully presented two emerging trends: connection between protection of cultural heritage and human rights protection and growing importance of intangible cultural heritage. The extensive Preamble of the Convention recalls human rights protection instruments (Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966) and other UNESCO instruments as well (UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, UNESCO Universal Declaration on Cultural Diversity of 2001, Istanbul Declaration of 2002).¹¹⁸

For the purposes of the protection is crucial that the Convention mentions “*deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage*”¹¹⁹ which presents the most important aspect of the protection: the intangible cultural heritage cannot be treated separately from its tangible elements or persons performing it. As Scovazzi¹²⁰ argues the intangible cultural heritage is also something that is *public*: the intangible cultural heritage cannot be restricted to someone’s private thoughts or kept at home in private but must be manifested to external world and someone else. The Preamble of the Convention also stresses the significance of intangible heritage for cultural diversity and sustainable development. This links intangible cultural heritage to communities, particularly indigenous ones. Protection of intangible cultural heritage can be thus viewed as part of protection of communities. The idea is confirmed in UN Declaration on the Rights of Indigenous Peoples that stresses importance of cultural heritage for well-being of indigenous communities.¹²¹

The Intangible Heritage Convention also widely defines its purposes in Article 1:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

¹¹⁸ Convention for the Safeguarding of the Intangible Cultural Heritage (Intangible Heritage Convention). 2003. Preamble.

¹¹⁹ Ibid.

¹²⁰ SCOVAZZI, Tullio. The Definition of Intangible Cultural Heritage. In BORELLI, Silvia, LENZERINI, Federico (eds). *Cultural Heritage, Cultural Rights, Cultural Diversity*. Leiden: Brill – Nijhoff, 2012, pp. 179-200.

¹²¹ United Nations Declaration on the Rights of Indigenous Peoples. 2007. Preamble.

(c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;

(d) to provide for international cooperation and assistance.¹²²

As pointed out by Forrest¹²³, term safeguarding is not very proper here. The 'safeguarding' is defined in Article 2, paragraph 3 of the Convention and rather aims to ensure viability of intangible cultural heritage than its protection. The safeguarding under the Intangible Heritage Convention cannot be compared to the same term under the 1954 Hague Convention. The Article 1 also provides extensive definition of intangible cultural heritage that shall be examined in following chapter.

Finally the Convention also establishes Representative List of the Intangible Cultural Heritage of Humanity that contains the most important intangible cultural heritage.¹²⁴

The most significant aspect of the Convention is stressing the interconnection between tangible and intangible heritage. The protection of tangible heritage is protection of intangible one as well and vice versa. Those two types of cultural heritage cannot be treated separately.

2.9.3. UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage

The UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (Intentional Destruction Declaration) from 2003 is noteworthy from several reasons. First of all it represents direct reaction of international community to certain act. The destruction of great rock sculptures of Buddhas in Bamiyan, Afghanistan by Taliban government in 2001 shocked the world and caused public outcry. However only a little could have been done since there was no customary rule that would prohibit destruction of cultural heritage during peacetime by government. The fate of Buddhas of Bamiyan is recalled in Preamble of the Intentional Destruction Declaration. The Convention views the act of destruction as contradictory to mission of UNESCO that protects cultural heritage and aims to preserve it for future generations.

UNESCO also reflects the destruction in wider context – the attack was in fact only part of iconoclastic campaign of Taliban government that struggled to erase all historic evidence about pre-Islamic cultures in what is present-day Afghanistan. The shift in general approach of UNESCO is obvious from the Preamble: “*cultural heritage is an important*

¹²² Intangible Heritage Convention. Art. 1.

¹²³ FORREST, Craig. *International Law and Protection of Cultural Heritage*. New York: Routledge, 2010. p. 369.

¹²⁴ Intangible Heritage Convention. Art. 16.

component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights.”¹²⁵ We do not speak about protection of cultural heritage *per se* but rather about protection of communities, groups and individuals, their dignity and human rights. Although the wording of the Preamble is promising the Declaration itself does not reflect this attitude in its provisions.

Interestingly Preamble of the Declaration also links the matter with protection of cultural property during armed conflict while recalling provisions of 1899 and 1907 Hague Regulations, 1954 Hague Convention and relevant Articles of Rome Statute of ICC. The idea to relate the destruction with International Criminal Law is tempting¹²⁶ nevertheless it has clear limit – the acts were committed during peacetime. On the other hand Preamble clearly shows that destruction of cultural heritage is something that concerns international community and could amount to issue grave enough for International Criminal Law (which is confirmed in the Article 1 of the Declaration).

Importantly the Declaration defines term intentional destruction in its Article 2:

act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law.¹²⁷

The provision addresses the destruction of cultural heritage including cultural heritage linked to natural heritage site. The Declaration is mostly focused on prevention and proposes number of measures to combat intentional destruction of cultural heritage: *“legislative, administrative, educational and technical measures, within the framework of their economic resources, to protect cultural heritage and should revise them periodically with a view to adapting them to the evolution of national and international cultural heritage protection standards.”*¹²⁸ For case of armed conflict the Declaration refers to existing treaties and encourages states to adopt them. During the peacetime the states should conduct all the

¹²⁵ UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (Intentional Destruction Declaration). 2003. Preamble.

¹²⁶ FRANCIANI, Francesco, LENZERINI, Federico. The Destruction of the Buddhas of Bamiyan and International Law. *European Journal of International Law*, 2003, Vol. 14, No. 4, pp. 619–651.

¹²⁷ Intentional Destruction Declaration. Art. 2.

¹²⁸ Ibid. Art. 3.

activities in accordance with provisions of relevant UNESCO conventions.¹²⁹ The Declaration establishes responsibility of state in case of failure to follow provisions of the Declaration however it also establishes the duty of the state to prosecute individuals who committed such acts:

States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization.¹³⁰

Finally the Declaration stresses co-operation with UNESCO and link between human rights violations and cultural heritage destruction: “*States recognize the need to respect international rules related to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations.*”¹³¹

By creating clear link between protection of human rights and protection of cultural heritage the Intentional Destruction Declaration represents real shift in protection of cultural heritage and recognizes development that appeared in the field in last decades. As shall be presented later we can observe the same pattern in some of the decisions of ICTY and ICC.

¹²⁹ Ibid. Art. 4.

¹³⁰ Ibid. Art. 7.

¹³¹ Ibid. Art. 9.

3. Terms 'Cultural Property' and 'Cultural Heritage' and different Types of Cultural Heritage

3.1. Introduction

The aim of this chapter is to clarify usage of terms 'cultural property' and 'cultural heritage' which is crucial for further discussing of the whole topic of this thesis. The matter initially might look like purely terminological issue however it is much deeper and more complicated question. Although we can see that even many scholars use both terms like synonyms it is not a right way how to approach the problem as shall be presented. So why does it matter to distinguish between cultural property and cultural heritage? Briefly speaking it brings many practical consequences. The most obvious one that will be discussed in this chapter is extent of protection over different forms and types of cultural heritage. It is also important to keep in mind that for purposes of this thesis we attempt to relate international law protecting cultural heritage and International Criminal Law. That is not easy task since both systems use different wording and it is not primary objective of ICL to ensure protection of cultural heritage. To accomplish that we shall closely examine both terms, their historical development and current meaning in international law.

Second part of this chapter evolves from the first one and examines different types of cultural heritage. We can sum it up into a question 'For who does the cultural heritage matter?'¹³² And why does it matter for us? Once again - despite it might seem like theoretical problem only it is not that simple. Together with proper understanding of term cultural heritage it gives raise many practical issues related to application of ICL. Those two elements – distinguishing between cultural property and cultural heritage and understanding of different types of cultural heritage – are together essential for understanding of current attitude of ICL towards cultural heritage protection and also its potential future development. Later discussed topics will be based on concept presented in this chapter and while examining further issues it will be necessary to remember findings introduced here.

3.2. Cultural property

The term 'cultural property' is the older one and traditionally related to International Humanitarian Law. It has been used in number of treaties that are dealing with protection of non-combatants during armed conflict. The term reflects understanding of whole concept of protection of cultural heritage during conflict in 19th century. Nevertheless nowadays is

¹³² FORREST: *International Law and...*, pp. 7-11.

regarded as too narrow and unable to take into consideration all aspects of cultural heritage protection.

The first problem starts with term itself. Comparing to French 'biens culturels' and Italian 'beni culturali' both meaning 'cultural goods' English version uses term 'property'. That evokes concept of ownership established by Roman law. It gives owner almost unlimited rights over his property. Besides possession owner also has right to trade, use or even destroy his property. Even more importantly he can exclude others from using it. However this is situation that is absolutely contrary to modern day understanding of cultural heritage protection. We can hardly imagine that owner of Michelangelo painting would be legally allowed to destroy it or use it in way that will cause its damage. Access to cultural heritage is even more important. Although there are many private art collections and private historical buildings owners usually allow visitors to their property. Current attitude is based on protection of cultural heritage and its preservation for future generations which brings certain limitations to rights of owner.

Another objections is based on general understanding of word 'property'. In common sense it refers to tangible objects only.¹³³ However nowadays protection of intangible elements of culture constitute important part of cultural heritage protection policy. Tangible and intangible elements are interrelated so the second one cannot be omitted.

Last but not least term 'property' brings certain 'commodification' of cultural objects.¹³⁴ Under such policy they are seen as goods to trade. In practice however cultural heritage market is heavily regulated and unique intrinsic value of the objects is taken into consideration. In many countries national cultural heritage cannot be legally taken abroad or sold to private collector.

As already mentioned term cultural property first appears in IHL treaties. However this is not totally correct. First of all majority of older treaties do not provide definition of cultural property. They list protected objects according to their nature or purpose¹³⁵ but no general definition is provided. Secondly whole understanding of protection is different. Treaties aim to protect private property to spare civilians dreads of war and mitigate

¹³³ CHECHI, Alessandro. *The Settlement of International Cultural Heritage Disputes*. Oxford: Oxford University Press, 2014. pp. 14-15.

¹³⁴ BLAKE, Janet. On Defining the Cultural Heritage. *International and Comparative Law Quarterly*, 2000, Vol. 49, No. 1, pp. 61-85.

¹³⁵ TOMAN: *Protection of Cultural Property...*, p. 13.

consequences of warfare to non-combatants. Thus cultural property is simply one of kinds of private property that is protected mostly for economic reasons.

The Lieber Instructions deals with cultural objects protection in the Articles 35 and 36. It does not speak about cultural property, only enumerates certain kinds of objects and institutions that are protected. Although there is no definition of cultural property majority of scholars¹³⁶ recognize mentioned objects and institutions as cultural property when referring to them.

Article 35 provides certain objects and institution protection during warfare – they have to be protected against '*avoidable injury*' even '*... when they are contained in fortified places whilst besieged or bombarded.*'¹³⁷ Objects and institutions enjoying this level of protection are following: classical works of art, libraries, scientific collections, precious instruments, such as astronomical telescopes and hospitals.¹³⁸ The list shows that term cultural property has very unclear borders here.

There is no doubt that classical works of art are part of cultural heritage as understood nowadays however in case of other objects the question arises. Scientific collections or objects such as astronomical telescopes can constitute valuable historical items but they primarily serve for purpose of science and education. Also the hospitals can be hardly regarded as cultural property and their protection is rather based on humanitarian reasons – protection of wounded and sick. We can assume that some of the objects in article 35 constitute cultural property however it does not apply to all of them.

Article 36 later establishes legal status of objects mentioned in previous article. Under certain conditions they can be taken away and their ownership determined later in peace treaty.¹³⁹ However there is important exception – it can be done only in case the objects belong to hostile nation or government.¹⁴⁰ Thus in case such objects are in private collection they cannot be seized unless military necessity requires so.¹⁴¹

¹³⁶ See e.g. TOMAN: *Protection of Cultural Property...*, pp. 7-9.

¹³⁷ Lieber Code. Art. 35.

¹³⁸ Ibid.

¹³⁹ Ibid. Art. 36.

¹⁴⁰ Ibid.

¹⁴¹ Ibid. Art. 38.

Similar approach is also chosen in the Brussels Declaration. In its Article 8 it speaks about institutions dedicated to religion, charity, education, art and sciences.¹⁴² Nevertheless there is one important innovation comparing to the Lieber Instructions – it also mentions historic monuments. This is crucial shift. The Lieber Instructions protect institutions rather than objects however term historic monument definitely describes object. Term *historic monument* already has been commonly used in that period and was understood as immovable object, typically historical building.¹⁴³ What does it mean? At least that some of structures deserve protection not because they host beneficial institution but because of their historical value or aesthetic qualities.

The definition is later almost word by word repeated in article 53 of Oxford manual.¹⁴⁴ Finally after peace conferences of 1899 and 1907 similar definition of protected objects became legally binding. In Regulations of 1907 annexed to Convention No. IV articles 27 and 56 define protected objects. The articles speak about buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals and places where wounded and sick are collected. First of all, unlike in earlier documents, Hague Regulations do not speak about institutions but buildings belonging to institution. In addition to historic monuments matter we can conclude that object of protection has shifted from institution itself to building. Some of the buildings are protected because they host the institution (like hospitals or places where wounded and sick are collected) however some other because of their own value since there is assumption that the institution is located in structure that has historical value in its own. Nevertheless once again – there is no precise definition of protected objects.

Roerich Pact uses very similar wording while speaks about immovable objects that must be respected and protected. It enumerates historic monuments, museum, scientific, artistic, educational and cultural institutions.¹⁴⁵ But there is interesting change regarding movable objects – they are protected only in case they are located in such building. Thus mentioned buildings should serves as centres where valuable objects are kept. As we shall see this idea will be important in later legislation.

Shortcomings on defining the term cultural property have been finally solved in 1954 Hague Convention. In its article 1 it states:

¹⁴² Brussels Declaration. Art. 8.

¹⁴³ O'KEEFE, Roger. The Meaning of 'Cultural Property' under the 1954 Hague Convention. *Netherlands International Law Review*, 1999, Vol. 46, No. 1, pp. 26-56.

¹⁴⁴ Compare to the Oxford Manual. Art. 53.

¹⁴⁵ Roerich Pact. Art. 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 sub-paragraph (a);

(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as 'centers containing monuments'.¹⁴⁶

First of all it is first complex definition of term cultural property. Comparing to previous attempts it is more inclusive – it adds category of archaeological sites, books and manuscripts but even more importantly it remains open for inclusion of other items. That is secured by two parts of paragraph (a). In enumeration it uses expression “*such as*” and also “*other objects of...*” which ensures that other objects of great importance might be included despite they are not mentioned explicitly on the list. It also distinguishes between movable and immovable property while putting both under the protection. Protection of movable objects does not require anymore their presence in certain kind of place (such as museum).

However protection is not general for all cultural property. Paragraph (a) requires that the property has to be “*of great importance to the cultural heritage of every people*”. Nevertheless this concept is very subjective as well¹⁴⁷ since there are not any fix criteria how to determine if certain object meets the requirement. In fact it is also problem of national legislation since every state determines itself¹⁴⁸ which of its cultural property recognizes as

¹⁴⁶ 1954 Hague Convention. Art. 1.

¹⁴⁷ TOMAN: *Protection of Cultural Property...*, p. 50.

¹⁴⁸ See Chapter II. of Regulations for the Execution of the Convention (1954 Hague Convention).

most important and standards can vary. That brings situation when some countries have long list of protected places whereas others are more modest in this matter. Such selection cannot be linked to UNESCO World Heritage List¹⁴⁹ since in this case places are chosen by international committee and decision is based on same standard for every country.

Paragraph (b) provides protection to buildings that contain objects defined in the previous paragraph. Buildings are not protected because of their value but for their content. The building has to serve to this purpose primarily and also effectively contain protected objects.¹⁵⁰

Finally paragraph (c) speaks about centres containing monuments. This is very broad expression describes major groups of buildings which include movable and immovable property¹⁵¹ such as city centres of some historical cities.

There is one more reason why 1954 Hague Convention is that interesting. It mentions term cultural heritage as well, actually twice. First time it makes reference to it in Preamble: “... *damage to cultural property belonging to any people whatsoever means damage to cultural heritage of all mankind...*”¹⁵² Second time it mentions it in article 1: “*movable or immovable cultural property of great importance to the cultural heritage of every people...*”¹⁵³ It is clear that cultural property and cultural heritage are two different categories under 1954 Hague Convention. Common understanding is that term cultural heritage is much wider and general than cultural property. Term cultural heritage includes objects defined as cultural property however it contains much more.¹⁵⁴ It covers also intangible heritage and in present day understanding natural heritage as well. For purposes of 1954 Hague Convention those two terms cannot be substituted.

Another important point is related to expression “*cultural heritage of all mankind*” in Preamble. As O’Keefe points out it must not be understood as “*common heritage of mankind*”.¹⁵⁵ Expression cultural heritage of all mankind refers to common signs of such heritage which makes it universal heritage to whole humanity. It illustrates cultural development and diversity of different cultures but in the same time it is small piece of global

¹⁴⁹ O’KEEFE: The Meaning of...

¹⁵⁰ TOMAN: *Protection of Cultural Property...*, p. 54.

¹⁵¹ Ibid.

¹⁵² 1954 Hague Convention. Preamble.

¹⁵³ Ibid. Art. 1.

¹⁵⁴ TOMAN: *Protection of Cultural Property...*, p. 40.

¹⁵⁵ O’KEEFE: The Meaning of...

culture common to everyone. Term '*common heritage of mankind*' refers to possession, holding something in common. Typical examples are deep seabed¹⁵⁶ or moon.¹⁵⁷ In such case there is set of rights shared by whole humanity but those rights are of different nature than rights related to cultural heritage.

Under present day understanding of cultural heritage protection definition of cultural property in 1954 Hague Convention is seen as very narrow. It omits intangible heritage and natural heritage. Also it focuses on property of great importance only and ignores less important objects. That could be partly explained by its purpose however there is significant shift in understanding of cultural heritage in last fifty years. To fully understand the situation we shall focus on term cultural heritage that started to replace cultural property.

3.3. Cultural Heritage

Under 1954 Hague Convention definition of cultural property is clear. However it does not apply to cultural heritage. In fact 1954 Hague Convention uses this term in general, not even legal meaning. In later documents we can see more elaborate usage of this term. Nevertheless the main problem remains – defining term cultural heritage seems to be highly complicated task.

First of all the term in its common meaning is very general – it consist definition of *culture* and *heritage*. The notion 'culture' is definitely not a legal term. It is an all-embracing notion that refers to every aspect of contemporary society¹⁵⁸ and might have various manifestations. While the term 'heritage' refers to something received from the predecessors that will be passed on to future generations.¹⁵⁹ The whole concept is constantly evolving and the span of manifestations included in the 'cultural heritage' is growing. Manifestation of 'cultural heritage' might be almost anything that was made by human or was given value by human.¹⁶⁰ It covers the totality of cultural objects, traditions, knowledge, and skills, which a given nation or community has inherited by the way of learning processes from previous

¹⁵⁶ United Nations Convention on the Law of the Sea. 1982. Preamble.

¹⁵⁷ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. 1984. Art. 11.

¹⁵⁸ BLAKE, Janet. *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage*. Leicester: Institute of Art and Law, 2006. p. 22.

¹⁵⁹ FORREST: *International Law and...*, p. 3.

¹⁶⁰ PROTT, Lyndel, O'KEEFE, Patrick. Cultural Heritage or Cultural Property? *International Journal of Cultural Property*, 1992, Vol. 1, No. 2, pp. 307-320.

generations and which provides its sense of identity to be transmitted to the subsequent generations.¹⁶¹ That is understanding of cultural heritage in its general meaning.

However for legal purposes it is inevitable to define the term more precisely. Law cannot recognize and protect all forms of cultural heritage in its most general meaning. That would be pointless as well since law aims to protect important values and most of the cultural heritage is something common, related to daily life and lacking any outstanding importance. For purposes of legal protection it is necessary to choose which types of cultural heritage shall be shielded.¹⁶²

The problem is that different documents define cultural heritage for different purposes. Some of them struggle to achieve general protection of different types of cultural heritage whereas others are highly specialized and focused on narrow field of objects. Interpretation of the term is complicated then - Vienna Convention on the Law of Treaties says that terms shall be interpreted in accordance with their ordinary meaning¹⁶³ but as we can see there is no ordinary legal meaning of term cultural heritage. The situation might be easier when we interpret the term for purposes of treaty that defines it only, not for general use since in such case we can see object and purpose of the treaty. We can conclude that definitions of the term provided in different treaties are not interchangeable.

One could ask why the whole shift from cultural property to cultural heritage appeared. As we have seen term cultural property is defined narrowly and bases protection on IHL and its understanding of the term in 19th century. However the international law is still developing and one of the most important and dynamic fields is human rights protection. Traditional IHL bases protection of cultural property on several assumptions. It aims to protect civil population and its property, important public institutions and objects of outstanding historic or aesthetic value. Modern international law is founded on such values however it goes further. It is more focused on human rights protection and recognizes link between cultural heritage and human rights.¹⁶⁴

That changes whole concept of the protection. Cultural objects are not protected for their own sake but as part of human rights protection. This shift cannot be reflected by the

¹⁶¹ FRANCIANI, Francesco. Culture, Heritage and Human Rights: an Introduction. In FRANCIANI, Francesco, SCHEININ, Martin (eds). *Cultural human rights*. Leiden: Martinus Nijhoff Publishers, 2008, pp. 1-15.

¹⁶² BLAKE: On Defining the...

¹⁶³ Vienna Convention on the Law of Treaties. 1969. Art. 31.

¹⁶⁴ Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59, para. 47.

term cultural property with its strict definition and requires more general approach provided by the term cultural heritage. Cultural heritage is not limited to tangible movable and immovable objects but includes also intangible elements. It understands culture as something that lives and evolves - not like object locked in museum showcase. Finally it also uses holistic approach to culture – its different elements cannot be treated separately and taken out of context. As pointed out by Prott and O’Keefe, concept of cultural heritage is nowadays recognized and used by historians, archaeologists, anthropologists and other researchers.¹⁶⁵ The only exception is legal context that still keeps usage of the term cultural property. However does it mean that it still understands the term in same way as it was defined in 1954 Hague Convention?

First more precise definition of the term cultural heritage is provided by 1972 UNESCO Convention. In its Article 1 it recognizes three types of cultural heritage: monuments, groups of buildings and sites. For purposes of 1972 UNESCO Convention it defines those three terms as following:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.¹⁶⁶

The definition clearly covers definition of the term cultural property under 1954 Hague Convention. It is not surprising that definition in 1972 UNESCO Convention is wider since it aims to protect cultural heritage during peacetime as well and bases the protection on different principles. What matters here is protection and preservation of heritage for future

¹⁶⁵ PROT, O’KEEFE: *Cultural Heritage or...*

¹⁶⁶ 1972 UNESCO Convention. Art. 1.

generations.¹⁶⁷ However as mentioned earlier it does not protect all cultural heritage – there is requirement of ‘outstanding universal value’ that the heritage has to meet to fit to protection under 1972 UNESCO Convention.

Additionally 1972 UNESCO Convention treats separately natural heritage. It defines it in its Article 2 as following:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.¹⁶⁸

Although we can see that some natural elements are included even in terms defined in Article 1, Article 2 describes different issue. Article 1 deals with situation when there is synthesis of natural site and human influence – combined work of nature and man. Natural site is modified by human influence and in fact the human influence is the element that creates worthy result. Conversely natural heritage under 1972 UNESCO Convention protects natural features that are not result of human activity. This may lead to assumption that there is wall of separation between cultural and natural heritage. Nevertheless as shall be presented later it is not that simple.

Speaking from theoretical point of view 1972 UNESCO Convention covers both movable and immovable tangible cultural heritage. However it does not pay any attention to intangible heritage. This area has been omitted for long time despite it is crucial for current understanding of the term cultural heritage. As pointed out in Preamble of Intangible Heritage Convention there is deep interdependence between intangible cultural heritage and tangible cultural and natural heritage.¹⁶⁹ This sole sentence serves as base for current holistic approach towards cultural heritage. Intangible Heritage Convention still keeps a little bit old fashioned

¹⁶⁷ Ibid. Preamble.

¹⁶⁸ Ibid. Art. 2.

¹⁶⁹ Intangible Heritage Convention. Preamble.

attitude while distinguishing different types of heritage but recognition of link between tangible and intangible heritage is important shift. Intangible Heritage Convention bases it on several elements. In Preamble it mentions number of human rights protection instruments and also relates the matter to indigenous communities and protection of global diversity and creativity.¹⁷⁰ Intangible elements of culture are not protected for its own sake but because they are firm part of cultural heritage in general meaning.

Intangible heritage for purposes of Intangible Heritage Convention is defined in its Article 2:

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.¹⁷¹

The definition is unlike majority of other legal definitions in international instruments. It struggles to define intangible cultural heritage but then adds something more. In fact it provides certain contextual background for the definition when it mentions process of creation and development of intangible cultural heritage and links it to other phenomenon such as environment, history and identity. Finally it limits scope of definition by application of standard based on existing human rights protection.

The Article 2 provides examples of manifestations of intangible cultural heritage:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;

¹⁷⁰ Ibid.

¹⁷¹ Ibid. Art. 2.

- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe;
- (e) traditional craftsmanship.¹⁷²

Although intangible heritage is discussed we can also see certain tangible elements: instruments, objects, artefacts, cultural spaces. What does it mean? Firstly it illustrates already mentioned link between tangible and intangible heritage. Those two types of heritage cannot be treated separately. Certain tangible cultural objects serve as precondition for execution of manifestation of intangible heritage – musical instruments, ritual objects, traditional tools etc. The pattern works vice versa as well. Traditional knowledge and craftsmanship gives raise tangible objects that are considered as typical and traditional expression of culture. For intangible heritage protection unity of tangible and intangible elements is inevitable. From this position there is only very small step towards even more holistic understanding of concept of cultural heritage that unites more elements into whole.

Current inclusive understanding of term cultural heritage is based on work of former Special Rapporteur in the field of cultural rights, Farida Shaheed. Ironically it was systematic and large scale destruction of cultural heritage in Middle East region that brought attention of international community to this issue. Shaheed was mostly focused on link between community and its cultural heritage and approached the problem from human rights based point of view. She argued that protection of cultural heritage of community is protection of human rights of members of the community in fact.¹⁷³ For such purpose it was necessary to define properly term cultural heritage again since majority of old definitions did not reflect this way of thinking. Shaheed offers definitions that could be seen as ground-breaking:

... tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs; vernacular or other languages; artistic expressions, folklore) and natural heritage (e.g. protected natural reserves; other

¹⁷² Ibid.

¹⁷³ Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59, para. 9.

protected biologically diverse areas; historic parks and gardens and cultural landscapes).¹⁷⁴

According to Shaheed this definition is not exhaustive and it is still open for new elements. However truly crucial is its holistic attitude. It unites all kinds of cultural heritage into whole – movable, immovable, tangible and intangible. Additionally it includes even natural heritage. That brings term cultural heritage to new position – it does not only define certain kinds of objects but works as umbrella for several other terms. Although some kinds of natural heritage mentioned in definition are not product of human creativity they are still covered by term cultural heritage. That is significant difference comparing to 1972 UNESCO Convention that sees as cultural heritage only sites at least partly created by mankind. The difference can be explained by reflection of human rights based approach.

1972 UNESCO Convention understands as cultural heritage sites such as cultural landscapes. It defines them as combined works of nature and mankind that express relationship between people and their natural environment.¹⁷⁵ Such sites may represent specific techniques of agriculture and land use, be related to local beliefs and traditions and be crucial for existence of community. Nevertheless are those functions limited only to sites that are combined works of nature and man?

In fact we can observe that number of religions and traditions relates certain natural features to their beliefs. Rivers,¹⁷⁶ mountains,¹⁷⁷ caves,¹⁷⁸ waterfalls¹⁷⁹ or forests¹⁸⁰ are recognized as important elements of culture. Those features are not manmade but only man-recognized natural sites linked to culture. As Simon Schama presents in his brilliant book *Landscape and Memory*¹⁸¹ human life and culture has been tied to natural features since its very existence. Starting from ancient civilizations we can observe link between certain landscape features that determine cultural expressions. Natural sites are bases for religion, traditions, art and culture in its general meaning. It also means that protection of such sites is

¹⁷⁴ Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38, para. 4.

¹⁷⁵ UNESCO. *Cultural Landscapes* (online). UNESCO, visited 22 February 2021. Available: <<https://whc.unesco.org/en/culturallandscape/>>.

¹⁷⁶ E.g. Ganges river in Hindu culture.

¹⁷⁷ E.g. Mount Kailash in Tibet that is important for both Hinduism and Buddhism.

¹⁷⁸ E.g. Amarnath Cave in India which is one of the holiest places in Hinduism.

¹⁷⁹ Important part of Japanese traditional culture.

¹⁸⁰ Sacred groves and trees were important part of European paganism. Currently still recognized in India and some parts of Africa.

¹⁸¹ SCHAMA, Simon. *Landscape and Memory*. New York: A. A. Knopf, 1995.

protection of culture in fact. This opinion has been confirmed in European Landscape Convention that recognizes public interest role of landscape in cultural, ecological, environmental and social fields and acknowledges importance of landscape for formation of local cultures and identity.¹⁸²

The matter of natural heritage can be approached from different angle as well. Even with omission of Schama's attitude we can still appreciate aesthetic beauty of certain natural sites or their importance for global natural diversity. As such they can be seen as world heritage of mankind as whole¹⁸³ and something that is in fact part of our culture. Environmental protection and protection of diversity¹⁸⁴ is one of important values of current civilization and as such should be understood as part of our culture. We can conclude that recognition of this attitude makes natural heritage protection and preservation part of our cultural heritage in general meaning.

Shaheed's definition serves as base for further development of link between human rights and cultural heritage. Cultural heritage is not protected *per se* anymore but as part of human rights protection. Only complex understanding of cultural heritage can reflex complexity of human rights protection. For purposes of human rights protection we cannot omit less important parts of cultural heritage since cultural heritage in its whole is related to certain human rights. Selectivity of 1972 UNESCO Convention and its fragmented attitude is obstacle for purposes of human rights protection.

The conclusion is that different definitions of cultural heritage serve different purposes. In case we want to provide high level of protection to certain objects or features definition has to be more narrow and exclusive. Protection of objects requires selectivity. However how does it match human rights protection? Human rights can be related to less important or outstanding object that does not deserve protection based on existing treaties. Which types of cultural heritage do we recognize for such purposes?

3.4. Different Types of Cultural Heritage

It has been already said that we can distinguish several types of cultural heritage while defining it. Mentioned definitions recognize movable and immovable heritage, tangible and intangible heritage and also cultural and natural heritage. Nevertheless this division is based

¹⁸² European Landscape Convention. 2000. Preamble.

¹⁸³ 1972 UNESCO Convention. Preamble.

¹⁸⁴ See e.g. Convention on Biological Diversity. 1992. Preamble.

either on nature of heritage (movable, immovable, tangible, intangible) or its origin (cultural, natural). However there are also other ways how to think about cultural heritage. It can be classified into different categories that are not based on objective characteristics of heritage but values assigned to it by humans.

One of the possible approaches was introduced by Merryman in his famous article *Two Ways of Thinking About Cultural Property*.¹⁸⁵ In the article author explains his opinion about two possible attitudes of understanding of cultural heritage. The first one he calls international. It understands cultural heritage as common heritage of mankind which constitutes culture common to all humans. As example of such approach he mentions 1954 Hague Convention that aims to protect cultural heritage during armed conflict irrespective to its origin and sees this task as protection of common heritage of mankind. Under such understanding protection of cultural heritage during armed conflict represent interest that exceeds concern of one nation but is important for humanity as whole. Similar applies to other situations as well. Rules regulating trade with cultural heritage are rather liberal and national boundaries that determine origin of the objects are not important. Since the heritage is common to humanity as whole it does not matter in which country is currently located and displayed.

Conversely there is national way of thinking about cultural heritage. This attitude understands cultural heritage as part of heritage of certain nation. As example of this approach he presents 1970 UNESCO Convention that is dealing with illicit trade with cultural heritage and establishes rules for import, export and transfer of ownership to items that it defines as cultural property.¹⁸⁶ This approach recognizes certain link between nation and its cultural heritage and tries to prevent decontextualization. Merryman in the article argues that by removing objects from its original location and placing them to museum (potentially even abroad) they lose part of their expressive value.

Of course this kind of approach can be seen as black and white attitude which presents two extreme, opposing poles of possible conception. In practice we can observe mix of both approaches: states are protecting their cultural heritage as part of their national heritage but in the same time they allow under certain conditions trade with such items. However there is

¹⁸⁵ MERRYMAN, John, Henry. *Two Ways of Thinking About Cultural Property*. *The American Journal of International Law*, 1986, Vol. 80, No. 4, pp. 831-853.

¹⁸⁶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 (1970 UNESCO Convention). 1970.

another reason why this concept seems to be interesting. Thanks to rapid development of human rights protection in this field we can now see something more behind national concept created by Merryman.

When we employ concept of human rights protection that sees link between certain kinds of cultural heritage and community and/or individual¹⁸⁷ we move towards extended understanding of national concept as introduced by Merryman. In such case we do not protect cultural heritage of nation but rather cultural rights related to certain items or objects belonging to community or individuals. Retention of cultural heritage serves as protection of living culture and its social structure and institutions¹⁸⁸ in this case. For this purpose speaking about national way of thinking seems to be too narrow and incorrect. We can rather use words communitarian way of thinking or human rights based way of thinking. The view is based on Merryman's approach to national heritage but it adds human element that he did not use.

Even this new perception cannot remove tension between international and national (communitarian, human rights based) approach however. Nevertheless it gives the dispute new dimension since it involves human rights. Modern International law understands human rights protection like one of the most important values and in last decades significance of the concept is growing. In this moment one of the two opposing attitudes is supported by human rights protection argument. Now there is tension between international approach towards cultural heritage and human rights protection of communities and individuals.

As presented by Lenzerini in his article¹⁸⁹ examining tensions between communities' cultural rights and global interests in case of Maori Mokomokai (mummified heads of Maori warriors) it is highly complex matter. On the one hand there is international interest to keep the object in museum in order to present different culture to public. On the other hand there is link between the object and community and individual for whose the object is related to number of cultural rights. Which interest prevails? As presented by Lenzerini Mokomokai from museum in Rouen were finally returned to New Zealand to families they belonged before sold and taken to Europe. In last decades it is common practice in case of objects such as

¹⁸⁷ Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59, paras. 7-20.

¹⁸⁸ FRANCIANI, Francesco. The Evolving Framework for the Protection of Cultural Heritage in International Law. In BORELLI, Silvia, LENZERINI, Federico (eds). *Cultural Heritage, Cultural Rights, Cultural Diversity*. Leiden: Brill – Nijhoff, 2012, pp. 3-25.

¹⁸⁹ LENZERINI, Federico. The Tension between Communities' Cultural Rights and Global Interests: The Case of the Māori Mokomokai. In BORELLI, Silvia, LENZERINI, Federico (eds). *Cultural Heritage, Cultural Rights, Cultural Diversity*. Leiden: Brill – Nijhoff, 2012, pp. 157-177.

human remains¹⁹⁰ and author argues that it proves that human rights protection prevails over international interest. Nevertheless it does not apply to all cultural heritage. We always have to search for genuine link between the object and community and/or individual. The link is precondition for existence of cultural rights and thus title for protection of the object as well.

It also presents that national approach as defined by Merryman cannot be fully replaced by communitarian or human rights based attitude. They rather exist side by side, sometimes overlapping each other but often standing separately. There is number of cases when certain objects represent cultural heritage of nation¹⁹¹ however we can hardly conclude that those objects are vital element of national culture. They rather present important part of national history and genius however they are not part of living culture anymore.

3.4.1. Outstanding Universal Value

Another way how to understand cultural heritage is based on its universal value. Term 'outstanding universal value' is key element of 1972 UNESCO Convention. As mentioned understanding of cultural heritage under 1972 UNESCO Convention is limited. The limit is not only the definition in the Articles 1 and 2 but value of the heritage too. Not every object that fits into the definition is protected nevertheless - it has to be object of outstanding universal value as well.¹⁹² The problem is that term outstanding universal value is not defined in the Convention.

To find the answer we have to focus on Operational Guidelines for the Implementation of the World Heritage Convention. The Operational Guidelines serve as precise criteria for inscription of heritage into World Heritage List¹⁹³ and define term outstanding universal value. At least one of the conditions has to be met by nominated property to be eligible for inscription into World Heritage List. It is characteristic that the term is still evolving. Definition of outstanding universal value in the Operational Guidelines has been changed many times¹⁹⁴ and current version from 2019 reflects present day approach to cultural

¹⁹⁰ SHARIATMADARI, David. 'They're not property': the people who want their ancestors back from British museums (online). The Guardian, 23 April 2019 (visited 22 February 2021). Available: <<https://www.theguardian.com/culture/2019/apr/23/theyre-not-property-the-people-who-want-their-ancestors-back-from-british-museums>>.

¹⁹¹ E.g. Parthenon Marbles, known also as Elgin marbles taken from temple of Parthenon on Acropolis of Athens and currently displayed in British Museum are still object of dispute between Greece and Great Britain.

¹⁹² 1972 UNESCO Convention. Preamble.

¹⁹³ UNESCO. The Operational Guidelines for the Implementation of the World Heritage Convention. 10 July 2019, WHC.19/01.

¹⁹⁴ First issue of Operational Guidelines was in 1977 and new version came into operation in 1978, 1980, 1984, 1987, 1988, 1992, 1994, 1996, 1997, 1999, 2005, 2008, 2011, 2012, 2013, 2015, 2016, 2017, 2019.

heritage. First of all there is only one set of criteria now that apply for both cultural and natural heritage. This is pure expression of holistic approach as introduced by Shaheed. Secondly the criteria reflect more non-monumentalist approach towards understanding of term cultural heritage which removes imbalance between different cultures.

Older versions of the Operational Guidelines were focused mostly on iconic sites that can be seen as wonders of the world.¹⁹⁵ Nevertheless this attitude is very limited – not every civilization expresses its culture by creating monumental objects and thus number of world cultures has been omitted. This is in direct conflict with idea of universality that understands World Heritage List as selection of the best human achievements from different cultures all around the world.¹⁹⁶ Monumentalist approach does not provide too much space for diversity and representation of different cultures.¹⁹⁷ In fact tradition of building monumental objects is limited to quite small area of the world¹⁹⁸ while majority of civilizations express their culture in other ways. Such civilizations most commonly manifest their culture by landscape shaping and traditional agriculture.¹⁹⁹ To reflex those facts and provide more balance between different cultures the Operational Guidelines were modified into their present day form.

Criteria for the assessment of Outstanding Universal Value are defined as following:

- (i) represent a masterpiece of human creative genius;
- (ii) exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
- (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
- (iv) be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history;

¹⁹⁵ Such as Pyramids in Giza, Taj Mahal or famous European monuments.

¹⁹⁶ FORREST: *International Law and...*, p. 236.

¹⁹⁷ CLEERE, Henry. The uneasy bedfellows: universality and cultural heritage. In LAYTON, Robert, STONE, Peter, G., THOMAS, Julian (eds). *Destruction and Conservation of Cultural Property*. London: Routledge, 2011, pp. 22-29.

¹⁹⁸ Most notably Europe, some areas of Middle East region, India, China and some areas of Latin America.

¹⁹⁹ E.g. traditional cultures of Australia and New Guinea.

(v) be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;

(vi) be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);

(vii) contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;

(viii) be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;

(ix) be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;

(x) contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of Outstanding Universal Value from the point of view of science or conservation.²⁰⁰

The difficulty is, as pointed out by Forrest, that the criteria are used rather like rules than guidelines.²⁰¹ They are subjective and it is only up to consideration of members of the World Heritage Committee if they meet requirements from the Articles 1 and 2 of 1972 World Heritage Convention that operate with terms unique, masterpiece or exceptional. We can conclude that selection of the heritage that fits into the World Heritage List is still highly subjective process despite efforts to make it more balanced and clear.

The question that emerges after determining what is the heritage of outstanding universal value is rather obvious. What is the rest of the heritage then? And how is it treated under International Law? Confusingly the Article 12 of the 1972 World Heritage Convention

²⁰⁰ UNESCO, The Operational Guidelines for the Implementation of the World Heritage Convention. 10 July 2019, WHC.19/01, para. 77.

²⁰¹ FORREST: *International Law and...*, p. 238.

states that the fact that certain cultural or natural heritage was not included into World Heritage List does not mean that it is not of outstanding universal value.²⁰² As presented International Law protects rather more important heritage that is carefully selected but this constitutes only small part of cultural heritage in general. To answer the question in the simplest possible way we can say that the second type of heritage is the heritage which does not have outstanding universal value. However even this category can be subdivided into different types of heritage. Is it heritage linked to certain living culture and community? Or is it heritage without such link? And why does it matter for International Law?

The issue of the heritage directly linked to living culture has been already discussed. According to concept recognized and developed by Farida Shaheed certain types of cultural heritage are crucial for protection of cultural human rights.²⁰³ In case of such heritage there is genuine link between the heritage and community or individual. This concept applies to both types of cultural heritage mentioned above: the heritage of outstanding universal value and the heritage that is not recognized as such. Link to living culture is thus important element. The cultural heritage connected with living culture is not protected *per se* but rather as part of human rights protection.

In case of the heritage of outstanding universal value we can clearly observe the difference. Some of the heritage fits into category of living heritage²⁰⁴ whereas other represent evidence of past without any direct link to existing culture.²⁰⁵

In case of the heritage which is not of outstanding universal value but has connection with living culture the link is even more important for its protection. In such case protection

²⁰² 1972 UNESCO Convention. Art. 12.

²⁰³ Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38, paras. 58-60.

²⁰⁴ Number of sites of outstanding universal value are living places related to present day culture and have their human element. This applies mostly to religious sites – they are still places of pilgrimages, prayers and worshiping. Example of such practice could be temples of Bagan in Myanmar or Mausoleum of Khoja Ahmed Yasawi in Kazakhstan. Even more importantly this always applies to intangible heritage that is performed by humans and thus human element is inevitable.

²⁰⁵ Sites like Colosseum in Rome or Pyramids in Giza represent common heritage of mankind of outstanding universal value however they are not linked to any living culture. They are only monumental remains of ancient civilization. Similar applies to majority of archaeological sites that aim to explore extinct cultures however lack any significant connection with present day culture.

provided by International Law is rather limited and human rights based protection seems to be more viable option.²⁰⁶

Finally the last category of cultural heritage – the one which is not of outstanding universal value and also has no link to living culture.²⁰⁷ In this case protection is very limited. International Law which protects cultural heritage omits such case and human rights based approach is not applicable. This type of the heritage might be protected under national legislation but general protection in field of International Law is almost non-existing.

Division of the cultural heritage into different categories according to its value or link to living culture may seem like purely theoretical concept. However as presented it might be relevant for protection under International Law and even more importantly under International Criminal Law. ICL approaches the matter differently than conventions protecting cultural heritage and its attitude is based both on protection of heritage *per se* and human rights protection. The most current definition of cultural heritage provided by The Office of the Prosecutor of the ICC in new Policy on Cultural Heritage aims to be both inclusive and holistic:

In particular, therefore, the Office will understand cultural heritage as including monuments, religious or secular (such as architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings, and other combinations of features of cultural value); buildings or groups of buildings which are of cultural value, either because of their architecture, homogeneity or place in the landscape, or because of their content, in the case of museums, archives or libraries; sites (manmade works) and movable objects (such as works of art, sculpture, collections, manuscripts, books, records or other movable property of cultural value); underwater cultural heritage, including shipwrecks and underwater archaeological sites; intangible cultural heritage (such as the practices, representations, expressions, knowledge and skills that communities, groups, and, in some cases, individuals, recognise as part of their cultural heritage, together with the instruments, objects, artefacts, and cultural spaces associated therewith); and natural

²⁰⁶ Such places are mostly of religious nature or closely related to similar kind of ceremonies. The important element is that they still have to be actively used so they are part of living culture.

²⁰⁷ In this case we speak virtually about every kind of cultural heritage which is not part of living culture nor has outstanding universal value. It might be represented by historic buildings, archaeological sites or any different kind of monument.

heritage (natural sites of cultural value, including certain natural or cultivated landscapes and physical, biological, or geological formations).²⁰⁸

The definition illustrates that the ICC fully adopted approach that was earlier introduced and developed by UNESCO and bases protection of cultural heritage on human rights protection even for purposes of ICL. The division of cultural heritage into categories such as cultural and natural heritage or tangible and intangible heritage does not seem to be relevant anymore since the new holistic approach covers all those eventualities.

²⁰⁸ Policy on Cultural Heritage. International Criminal Court. 2021. Para. 16.

4. Human Rights Based Approach to Cultural Heritage

4.1. Introduction

The aim of this chapter is to explain relation between protection of cultural heritage and human rights protection. It provides view at historical development of link between human rights and cultural heritage. For this purpose number of relevant conventions will be scrutinized. Later it examines notion of cultural rights and their relationship with cultural heritage protection. Another concept that is discussed is cultural genocide as introduced by Raphael Lemkin – the idea behind the pattern is highly relevant for later understanding of whole issue.

The purpose of this chapter is not just to provide historical background but more importantly to present continual shift in development of protection. Present day understanding of the protection of cultural heritage receives with human rights based approach new dimension as shall be explained. The human rights based approach is even more crucial for protection of cultural heritage under International Criminal Law. With recognition of cultural heritage protection as part of human rights protection prosecution of attacks against cultural heritage is not limited to notion of war crimes anymore.

To provide illustrative example of discussed theoretical matter we shall later focus on several model situations related to famous cases under ICL. Most notably it shall be cases tried before ICTY with regard to destruction of cultural heritage in former Yugoslavia and also more currently background of *Al Mahdi* case with focus on cultural heritage of city Timbuktu. The cases shall be presented rather from human rights protection perspective to explain significance of the heritage for local community and individuals. Examination of consequences for ICL shall be left for next chapter.

4.2. Cultural Genocide

The concept of cultural genocide might seem like something that should be rather discussed under ICL than as topic related to human rights protection. It is true that original concept as created by Raphael Lemkin has seen cultural genocide as one of parts of the crime genocide. On the other hand the very idea of cultural genocide is something that overtook human rights protection for many years. The concept introduces ideas that became regarded as common much later under notion of human rights protection. Thus we can see the whole concept as base for later approach despite it has moved to different field of International Law.

Actions that could be understood as cultural genocide are not acts that suddenly appeared during the last century. Just the opposite is true – this type of behaviour used to be more common throughout most of human history. History is full of stories that represent this phenomenon. Until last centuries it was common practice that military victory was followed by destruction of cultural symbols of defeated party. Some of the most famous military leaders of all times like Tamerlane or Gengis Khan are perfect examples – whole cities were ruined by their orders and particular attention was paid to structures that represented culture and pride of those places.²⁰⁹ It was not just act of victorious power but also practical step how to ensure that new ruler of the city will be accepted and the old one forgotten. People are related to symbols of their culture and when the symbols are gone they more likely accept new culture and new order with its own symbols. This is not idea connected just to historical figures that are seen as barbaric today. The same logic behind destruction of certain structures in conquered city was used by Niccolo Machiavelli²¹⁰ during 15th century – the period which is regarded as progressive and humanistic. When we speak about more recent issues the only difference is that 20th century knows the word genocide and importance of protection of human life and dignity became crucial matter.

It is impossible to speak about genocide without mentioning Raphael Lemkin - the man who coined word genocide and is regarded as person behind Genocide Convention. Lemkin was born in area which is part of present day Belarus however in that time it was Russian Empire and after WWI the territory was ceded to reborn Poland. This corner of Europe always represented crossroad between east and west, meeting point of different cultures, religions and nations. Deep forests of Grodno Governorate hosted not only Poles and Belarusians but many ethnic minorities too. The area was traditionally inhabited by large Jewish communities and Lipka Tatars which provided multiethnic and multicultural feeling. Landscape was formed by orthodox and catholic churches, wooden synagogues and mosques. The diverse environment certainly shaped Lemkin's attitude towards minorities and different cultures. Lemkin himself was born to family of Polish Jews and historic experience of pogroms that used to be something common in the area also influenced his views.

²⁰⁹ E. g. Bukhara was conquered by Mongols in 1220 and the majority of city was burnt. The only surviving structure was Kalon Minaret that was spared for its outstanding beauty. The Minaret is dominant feature of the city skyline until these days. Similarly Baghdad was conquered by Mongols in 1258 which resulted in massacre of local population and destruction of city that was centre of education and culture in region.

²¹⁰ MACHIAVELLI, Niccolo. *The Prince*. London: J. M. Dent and Co., 1924. pp. 27-28.

Lemkin graduated at Lviv University and became very early active in international field too. In 1933 he submitted to the Fifth International Conference for the Unification of Penal Law a report with draft articles on crimes concerning destruction and oppression of population. The draft included definitions of two crimes – barbarity and vandalism. He defined barbarity as “*oppressive and destructive actions directed against individuals as members of national, religious or racial group*” and vandalism as “*malicious destruction of works of art and culture because they represent the specific creations of the genius of such groups*”.²¹¹

Crime of vandalism later served as base for the concept of cultural genocide. The breaking point is that Lemkin sees culture of specific group as something that is necessary to protect in order to protect the group itself. Thus he recognizes the specific culture of the group like something important that is related to group existence.

However, the crucial point for the present understanding of genocide is his work written during WWII – *Axis Rule in Occupied Europe* (Axis Rule), where he examines different patterns of government and laws established by occupant powers in defeated states. Here he also defines the term genocide as “*destruction of a nation or ethnic group*”. The term itself is created from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), which accurately describes the nature of this notion.²¹²

Comparing to Genocide Convention Lemkin’s understanding of genocide in Axis Rule is much broader. He describes genocide as “*coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups with the aim of annihilating the groups themselves*”.²¹³ In order to reach this goal Lemkin recognizes eight techniques of genocide: political, social, cultural, economic, biological, physical, religious, and moral. According to Lemkin’s concept they are carried out together and their purpose is to destroy all elements of nationhood.²¹⁴

While defining cultural genocide, Lemkin provides several examples from Nazi occupied territories. Among other measures he mentions restrictions of usage of national language (especially at schools) and strict control over all cultural activities to prevent

²¹¹ LEMKIN, Raphael. *Axis Rule in Occupied Europe*. Washington: Carnegie Endowment for International Peace, 1944. p. 91.

²¹² Ibid. p. 79.

²¹³ Ibid.

²¹⁴ Ibid. p. 82.

expressions of national spirit. Another element of cultural genocide is destruction of national monuments and removing content of cultural institutions like museums, archives, libraries and galleries.²¹⁵ Especially the last example of behaviour constituting cultural genocide is clearly based on definition of crime of vandalism as proposed in 1933.

Finally it is significant to point out that according to Lemkin genocide does not necessarily mean *destruction* but rather '*replacing national pattern*'. In *Axis Rule* he argues that there are two phases of genocide.²¹⁶ During the first one national pattern of oppressed group is destroyed. The second one means imposition of national pattern of oppressor. Lemkin does not protect mere physical and biological existence of oppressed group but aims to maintain its distinctive features as well.

Soon after the war Lemkin had chance to recast his theoretical work into practice. He was appointed as one of three independent experts to prepare the Secretariat Draft of Genocide Convention for the UN. Lemkin closely followed the pattern created in *Axis Rule* that introduced genocide as wide term not limited to physical and biological elimination of oppressed group.

The Draft uses the terms 'physical', 'biological', and 'cultural' genocide and describes different acts directed against oppressed groups while following these three categories. Physical genocide is defined as "*acts causing death of members of group or injuring their health or physical integrity*", biological genocide means "*restricting births*" and cultural "*destroying the specific characteristics of the group*".²¹⁷

The Draft defines elements of cultural genocide as following:

forced transfer of children to another human group, forced and systematic exile of individuals representing the culture of the group, prohibition of use of the national language even in private intercourse, systematic destruction of books printed in national language or of religious works or prohibition of new publications, systematic destruction of historical or religious monuments or their diversion to alien uses,

²¹⁵ Ibid. p. 84.

²¹⁶ Ibid. p. 79.

²¹⁷ Draft Convention on the Crime of Genocide, 26 June 1947. UN Doc. E_447. Sec. 2 Art. 2.

destruction or dispersion of documents and objects of historical, artistic or religious value and of objects used in religious worship.²¹⁸

However even in this early stage two other experts nominated to prepare the Draft expressed their doubts about the concept of cultural genocide. According to Henri Donnedieu de Vabres and Vespasian Pella cultural genocide represented undue extension of notion of genocide and aimed to re-establish former system of minority protection under the term of genocide.²¹⁹

At the next stage of drafting process Ad Hoc Committee examined whether the term genocide should be limited to physical and biological one. The Ad Hoc Committee proposed inclusion of article prohibiting any deliberate act committed with intent to destroy language, religion or culture of national, racial or religious group:

1. prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
2. destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.²²⁰

This draft started another discussion between supporters and opponents of concept of cultural genocide. Supporters argued that cultural bond is one of the most important factors that unites such group and physical genocide is not the only way how to destroy the group when opponents highlighted that it would be complicated to determine clear limits of cultural genocide and distinguish it from protection of human rights and minority protection.²²¹

When the Sixth Committee met to adopt the Draft the discussion continued. Finally cultural genocide was excluded from the text of Genocide Convention with only one exception – forcible transfer of children from the group to another one. Otherwise the definition of crime genocide followed Lemkin's concept of physical and biological genocide:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

²¹⁸ Ibid. Sec. 2 Art. 2 at § 3.

²¹⁹ Draft Convention on the Crime of Genocide UN ESCOR, 5th Session (1947). UN Doc E/447, pp. 6-7.

²²⁰ Summary Record of Meetings, UN ESCOR, 7th Session, Supp No 6 (1948). UN Doc E/3/SR 175-225, p. 6.

²²¹ Summary Record of the Fifth Meeting of the Ad Hoc Committee on Genocide, U.N. ESCOR, 6th Session, 5th meeting (1948). UN Doc E/AC.25/SROV.5, pp. 2-3.

- (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.²²²

4.2.1. Objections against Concept of Cultural Genocide

The history of drafting of the Genocide Convention shows that the idea of cultural genocide is highly controversial. There was number of objections against the concept based on several grounds. The most important base for objections mentioned by number of states was issue of assimilation. States with large colonial domains or distinctive minority groups were afraid that their assimilation policy can be recognized as cultural genocide.

It is not hard to understand why the states anticipated such threat. In case of colonial rule new model of administration imposed by colonial power was usually established. Old local system of administration was either abolished or fully controlled and subordinated to new one. Culture, language and religion of new ruler were replacing the original one. Similar applies to minority groups inside states. Assimilation efforts were based on replacement of traditional culture, language, religion and often forcible transfer of children as well.²²³

During the drafting process Philippines argued that inclusion of cultural genocide might lead to deprivation of nation's right to integrate different elements and create one homogenous unit.²²⁴ Similarly Sweden claimed that its policy of conversion of Sami population to Christianity might be considered as cultural genocide.²²⁵ Same argument was later used by Brazil as well. Many other countries were also concerned that it would be almost impossible to determine clear limits of cultural genocide in comparison to assimilation policies.²²⁶ Another common opinion remarked that such questions shall be rather treated under the system of human rights protection and minorities protection.

The second argument opposing the idea of cultural genocide is generally based on the first one however it develops it. Concept created by Lemkin understands cultural genocide as

²²² Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). 1948. Art. 2.

²²³ SHAMIRAN, Mako. Cultural Genocide and Key International Instruments: Framing the Indigenous Experience. *International Journal on Minority and Group Rights*, 2012, Vol. 19, No. 2, pp. 175-194.

²²⁴ UN Doc. A/C.6/SR.65 (Paredes, Philippines).

²²⁵ UN Doc. A/C.6/SR.83 (Petren, Sweden).

²²⁶ GILBERT, Jérémie. Perspectives on Cultural Genocide. In GUZMAN, Margaret de, AMANN, Diane (eds). *Arcs of Global Justice; Essays in Honor of William A. Schabas*. Oxford: Oxford University Press, 2016, pp. 321-329.

prerequisite for physical and biological genocide. Either cultural genocide is followed by physical and biological one or they take place simultaneously. Nevertheless as assimilation issue presents it does not have to be like this. In some cases cultural genocide does not develop into physical and biological one. As result there appears question – do we recognize attacks against culture and identity of the group as grave as attacks against physical existence of the group? Or in case we want to use criminal law language – are attacks against property as grave as attacks against persons?

Human life is one of the most important values protected by modern International law and its position above other protected values has been confirmed several times.²²⁷ Thus we can conclude that gravity of attacks against property (tangible elements of culture) is lower than gravity of attacks against human life. As result attacks against property should not be treated in same way as attacks against human life. When employing this way of thinking the decision to remove cultural genocide from Genocide Convention seems to be correct.

On the other hand it is necessary to keep in mind Lemkin's holistic approach. Before the WWII he was deeply concerned about events that were later recognized as genocide – annihilation of Armenian population in Ottoman Empire and holodomor in Ukraine under Soviet policy of Russification of Ukraine. In both cases the attacks were not targeted only against physical existence of the group but also against its culture. Lemkin understood those two elements as inseparable and saw protection of group's culture as protection of the group itself.

Massacres of Armenian population in Ottoman Empire that took place during 1915 – 1923 were denoted as genocide by number of states.²²⁸ Systematic extermination of Armenians was accompanied by efforts to erase any evidence of their existence in areas they once used to live. Particular attention was paid to buildings of religious character²²⁹ that represented distinctive Armenian culture and their outstanding architecture was considered as important cultural expression. Before the WWI Armenian churches totalled 2538 and monasteries 451 in area of present day Turkey.²³⁰ Until end of massacres in 1923 over 1000

²²⁷ See e.g. Prosecutor v. Ahmad Al Faqi Al Mahdi (Al Mahdi Judgment). Judgment and Sentence. Trial Chamber. 26 September 2016. ICC-01/12-01/15. para. 77.

²²⁸ As of 2020 Armenian Genocide was formally recognized by 32 states including United States, Russia, France, Italy and Brazil.

²²⁹ KEBRANIAN, Nanor. Cultural Heritage and the Denial of Genocide Law. In DEMIRDJIAN, Alexis (ed). *The Armenian Genocide Legacy*. London: Palgrave Macmillan UK, 2016, pp. 243-254.

²³⁰ Ibid. Footnote 23.

structures were levelled to ground and another 700 partly destroyed.²³¹ Majority of remaining structures were converted into different use such as mosques, stables or storehouses.²³² Systematic attacks against Armenian cultural heritage continued even in republican Turkey – large number of historic structures was dynamited or used as targets during military trainings of Turkish army.²³³

In 1953 Lemkin's speech *Soviet Genocide in the Ukraine*²³⁴ he describes purpose behind Soviet policy in Ukraine. In order to gain full control over Ukraine it was necessary to remove Ukrainian spirit which served as foundations of Ukrainian nationalism. In addition to intentionally causing famine that killed about five millions of Ukrainians during 1932-33 Soviet government accomplished larger policy of Russification. As Lemkin states, soul of Ukraine was attacked. Clergy, writers, journalists and other intellectuals were systematically killed or deported. Later same fate awaited farmers who Lemkin saw as keepers of Ukrainian traditions, folklore, music and language. As final step repopulation of Ukraine was taken so original population was fragmented and in many areas became minority. Once again destruction of cultural elements works as tool of non-physical annihilation of nation.

4.2.2. Which Culture is Protected?

The final remark on concept of cultural genocide is focused on object of protection. Term cultural genocide is often used in common and general meaning rather as legal term. In last years we witnessed such usage of the term by journalists and even some scholars while referring to policy of cultural heritage destruction in Middle East region by ISIS. Attacks against cultural heritage were often regarded as attacks against culture in general.²³⁵ In such cases there was no reference to particular group whose culture was attacked but common culture shared by whole humanity. Although it is impossible to deny that this kind of attitude reflects importance of targeted heritage it has nothing to do with concept of cultural genocide as created by Lemkin.

²³¹ Ibid.

²³² BEVAN, Robert. *The Destruction of Memory*. London: Reaktion Books, 2019. pp. 39-82.

²³³ The Armenian Genocide Museum – Institute Foundation. *Cultural Genocide* (online). The Armenian Genocide Museum – Institute Foundation, visited 23 February 2021. Available: <http://genocide-museum.am/eng/cultural_genocide.php>.

²³⁴ LEMKIN, Raphael. Speech: *Soviet Genocide in the Ukraine*. 1953.

²³⁵ DOPPELHOFER, Christoph. *Will Palmyra rise again? - War Crimes against Cultural Heritage and Post-war Reconstruction* (online). 2016, visited 23 February 2021. Available: <<https://www.ohchr.org/Documents/Issues/CulturalRights/DestructionHeritage/NGOS/Ch.Doppelhofer.pdf>>.

Lemkin did not intend to protect cultural heritage *per se* but as part of identity and living environment of certain protected group. In his eyes protection of cultural heritage of the group was protection of the group itself in fact. Thus it is incorrect to use the term cultural genocide in case of destruction of cultural heritage that has no link to the protected group. We cannot employ concept of *common heritage of mankind* that matters to humanity as whole. The conclusion is that only certain types of cultural heritage are shielded. To determine which cultural heritage deserves the protection under notion cultural genocide relationship between the heritage and protected group has to be examined.

In practice approaches towards usage of the term cultural genocide are mixed.²³⁶ We can observe both correct use while describing attacks against the cultural heritage that comprises heritage of oppressed group²³⁷ and incorrect one while referring to attacks against objects that are rather common heritage of mankind with no link to specific group.²³⁸ Nevertheless explanation of this phenomenon might be different as well. The term cultural genocide became rather non-legal term used in popular meaning to describe attacks against culture in general. That is clearly not something intended by Lemkin however the term lives its own life.

4.2.3. Return of the Cultural Genocide?

It might seem like the legal term cultural genocide is something partly forgotten and obsolete. However many scholars argue²³⁹ that it is just opposite. With rapid human rights protection development the issues under the term cultural genocide emerged again. The same concept appeared in different field of International law and under different name but its aim is similar. As shall be presented current developments in human rights protection are covering areas supposedly shielded by cultural genocide. However one crucial difference remains – possibilities of protection under ICL. Can ICL overcome this gap?

4.3. Cultural Human Rights

Cultural rights are often recognized as ‘underdeveloped’ category of human rights. Compared to other categories of human rights—civil, political, economic, and social—they

²³⁶ CAYABYAB, Darlene. *ISIS and the Cleansing of a Culture* (online). Counter Extremism Project, 28 April 2015, visited 23 February 2021. Available: <<https://www.counterextremism.com/blog/isis-and-cleansing-culture>>.

²³⁷ Ibid. The author mentions attacks against sites of Shia Muslims and Christians.

²³⁸ Ibid. The author mentions ancient sites of Nimrud, Hatra and Khorasabad.

²³⁹ LUCK, Edward, C. *Cultural Genocide and the Protection of Cultural Heritage*. Los Angeles: J. Paul Getty Trust, 2018. pp. 26-29.

are far less developed in their scope and enforceability.²⁴⁰ Nevertheless this is gradually changing. In last decades growing attention has been paid to cultural rights which resulted in their specification and recognition of their importance. UNESCO has been particularly active in the field – number of instruments develops scope of cultural rights and creates firm base for further progress. Under UNESCO attitude towards cultural rights the one area is especially important – cultural rights related to cultural heritage. Cultural heritage is not seen as something separated from humans but element of living culture that constantly evolves. Scholars speak about ‘human element’ of cultural heritage protection²⁴¹ which brings new concepts of protection. The connection between cultural heritage and people is now supported by acknowledgement of such link in the field of human rights. Practical consequences of this progress are numerous and they are not limited to the areas of human rights protection and cultural heritage protection as shall be presented. There can be found two categories of cultural rights according to Donders:²⁴² rights that explicitly refer to culture and rights with direct link to culture. As example of rights referring to culture might be mentioned rights to take part in cultural life or to use minority language as part of right to self-determination. The second category is more complicated one – almost every human right has its cultural dimension. Nevertheless some rights have very direct link to culture: rights to freedom of religion, freedom of expression or freedom of assembly and association.

4.3.1. Cultural Rights in Human Rights Conventions

The Universal Declaration of Human Rights (UDHR) is truly milestone document in history of human rights protection. Not only that it recognizes and defines wide list of human rights but it also possess high level of authority. Although it is not binding it is almost universally acknowledged. In its Article 27 cultural rights are briefly mentioned:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.²⁴³

²⁴⁰ SYMONIDES, Janusz. Cultural Rights: a neglected category of human rights. *International Social Science Journal*, 1998, Vol. 50, No. 158, pp. 559-572.

²⁴¹ FRANCIANI, Francesco. The Human Dimension of International Cultural Heritage Law: An Introduction. *The European Journal of International Law*, 2011, Vol. 22, No. 1, pp. 9-16.

²⁴² DONDEERS, Yvonne. Foundations of Collective Cultural Rights in International Human Rights Law. In JAKUBOWSKI, Andrzej (ed). *Cultural Rights as Collective Rights*. Leiden: Brill – Nijhoff, 2016, pp. 85-112.

²⁴³ Universal Declaration of Human Rights (UDHR). 1948. Art. 27.

For purposes of defining the rights related to cultural heritage paragraph 1 is more significant. Wording is rather general (as is typical for whole document) and does not provide any explanation what understands under phrases ‘participate in the cultural life’ and ‘enjoy arts’.

Similar applies to another important document - International Covenant on Economic, Social and Cultural Rights (ICESCR). Although ICESCR is more focused on groups of rights mentioned in its official name in case of cultural rights it barely provides more detailed specification than UDHR. In its Article 15 three groups of rights are mentioned:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.²⁴⁴

Nevertheless in case of Article 15 of ICESCR closer interpretation is provided by General comment No. 21. To fully understand meaning of the Article two key terms have to be outlined: culture and cultural life. Concept of culture under ICESCR is holistic and culture is seen as living organism:

The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, ...²⁴⁵

Wide and holistic understanding of culture is also reflected in its definition for purposes of term cultural life:

encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their

²⁴⁴ International Covenant on Economic, Social and Cultural Rights (ICESCR). 1966. Art. 15.

²⁴⁵ General Comment No. 21 (General Comment No. 21). 2009. UN Docs. E/C.12/GC/21. Art. 12.

encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.²⁴⁶

Thus the cultural life is defined as “... *is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.*”²⁴⁷ The right to take part in cultural life can be described as freedom.²⁴⁸ It requires from state both abstention (non-interference) and positive action (ensuring preconditions). It is also related to number of other cultural rights: the right to enjoy the benefits of scientific progress and its applications, the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author, the right to freedom indispensable for scientific research and creative activity and right to education through which values, religion, customs, language and other cultural references are passed.²⁴⁹

According to the definition ‘everyone has right to participate in cultural life’. ‘Everyone’ can describe both individuals and collectives.²⁵⁰ There are three ways how to exercise cultural rights: individually, in association with others or as member of group or community. ‘Participate’ is synonymous to ‘to take part’ and refers to three interrelated main components: participation in, access to and contribution to cultural life.²⁵¹

For full realization of the right of everyone to take part in cultural life several elements have to be present: availability, accessibility, acceptability, adaptability and appropriateness.²⁵² Availability means presence of cultural goods and services that are open to everyone. Accessibility is opportunity to fully enjoy the culture. Acceptability refers to laws, policies and programmes of state in regard to cultural life that should be formulated in way that is acceptable to involved individuals and communities. Adaptability is flexibility and relevance of strategies, policies and programmes in area of cultural life. Finally appropriateness is related to realization of specific human right in way that is suitable to given cultural modality and respect culture and cultural rights of others.

²⁴⁶ Ibid. Art. 13.

²⁴⁷ Ibid. Art. 11.

²⁴⁸ Ibid. Art. 6.

²⁴⁹ Ibid. Art. 2.

²⁵⁰ Ibid. Art. 9.

²⁵¹ Ibid. Art. 15.

²⁵² Ibid. Art. 16.

Further development of concept of cultural rights can be observed in category of persons and communities requiring special protection. Among them two are significant for case of cultural heritage protection as well. In such way minority groups are protected against assimilation by shielding their language, customs, traditions, religion and diversity in general.²⁵³ Similar applies to indigenous peoples who are seen as closely related to their land and their traditions and customs are recognized as integral part of their lives since their daily life has strong communal dimension.²⁵⁴ Protection of indigenous peoples is one of areas that leads development of cultural rights protection and recognition. It also follows closely concept of cultural genocide created by Lemkin as shall be presented.

Concept of cultural life is also linked to diversity.²⁵⁵ In fact protection of cultural life is protection of diversity itself. Freedom of cultural practices ensures survival of different cultures and thus world diversity. All forms of cultural heritage are seen as record of human experience and aspirations and expression of cultural diversity among different cultures.²⁵⁶ Cultural diversity refers to different ways in which cultures of groups and societies are expressed in form of cultural heritage.²⁵⁷ UNESCO also links diversity with cultural identity and uses concept of diversity protection as tool for identity preservation.²⁵⁸

Finally, protection of diversity is closely related to protection of cultural heritage. Cultural heritage represents tangible or intangible expression of diversity and the best way how traditions, customs and culture in general can be passed. General comment No. 21 determines four obligations of states: (1) respect and protect cultural heritage in all its forms during peace, war and natural disasters, (2) respect and protect cultural heritage of all groups and communities, (3) respect and protect cultural productions of indigenous people, (4) prevent discrimination based on cultural identity by legislation.²⁵⁹

4.3.2. Indigenous Peoples and their Cultural Rights

The concept of cultural rights has been vastly developed for purposes of protection of one certain category of people – indigenous peoples. Based on presumption that indigenous people still live in traditional way number of cultural rights related to their traditional lifestyle

²⁵³ Ibid. Art. 32.

²⁵⁴ Ibid. Art. 36.

²⁵⁵ Ibid. Art. 40.

²⁵⁶ UNESCO Universal Declaration on Cultural Diversity. 2001. Art. 7.

²⁵⁷ The Convention on the Protection and Promotion of the Diversity of Cultural Expressions. 2005. Art. 4.

²⁵⁸ DONDEERS, Yvonne. A Right to Cultural Identity in UNESCO. In FRANCIONI, Francesco, SCHEININ, Martin (eds). *Cultural human rights*. Leiden: Martinus Nijhoff Publishers, 2008, pp. 317-340.

²⁵⁹ General Comment No. 21. Art. 50.

and culture has been recognized. There is no doubt that indigenous people are closely linked to environment where they live and also that their traditional lifestyle is important element of their society and identity. Protection of their cultural rights is seen as part of protection of their right to self-determination.²⁶⁰

However protection of indigenous people must not be overestimated – cultural rights applicable to indigenous people are not automatically applicable to rest of society. Indigenous people comprise special group within society. For long time they faced discrimination in many fields and assimilation pressure as well. They are vulnerable group that require special protection in many aspects.

The first complex tool to protect indigenous people is United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted in 2007. It determines number of cultural rights in order to protect traditional culture, way of living and cultural heritage of indigenous peoples. Rights recognized under UNDRIP can be summarized as following:

- Right to maintain and strengthen distinct cultural institutions
- Right to belong to indigenous community or nation in accordance with customs of the community or nation concerned
- Right to practice, revitalize and transmit cultural traditions and customs
- Right to control own education system and institutions providing education in own language
- Right to promote, develop and maintain institutional structures, customs, spirituality, traditions and juridical system
- Right to maintain, control and develop their cultural heritage and traditional knowledge
- Right not to be subjected to forced assimilation or destruction of culture²⁶¹

Curiously the UNDRIP speaks about cultural heritage only in its Article 31 where is states that *“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions...”*²⁶²

²⁶⁰ VRDOLJAK, Ana, Filipa. Self-Determination and Cultural Rights. In FRANCONI, Francesco, SCHEININ, Martin (eds). *Cultural human rights*. Leiden: Martinus Nijhoff Publishers, 2008, pp. 41-78.

²⁶¹ The United Nations Declaration on the Rights of Indigenous People: A manual for national human rights institutions (Asia Pacific Forum of National Human Rights Institutions and Office of the United Nation High Commissioner for Human Rights, 2013), p. 13.

²⁶² UNDRIP. Art. 31.

Nevertheless the UNDRIP provides more important message – it shows interrelationship of different cultural elements. Once again we can observe holistic approach when cultural heritage protection is only part of wider protection of culture and indigenous people itself. The UNDRIP not only defines cultural rights but presents important connections among them and other elements: traditionally inhabited lands and territories,²⁶³ archaeological and historical sites, artefacts, designs, ceremonies, technologies, art performance and literature²⁶⁴ as well as religious and cultural sites, ceremonial objects and human remains.²⁶⁵ Protection of such tangible objects is integral part of protection of cultural life of indigenous people. Mentioned elements serve as prerequisite for execution of cultural rights recognized in the UNDRIP.

4.3.3. Intangible Cultural Heritage

Convention for the Safeguarding of the Intangible Cultural Heritage (IHC) adopted by UNESCO in 2003 marks crucial turn not only in understanding of cultural heritage but also in recognition of cultural rights. The IHC is result of longer development process characterized by increasing attention paid to intangible cultural heritage. Preamble of the IHC already uses holistic approach towards cultural heritage. It recognizes interdependence between intangible and tangible cultural and natural heritage. Even more importantly it sees intangible cultural heritage as source of cultural diversity and base for sustainable development.²⁶⁶ Nevertheless for cultural rights issue is the most significant IHC approach towards entitled persons: it recognizes role of communities, groups and individuals in production, safeguarding, maintenance and re-creation of intangible cultural heritage.

As pointed out by Blake²⁶⁷ it makes protection of intangible cultural heritage more complex issue. In fact we do not speak only about protection of cultural heritage but more likely about protection of culture and communities. Cultural rights of communities are not directly recognized in IHC but the attitude results in their protection too. Comparing to earlier UNESCO conventions the shift is obvious – in the IHC the living culture is protected and thus cultural life of communities, groups and individuals as well. Communities, groups and individuals should be also involved in intangible heritage protection and take active part in it.

²⁶³ Ibid. Art. 10.

²⁶⁴ Ibid. Art. 11.

²⁶⁵ Ibid. Art. 12.

²⁶⁶ Intangible Heritage Convention. Preamble.

²⁶⁷ BLAKE, Janet. UNESCO's 2003 Convention on Intangible Cultural Heritage. The implication of community involvement in safeguarding. In SMITH, Laurajane, AKAGAWA, Natsuko. *Intangible Heritage*. London: Routledge, 2008, pp. 45-50.

4.4. Special Rapporteur in the Field of Cultural Rights

In 2009 the Human Rights Council of UN decided to establish new special procedure entitled 'independent expert in the field of cultural rights' through Resolution 10/23. Since 2012 the mandate was named Special Rapporteur in the field of cultural rights. In period 2009-2012 it was hold by Farida Shaheed who was later replaced by Karima Bennoune. Generally speaking the aim of the mandate is promotion of cultural rights within system of human rights and clarification of fact that their violation represents serious issue.²⁶⁸

Ironically it was large scale violation of human rights committed by ISIS in Syria and northern Iraq that brought rapid development in field of cultural rights. Farida Shaheed was in her mandate focused not only on cultural rights in general but more importantly on relationship among cultural rights and cultural heritage. In ISIS occupied territories cultural heritage faced systematic looting and destruction. Whereas the destruction was usually justified by ideological reasons the looting had purely economic background. In majority of cases the targeted cultural heritage was not the heritage of outstanding universal value but cultural heritage of local communities. It is important to point out that relevant region is traditionally inhabited by number of ethnic and religious minorities with their distinct cultures. Such conditions create perfect environment for exploration of link among cultural heritage and certain group of people or individual related to it. In human rights based approach to cultural heritage protection it is protection of the rights what matters. For this purpose it is inevitable to closely examine human rights related to cultural heritage.

To outline attitude of Special Rapporteur towards protection of cultural rights related to cultural heritage we have to focus on her understanding of cultural heritage first. She promotes fully holistic approach that does not make any difference among different types of cultural heritage. Although she points out that there is not any universal definition of cultural heritage she tries to create pattern that would describe the term from human rights based point of view:

...tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs; vernacular or other languages; artistic

²⁶⁸ United Nations Human Rights Office of the High Commissioner. Special Rapporteur in the field of cultural rights (online). United Nations Human Rights Office of the High Commissioner, visited 23 February 2021. Available: <<https://www.ohchr.org/en/issues/culturalrights/pages/srculturalrightsindex.aspx>>.

expressions, folklore) and natural heritage (e.g. protected natural reserves; other protected biologically diverse areas; historic parks and gardens and cultural landscapes).²⁶⁹

For purposes of human rights protection classification of different types of cultural heritage is not relevant. The new approach sees types of cultural heritage as deeply interconnected and dependent on each other. Destruction of one type of cultural heritage often brings destruction of other type as well²⁷⁰ (e.g. destruction of tangible ritual object can cause vanishing of the ritual - intangible cultural heritage – itself). Whole concept of cultural heritage reflects dynamic character of something that was developed, built or created and interpreted in history and later transmitted from generation to generation. Cultural heritage represent link between past and future.²⁷¹

Special Rapporteur also created definition of cultural rights that reflects new development in the field:

Cultural rights protect the rights for each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They may also be considered as protecting access to cultural heritage and resources that allow such identification and development processes to take place.²⁷²

The definition is based on General Comment No. 21 to ICESCR. One of the most important elements developed by Special Rapporteur is concept of access to cultural heritage. In fact we speak about the right to access and enjoy cultural heritage. Access and enjoyment are two interdependent concepts – they include ability to know, understand, enter, visit, use, maintain, exchange, and develop cultural heritage.²⁷³ The concept of access has been

²⁶⁹ Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38. Art. 4.

²⁷⁰ Cultural rights. 2016. UN Docs. A/71/317. Art. 7.

²⁷¹ Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38 Art. 5.

²⁷² Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59. Art. 7.

²⁷³ Report of the independent expert in the field of cultural rights, Farida Shaheed. 2011. UN Docs. A/HRC/17/38. Art. 58.

developed by Committee on Economic, Social and Cultural Rights. According to the Committee four forms of access have to be ensured:

(a) physical access to cultural heritage, which may be complemented by access through information technologies; (b) economic access, which means that access should be affordable to all; (c) information access, which refers to the right to seek, receive and impart information on cultural heritage, without borders; and (d) access to decision making and monitoring procedures, including administrative and judicial procedures and remedies.²⁷⁴

The right of access and enjoyment of cultural heritage is both individual and collective human right. Right holders are individuals and groups, majority and minorities, citizens and migrants as well.²⁷⁵ The fact that the right can be exercised by individuals is not in contradiction to collective nature of the right. As pointed out by Jovanović there are three ways how cultural rights can be exercised.²⁷⁶ It might be by individual as member of right-holding collective, by collective entity as such or by representative body of right-holding collective. Slightly different attitude towards collective rights offers Donders.²⁷⁷ She understands collective rights as community rights, communal rights or individual rights with collective dimension. In case of community rights the right-holder is collective entity. Regarding communal rights the right-holder is individual organized as member of collective entity. Finally in case of individual rights with collective dimension the right-holder is individual and no explicit reference is made to collective entity however enjoyment of the right has collective dimension. Thus in approach proposed by Donders collective dimension refers to subject of the right (right-holder) but also can be found in object of the right (collective dimension of the right).

Nevertheless the most important shift lies in fact that we do not speak about protection of cultural heritage *per se*. Cultural heritage is rather seen as precondition for exercising of cultural rights. There is fundamental relation between cultural heritage and humans and protection of cultural heritage is inevitable for protection of human rights. However as presented earlier there are different types of cultural heritage and not all of them are related to certain individual or group. In every case has to be scrutinized whether the link between

²⁷⁴ Ibid. Art. 60.

²⁷⁵ Ibid. Art. 61.

²⁷⁶ JOVANOVIĆ, Miodrag. Cultural Rights as Collective Rights. In JAKUBOWSKI, Andrzej (ed). *Cultural Rights as Collective Rights*. Leiden: Brill – Nijhoff, 2016, pp. 15-35.

²⁷⁷ DONDERS: Foundations of Collective...

cultural heritage and group or individual is present – not every cultural heritage has its human element.

Special Rapporteur relates issue of cultural heritage protection to number of cultural rights:

(a) human creativity in all its diversity and the conditions for it to be exercised, developed and made accessible; (b) the free choice, expression and development of identities, which includes the right to choose not to be a part of particular collectives, as well as the right to change one's mind or exit a collective, and indeed to take part on an equal basis in the process of defining it; (c) the rights of individuals and groups to participate – or not to participate – in the cultural life of their choice and to conduct their own cultural practices; (d) their right to interact and exchange, regardless of group affiliation and of frontiers; (e) their rights to enjoy and have access to the arts, to knowledge, including scientific knowledge, and to their own cultural heritage, as well as that of others; and (e) their rights to participate in the interpretation, elaboration and development of cultural heritage and in the reformulation of their cultural identities.²⁷⁸

According to presented concept damage to cultural heritage means damage to cultural rights.²⁷⁹ Cultural heritage is precondition to exercise mentioned rights. Together with holistic understanding of cultural heritage we can conclude that all forms of cultural heritage are important for human rights protection. We have to scrutinize presence of human element, not type or form of cultural heritage.

The intentional destruction of cultural heritage that has taken place in the Middle East region in the last years undermines a number of rights - right to freedom from discrimination, right to freedom of thought, conscience and religion, and right to take part in cultural life, including right to maintain and develop the cultural practices of one's choice, and to access cultural heritage including one's own history, and the right to freedom of artistic expression and creativity.²⁸⁰ However it is necessary to observe those violations of human rights in wider context. As pointed out by Special Rapporteur they are part of broader policy that aims to destroy cultural diversity and erase memory about past, remove evidence about presence of

²⁷⁸ Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59. Art. 9.

²⁷⁹ Cultural rights. 2016. UN Docs. A/71/317. Art. 13.

²⁸⁰ Ibid. Art. 34.

minorities, religions or philosophies and beliefs.²⁸¹ Such practices can be described as cultural cleansing.

The attitude chosen by Special Rapporteur illustrates that it is not correct to speak about protection of cultural heritage or protection of property. In fact we speak about protection of people and their human rights. It is true that final outcome might look like protection of cultural heritage however the purpose of such protection is fact that cultural heritage serves as base to exercise number of human rights. This new approach brings significant changes: the distinction between protection of persons and protection of property is disappearing in certain cases. In case we protect human rights the protection of property is protection of persons in fact. People cannot be separated from their cultural heritage – protection of both has to be interconnected.²⁸² The approach reflects events when attacks against cultural heritage are more often used as weapon of war.²⁸³ The idea behind the attacks is to bring terror among civil population but also to modify it and eventually even destroy it through destruction of its culture. Attacks against cultural heritage are attacks against identity of individuals and groups and their development process.²⁸⁴

4.5. Cultural Rights and International Criminal Law

The very idea of relating cultural rights to International Criminal Law might seem controversial. As presented extent of cultural rights is often unclear and whole category is continuously developing. It marks obvious contradiction to principle of legality which is cornerstone of International Criminal Law. Cultural rights (together with economic and social rights) are considered as vague and thus not fitting under ICL protection.²⁸⁵ Moreover cultural rights are never mentioned in any ICL document. Can this gap be overcome?

The answer highly depends on chosen approach. First of all it is necessary to understand that we speak about two different systems: human rights law and International Criminal Law. The matter is that the systems use different wording and attitude towards same issues.²⁸⁶ Human rights law defines rights whereas ICL defines crimes. ICL does not speak

²⁸¹ Ibid. Art. 33.

²⁸² Ibid. Art. 53.

²⁸³ TURKU, Helga. *The Destruction of Cultural Property as a Weapon of War*. Washington: Palgrave Macmillan, 2018. pp. 38-49.

²⁸⁴ Report of the Special Rapporteur in the field of cultural rights. 2016. UN Docs. A/HRC/31/59. Art. 47.

²⁸⁵ SCHMID, Evelyne. *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law*. Cambridge: Cambridge University Press, 2015. pp. 22-23.

²⁸⁶ Ibid. p. 24.

about rights but rather obligations.²⁸⁷ Nevertheless crime is nothing else than violation of right all after all. ICL protects certain values determined by elements of crime. Cultural rights do the same by defining rights. ICL also never mentions civil or political rights however there is no doubt that it covers some of the values protected under them. Current attitude relates crimes under International law to gross violations of civil and political rights.²⁸⁸ However since all the human rights are considered as equal there is no reason why to pay less attention to violations of cultural rights. In fact ICL represents ultimate way of human rights protection.

The most important aspect of the whole problem is that ICL approach is narrower than human rights based attitude. Not every violation of human (cultural) right is crime under International law.²⁸⁹ Same factual background is seen differently under human rights law and ICL. Elements of crime work as filter that determines whether violation of human right constitutes crime under International law. In fact human rights protection, ICL and IHL are deeply interconnected.²⁹⁰ Nevertheless protection of cultural rights under ICL brings significant element – individual criminal responsibility. Whereas in case of human rights protection law state has responsibility to implement the rules ICL prosecutes their violations on individual basis. Finally we have to stress that there is no direct criminalization of violations of cultural rights.²⁹¹ Their violations are prosecuted indirectly through already existing crimes that contain relevant elements of protection of cultural rights.

To provide more concrete idea about discussed concept we shall focus on crimes under International law that might contain violation of cultural rights. Strictly speaking we will pay attention to cases where cultural heritage is involved. As presented right to access and enjoy cultural heritage is important cultural right that also brings new elements to cultural heritage protection itself. Protection of cultural rights related to cultural heritage results in protection of heritage itself since it is seen as precondition for cultural rights exercise. Holistic approach to cultural heritage ensures protection of wide range of cultural expressions which makes the concept very inclusive.

As pointed out ICL documents do not mention cultural rights. To identify whether certain definition of crime protects cultural rights we have to examine protected object more

²⁸⁷ STAHN, Carsten. *A Critical Introduction to International Criminal Law*. Cambridge: Cambridge University Press, 2019. p. 16.

²⁸⁸ Ibid.

²⁸⁹ SCHMID: *Taking Economic, Social...*, pp. 41-45.

²⁹⁰ Ibid. p. 45.

²⁹¹ Ibid. pp. 31-33.

closely. In some cases we will realize that described *actus reus* and *mens rea* have link to cultural rights protection. This is not something surprising – definitions of crimes are open to interpretation and understanding of notions is developing and shifting. It is proven even by courts themselves by their decisions based on current interpretation of relevant terms. We can conclude that cultural rights are already protected under ICL in certain extent that depends on interpretation of existing definitions of crimes by court.

First crime that is closely related to protection of cultural rights is genocide. Although as presented earlier idea of cultural genocide has been rejected even current definition of genocide keeps certain cultural elements. Genocide by forcibly transferring children as defined in Article 6(e) of Rome Statute of ICC²⁹² represents more protection of cultural background of protected group than prevention of physical or biological genocide. The purpose of transfer of children from one national, ethnical, racial or religious group to another is destruction of such group in whole or in part.²⁹³ However we speak more about the destruction in cultural meaning than physical or biological one. Transferred children are removed from their original environment and forced to accept new cultural pattern. The concept is closer to present day idea of assimilation nevertheless it certainly represents serious violation of cultural rights.²⁹⁴ The children are deprived of their right to take part in cultural life of their original group and forced to follow order of new one.

Another crime that has strong connection with cultural rights protection is crime against humanity of persecution. Some authors²⁹⁵ argue that crime of persecution covers Lemkin's original concept of cultural genocide in fact. *Actus reus* requires deprivation of fundamental rights contrary to international law.²⁹⁶ Such rights might be cultural rights among others. Targeting of person is based on political, racial, national, ethnic, cultural, religious or gender grounds (or other grounds that are universally recognized as impermissible under International law) and, for cultural rights protection importantly, perpetrator targets person because of his or her identity of the group or collectivity.²⁹⁷ From human rights protection based point of view we can assume that we speak about protection of group identity and

²⁹² Rome Statute of the International Criminal Court (Rome Statute). Art. 6 (e).

²⁹³ Elements of crimes. International Criminal Court, 2011 (Elements of Crimes). ICC-PIDS-LT-03-002/11_Eng. Art. 6 (e).

²⁹⁴ SCHMID: *Taking Economic, Social...*, pp. 217-218.

²⁹⁵ NOVIC, Elisa. From 'Genocide' to 'Persecution': 'Cultural Genocide' and Contemporary International Criminal Law. In JAKUBOWSKI, Andrzej (ed). *Cultural Rights as Collective Rights*. Leiden: Brill – Nijhoff, 2016, pp. 313-335.

²⁹⁶ Elements of crimes. Art. 7(1)(h).

²⁹⁷ Ibid.

cultural life. This view was also confirmed in several cases before the ICTY²⁹⁸ where the Tribunal recognized attacks against cultural heritage of certain group as violation of fundamental rights and attack against identity of the group that constitute crime of persecution.

Speaking about war crimes there is several examples provided by court's decisions that there can be link between cultural rights protection and war crime of attacking of protected objects.²⁹⁹ In this case presence of cultural rights element is based on nature of targeted protected object. The object has to be of *symbolic value*³⁰⁰ for group related to it. Not every object has such value – it has to be part group's daily life, identity and cultural life thus strong link between the group and the object exist. *Actus reus* does not require any of these elements so they are result of court's consideration and example how shortcoming in crime definition can be overlap by interpretation of existing rules.

There is also number of other crimes that might theoretically constitute violation of cultural rights however such option has never been examined by court so far. Crime against humanity of deportation or forcible transfer of population³⁰¹ clearly violates group's right to cultural life since it loses access to its immovable cultural heritage (which can cause damage to group's intangible cultural heritage as well). Same applies to war crime of unlawful deportation and transfer³⁰² with similar *actus reus*. Finally it is questionable if violation of cultural rights might be related to crimes directed against property of civilians or enemy.³⁰³ Depending on nature of such property this option seems to be viable but highly theoretical. As in case of persecution destruction of certain types of property might constitute violation of cultural rights however such option has never been examined more closely. These ideas have been significantly developed by the ICC in new Policy on Cultural Heritage. The Office of the Prosecutor “*views cultural heritage as the bedrock of cultural identities, and endorses the understanding that crimes committed against cultural heritage constitute, first and foremost, an attack on a particular group's identity and practices*”.³⁰⁴ It also stresses that attacks

²⁹⁸ See e.g. cases *Kordić and Čerkez* or *Kupreškić* before the ICTY.

²⁹⁹ Such connection was recognized e. g. in cases *Al Mahdi*, *Prlić et al.*, *Blaškić*. The cases shall be discussed in detail in following chapter.

³⁰⁰ This words were used both in *Blaškić* and *Al Mahdi* cases with regard to nature of targeted objects.

³⁰¹ Elements of crimes, 7 (1) (d).

³⁰² Elements of crimes, 8 (2) (a) (vii)-1.

³⁰³ Elements of crimes. War crime of destruction and appropriation of property, War crime of attacking civilian objects, War crime of destroying or seizing the enemy's property.

³⁰⁴ Policy on Cultural Heritage. International Criminal Court. 2021. Para. 17.

against cultural heritage destroy conditions that allow people to access, participate in and contribute to cultural life.³⁰⁵

4.6. Timbuktu as Living City

Very few cities have so legendary reputation as Timbuktu. In stories that arrived to Europe the city was something mysterious, distant and almost intangible. For centuries it was object of imagination of travellers despite many doubted if it actually exists. When finally reached by Europeans in early 19th century the city was only glint of its former glory.

Located in northern Mali Timbuktu is gateway to Sahara desert. Founded as Tuareg camp on crossroad of trans-Saharan trade routes the city continuously became important trade centre. Later, in 14th century rich Timbuktu also became centre of education, religion and Islamic culture in Western Africa. After pilgrimage of Malian emperor Mansa Musa to Mecca in 1324 the Great Mosque (Djinguereber) was built and Sankore University established.³⁰⁶ The golden age of the city followed – it was important intellectual centre with over 25 000 scholars and students from all Northern Africa and commercial hub that controlled trade with gold and salt in region. In this period the city also gained its nickname – city of 333 saints. Islamic culture was spreading from Timbuktu to neighbouring regions and city population was increasing. This period gave birth to legends about Timbuktu as legendary rich city hidden in desert. However nothing lasts for eternity and in late 16th century the city was conquered by Morocco. The event marked its continuous decay. In next centuries it suffered from regular raids of desert tribes, scholars left and trade centres moved to other places. In 19th century when the place was finally reached by Europeans it was mere poor forgotten desert town.

Nevertheless something has remained – memories of glorious past both in tangible and intangible form. Remains of city golden age do not have form of fantastic legends only. Timbuktu is dotted by mausoleums of Sufi saints, madrasas and historical mosques. Moreover the history has its written form too – local library and families still possess over 180 000 ancient manuscripts from period when Sankore University used to be centre of education.³⁰⁷ Uniqueness of those documents is not only in their age but more importantly in their content. Africa has long tradition of oral history but the manuscripts cast new light on the written one.

³⁰⁵ Ibid. para. 28.

³⁰⁶ The Editors of Encyclopaedia Britannica. *Timbuktu* (online). Britannica, 25 November 2019, visited 24 February 2021. Available: <<https://www.britannica.com/place/Timbuktu-Mali>>.

³⁰⁷ DJIAN, Jean, Michel. Timbuktu Manuscripts: Africa's Written History Unveiled. *The UNESCO Courier*, 2007, No. 5, pp. 7-9.

Centuries of history are recorded in those documents that are truly exceptional evidence of local life and knowledge in that period.

Reflecting its memorable past, unique role in region and still existing rich architectural heritage UNESCO decided in 1988 to design the city as World Heritage site. Three great mosques (Djingareyber, Sankore and Sidi Yahia) and number of mausoleums represent evidence of city's role in past.³⁰⁸ Timbuktu became internationally famous once again in 2012 when it was occupied by armed Islamist groups. During the occupation number of mausoleums of local saints was destroyed and mosques damaged. The action caused public international outcry and later resulted in famous *Al Mahdi* case before ICC that is seen as crucial turn in protection of cultural heritage.

Nevertheless there is something more that makes Timbuktu really special place. In addition to outstanding universal value recognized by UNESCO there is also reason why we have to speak about the city when discussing cultural rights related to cultural heritage. Timbuktu is still living city with its citizens, guilds, communities and ancient traditions. Historic buildings, the tangible cultural heritage, represent more obvious and visible part of the city identity. However there is intangible element of local cultural heritage too. Those two elements are deeply interconnected and interdependent. One cannot be separated from other and only together they create firm base of local life. Mosques and mausoleums are part of daily life of locals and something that gives them feeling of identity and continuity.

The majority of famous Timbuktu historic structures are built from material called banco. It is mixture of clay and rice straw traditionally used for making bricks and roughcasting of house facade.³⁰⁹ The problem of this kind of material is that it is susceptible to erosion caused by local desert climate and requires regular maintenance. The restoration works are carried out once per year and represent important social event when all the community gathers and participate.³¹⁰ As already mentioned, there are still present traditional guilds in the city. Among them one of the most important and respected is guild of masons. The three most significant mosques of old Timbuktu are placed under supervision of traditional mason families who are responsible for their regular maintenance.³¹¹ Masons

³⁰⁸ UNESCO. Timbuktu (online). UNESCO, visited 24 February 2021. Available: <<https://whc.unesco.org/en/list/119/>>.

³⁰⁹ SIDI, Ali Ould. Monuments and Traditional Know-how: the Example of Mosques in Timbuktu. *Museum International*, 2006, Vol. LVIII, No. 1-2 / 229-230, pp. 49-58.

³¹⁰ Ibid.

³¹¹ DIOP, Alpha. Timbuktu. The future of traditional masons. *World Heritage*, 2016, No. 82, pp. 44-48.

represent another significant part of Timbuktu's cultural heritage. Their know-how including traditional building methods is essential not only for local monuments preservation but has social role as well.

The regular maintenance work is great event. Before selection of specific day of work imam of the mosque initiates collection of necessary funds and materials together with masons. Later he informs worshippers about the event during Friday prayers. The selected day is always subsequent Sunday in order to gather maximum of people. The work starts early in the morning. After magical ritual executed by masons the reparation itself can start. It begins from minaret of the mosque and continues to mosque itself. In the same time the event is large popular celebration where all the local community meets to take part. In the end of the works imam thanks the crowd and offers blessing. Also small presents are given to the masons who let the works.³¹²

The event of restoration of mosques reinforces social and cultural relations in community, brings together different generations and unites tangible and intangible elements of local cultural heritage.³¹³ It is not only about maintenance of tangible cultural heritage – the social dimension of the event is even more important. It strengthens and unites the community and reinforces social fabric.

During the Islamist occupation of the city locals were prevented from the event.³¹⁴ Not only that number of mausoleums and ancient manuscripts were destroyed but the cultural life of local community was hit even harder. Locals were not allowed to visit mausoleums for prayers and event of regular mosques restoration was prohibited. The damage goes further behind tangible results that can be observed on the structures. Regarding close ties among local community and its cultural heritage the intangible element suffers even more. The attack against buildings constitutes attack against community itself in fact. This fact has been reflected even in *Al Mahdi* case as shall be presented later. As pointed out by Lenzerini the attack against cultural heritage of the community can serve as tool to destroy the group's identity and constitutes violation of fundamental rights.³¹⁵

³¹² SIDI: Monuments and Traditional...

³¹³ Ibid.

³¹⁴ UNESCO's Role and Action to Protect and Safeguard Cultural Heritage and to Promote Cultural Pluralism in Crisis Situations. Case Study: Lessons Learned from Mali. 2017. IOS/EVS/PI/159 REV. p. 7.

³¹⁵ LENZERINI, Federico. Suppressing and Remedying Offences against Culture. In VRDOLJAK, Ana, Filipa. *The Cultural Dimension of Human Rights*. Oxford: Oxford University Press, 2013, pp. 240-272.

Later rebuilding of destroyed mausoleums became important project under UNESCO supervision.³¹⁶ The key element was inclusion of local community. The whole project was seen as mitigation of psychological impact that the destruction had on local population and chance how to recover local community.³¹⁷ We can certainly speak about protection of cultural heritage in *largo sensu*. The approach of UNESCO is perfect example of holistic attitude towards cultural heritage protection: it unites tangible elements (mosques and mausoleums) with intangible elements (the traditional know-how of masons, the restoration event, the religious practices of locals) and human element (meaning of structures and events for local community). It presents how the different elements of cultural heritage are interconnected and protection of one element requires (and includes) protection of other too. The protection goes far beyond tangible elements protection. Rather we can conclude that protection of cultural rights covers all the mentioned elements and constitutes the most reasonable base for complex protection of cultural heritage.

4.7. Destruction of Cultural Heritage in former Yugoslavia as Violation of Cultural Rights

Balkan always used to be cultural crossroad. Spread between Europe and Asia Minor served as gateway to Europe for countless conquerors and waves of migration. Together with people from different parts of the world came they culture as well. Number of competing influences gave birth to curious cultural mix so typical for Balkan countries. Christianity and Islam, Orthodox and Catholic, Latin and Slavic – Balkan has many faces. The diversity is expressed in its architecture, food, art, customs... All big powers neighbouring on Balkan – Italy, Ottoman Empire, Austro-Hungarian Empire handed their cultural patterns to Balkan – and Balkan absorbed it. In addition many different communities still keep their traditions and lifestyle related to their environment and cultural heritage. Another equally culturally diverse area cannot be found in Europe.

Yugoslav Wars that erupted in early 1991 brought horror unseen in Europe since the end of the WWII. Series of chaotic conflicts that quickly changed into ethnic violence resulted in massive violations of IHL. Although the conflict officially ended in 2001 there are still many open questions and unstable areas. Establishment of the ICTY was seen as way how to bring justice to victims of the conflict and punish perpetrators. However jurisprudence of the

³¹⁶ UNESCO's Role and Action to Protect and Safeguard Cultural Heritage and to Promote Cultural Pluralism in Crisis Situations. Case Study: Lessons Learned from Mali. 2017. IOS/EVS/PI/159 REV.

³¹⁷ ELOUNDROU, Lazare, CISSÉ, Lassana. Reconstruction of the mausoleums in Timbuktu. The role of local communities. *World Heritage*, 2016, No. 86, pp. 48-53.

ICTY also supported development of ICL in many fields. One of them was attitude towards protection of cultural property during armed conflict and recognition of human element of the issue.

Nothing represents civil war in former Yugoslavia so precisely as term ethnic cleansing. In order to create ethnically homogeneous areas whole ethnic groups were expelled from territories they traditionally inhabited. Nevertheless banishing people does not have to be enough – the history of the place has to be rewritten too.³¹⁸ Any evidence of different past has to disappear to change memory of the place and prevent original inhabitants from return. Together with the ethnic cleansing cultural cleansing was carried out. The cultural heritage that reminded the former population was deliberately targeted and systematically destroyed. Perpetrators of those acts were well aware of ties between such symbolic places and population and importance of the cultural heritage for existence of community. One of big achievements of the ICTY was recognition of this relationship and its reflection in some decisions. We can certainly speak about indirect protection of cultural rights of individuals and communities in some cases.

The importance of cultural heritage for future of local communities was later confirmed in Dayton Peace Agreement in 1995. The document ended war in Bosnia-Herzegovina (BiH) and one of its aims was post-war reconstruction of diverse multiethnic and multicultural society³¹⁹ so typical for BiH before the war. Annex 7 to Dayton Agreement declares right of refugees to return while expects that they will comprise minority in new state.³²⁰ For cultural heritage protection and understanding of its role Annex 8 is even more important. The Annex 8 understands protection and restoration of cultural heritage damaged or destroyed during the conflict as way to reconciliation and future stability of the region. It establishes category of National Monument and defines it as “*movable or immovable property of great importance to group of people with common cultural, historic, religious or ethnic heritage...*”³²¹ This represents significant shift – national monument of great importance is not defined by its value but rather by its role for group of people. The document does not speak about cultural rights but it clearly protects them. The reason behind the protection is

³¹⁸ BEVAN, Robert. *The Destruction of...*, pp. 17-22.

³¹⁹ PERRY, Valery. Cultural Heritage Protection in Post-conflict Bosnia-Herzegovina: Annex 8 of the Dayton Peace Agreement. In WALASEK, Helen. *Bosnia and the Destruction of Cultural Heritage*. New York: Routledge, 2017, p. 185.

³²⁰ General Framework Agreement for Peace in Bosnia-Herzegovina (known as Dayton Peace Agreement). 1995. Annex 7. Art. 1.

³²¹ Ibid. Annex 8. Art. 6.

protection of community itself and protection of its rights. To make it clear Annex 8 also recognizes monuments that are more universal (not related to any particular group) and protects them as separated category.

Campaign of cultural cleansing targeted on cultural heritage was most intense in BiH. Primary target were religious objects – mosques of Bosnian Muslims, Orthodox churches of Bosnian Serbs and Catholic churches of Bosnian Croats.³²² Religious site often represented centre of cultural life of local community and its destruction was seen as key element for removal of the community. The destruction was not result of military operations and fighting but elaborate plan how to create territories without any minorities. The structures were not only destroyed but their remains were also removed to give impression that the building has never existed.³²³ In Serb-controlled areas of BiH almost 100% of mosques and over 75% of Roman Catholic churches were either heavily damaged or destroyed.³²⁴ The ICTY in several judgments that shall be discussed in subsequent chapter acknowledged that essence of the attacks was targeting the communities. The Tribunal did not see targeted structures as mere historic monuments but as integral part of life of local community. The ICTY also makes clear difference between situation when protected object is destroyed during military operations and situation when the destruction is part of ethnic cleansing policy carried out during subsequent occupation. While the first situation can give rise war crimes the second one is recognized as crime against humanity persecution. Thus the ICTY recognizes the human element of targeted property and understands the protection of cultural heritage as part of human rights protection.

The most outstanding example of this attitude is case of destruction of Stari Most in Mostar. Stari Most is far more than just bridge. Built in middle of 16th century by direct order of Ottoman sultan Suleiman the Magnificent and designed by one of the most famous Ottoman architects of all times – Sinan - the bridge represents example of truly unique architecture.³²⁵ It mixes several influences – Ottoman, European and Mediterranean in perfect

³²² WALASEK, Helen. *Bosnia and the Destruction of Cultural Heritage*. New York: Routledge, 2017. p. 25.

³²³ Ibid. p. 37.

³²⁴ Case Concerning of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment. I.C.J. 26 February 2007. paras. 335-344.

³²⁵ HADZIMUHAMEDOVIC, Amra, BOUCHENAKI, Mounir. Reconstruction of the Old Bridge in Mostar. *World Heritage*, 2016, No. 86, pp. 20-26.

harmony. The structure soon became admired and iconic symbol of the city.³²⁶ Symbolic meaning of Stari Most is even deeper however. It does not only connect two banks of Neretva river but marks local religious tolerance and cooperation between different communities in multicultural city. Along with its urban function the bridge has far more important sense – it connects people.

When the bridge collapsed in early November 1993 as result of shelling during fighting over control of the city it did not cause only international outrage. For local residents it was symbolic end of one era.³²⁷ Question of reconstruction arose almost immediately. Rebuilding of Stari Most was seen as matter of peace building strategy that will make easier future reconciliation and create real bridge between different communities. Finally the reconstruction started in 1999 and after five years was completed.³²⁸ The bridge became symbol of international co-operation and coexistence of diverse religious, ethnic and cultural communities in Mostar.

Curious addition was provided by the ICTY in *Prlić et al.* case that will be discussed in detail in next chapter. Defendants tried to justify the destruction of the bridge by pointing out that it constituted military objective since it was used for supplying of besieged part of the city. Nevertheless this defence was not accepted by the Tribunal that argued that cultural value of the bridge outweighed military advantage achieved by its destruction.³²⁹ Once again protection of cultural rights emerges despite not explicitly mentioned.

³²⁶ UNESCO. Old Bridge Area of the Old City of Mostar (online). UNESCO, visited 24 February 2021. Available: <<https://whc.unesco.org/en/list/946/>>.

³²⁷ PETROVIĆ, Jadranka. *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict*. Leiden: Brill – Nijhoff, 2013. pp. 61-88.

³²⁸ HADZIMUHAMEDOVIC, BOUCHENAKI: Reconstruction of the Old...

³²⁹ Prosecutor v Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić. Case No. IT-04-74, 29 May 2013, Judgment, Volume 3, para. 1584.

5. International Criminal Law and Protection of Cultural Heritage

5.1. Introduction

The idea of relating cultural heritage and International Criminal Law might seem like something bold. Nevertheless those two areas are already connected in fact. Similarly to any other branch of law the ICL is continuously developing and its attitude towards some issues has changed significantly in last decades. Traditionally ICL is seen as mass atrocity crimes. However as pointed out by Stahn it is only one of the possible approaches.³³⁰ He presents that ICL can be defined as protection of certain public goods and interests as well. It means that certain individual and collective rights are protected because of their relevance to community interest or context as presented in previous chapter. Another attitude mentioned by Stahn (and the highly relevant one for the purpose of cultural heritage protection) defines international crimes by reference to community whose interest is violated. This approach is based on assumption that the crime is attack against the community itself.

All three ways of thinking about ICL and international crimes do present complexity of the matter. ICL is based on principle *nullum crimen sine lege* and thus confined by strict definitions but on the other hand it reflects real life that is far more complicated. The definitions show that ICL cannot ignore elements that are more related to human rights protection. This is also confirmed by theories explaining international crimes. Common perception is that international crimes are so serious that they affect international community as whole which is expressed in two theories.³³¹ The first one, *malum in se*, is tied to nature of offence. The crime is considered inherently wrong because of its evil nature. The second one, *malum prohibitum*, is based on idea that the international crime is directly criminalized by international law. Current ICL approach mixes both theories.

Coming back to relationship between ICL and cultural heritage the above mentioned perceptions have to be reflected. The question is if the cultural heritage protection can be recognized as issue fitting under *malum in se* theory or constitutes part of already existing international crimes (and thus is *malum prohibitum*). Generally speaking we can assume that importance of cultural heritage protection under ICL is growing. With more inclusive understanding of ICL reflecting human rights protection the cultural heritage protection

³³⁰ STAHN: *A Critical Introduction to...*, pp. 16-22.

³³¹ *Ibid.*

definitely has its place in the system. This opinion has been confirmed in several cases. Finally use of the term 'cultural heritage' instead of 'cultural property' that was adopted by the ICC³³² also emphasizes inclusion of human rights protection into the matter.

Firstly the significance of the cultural heritage protection was acknowledged in number of UN resolutions. They do not only condemn intentional destruction of cultural heritage but also mention need of prosecution of such acts.³³³ The prosecution shall be ensured both on national and international level. This confirms that the cultural heritage protection is seen as the issue relevant for ICL.

Another important component is co-operation between UNESCO and ICC in cases relevant for the cultural heritage protection.³³⁴ Both institutions understand the cultural heritage protection as part of wider campaign that should prevent sectarian violence and make easier post-conflict recovery and peacebuilding. Irina Bokova, the former Director-General of UNESCO, presents importance of cultural heritage for identity, diversity and common human history.³³⁵ The matter is highly complex and requires multi-faceted approach. Similarly the ICC prosecutor Fatou Bensouda stresses significance of collaboration with UNESCO and emphasizes that attacks against cultural heritage belong to framework of Rome Statute. This attitude marks the famous *Al Mahdi* case nevertheless it is not the first time when ICL reflects values mentioned by Bokova and Bensouda. The ICTY dealt with number of cases related to intentional destruction of cultural heritage and in its decisions reflected the values mentioned by Bokova and Bensouda. It proves that ICL can actually takes into consideration complexity of the cultural heritage protection.

The ICL approach towards cultural heritage can be described as diverse. For purposes of this chapter we shall focus on three core crimes under jurisdiction of ICC: war crimes, crimes against humanity and genocide. However the attitude of ICL in certain case is determined by other element – the type of cultural heritage. Types of cultural heritage have been described extensively in previous chapters and the introduced classification will be

³³² Policy on Cultural Heritage. International Criminal Court. 2021. Para. 14.

³³³ See e.g. UN Security Council Resolution 2347 (2017). UN Docs. S/RES/2347 (2017).

³³⁴ UNESCO. *International Criminal Court and UNESCO Strengthen Cooperation on the Protection of Cultural Heritage* (online). UNESCO, 6 November 2017, visited 25 February 2021. Available: <<https://en.unesco.org/news/international-criminal-court-and-unesco-strengthen-cooperation-protection-cultural-heritage>>.

³³⁵ Ibid.

maintained for purposes of this chapter as well. The following table summarizes relationship between types of cultural property and discussed crimes.

Cultural property type	war crime	crimes against humanity	genocide
universal value	yes	no	no
value for local community	yes	yes	no with reservation
both	yes	yes	no with reservation

5.2. War Crimes

The most common and developed modality regarding cultural heritage protection under ICL is protection under notion of war crimes. There is rich case law dealing with prosecution of cultural heritage destruction as war crime. It is nothing surprising – war always brings destruction. There are numerous examples of devastation of cultural heritage during armed conflict in human history. In many cases the most famous military leaders are also responsible for the worst razing of cultural heritage. Personalities like Tamerlane or Genghis Khan are notorious for their systematic destruction of conquered cities. However such actions are not limited to barbaric conquerors from east – same applies to ancient Greeks and Romans. Especially for Romans it used to be common practice to destroy cultural heritage of their enemies or revolting colonies. Fate of Carthage or Jewish Second Temple in Jerusalem are clear reminders of the attitude.

Nevertheless as discussed in the first chapter there is opposing approach as well. Cultural heritage was seen as something that should be treated differently from other types of property since it bears specific values. As result there appeared rules protecting cultural heritage during armed conflict in late 19th century and later were vastly developed. Current understanding of war crimes is based on rules governing IHL. In order to fully understand nature of war crimes related to cultural heritage protection we have to examine IHL first in fact.

Cultural heritage protection during armed conflict is something well-established and mentioned in number of treaties. The provisions in Hague Regulations and Geneva

Conventions are part of customary law³³⁶ and some authors argue that even provisions of 1954 Hague Convention represent customary law.³³⁷ Also there are three rules formulated by the International Committee of the Red Cross (ICRC) that are dealing with cultural heritage protection during armed conflict. Rules 38, 39 and 40 are summarizing customary international law related to cultural heritage protection during the armed conflict:

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

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

Rule 40. Each party to the conflict must protect cultural property:

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

B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.³³⁸

The rules use wording of 1954 Hague Convention (cultural heritage of every people) however they do not fully reflect provisions of the Convention and rather adhere to 1949 Geneva Conventions and their Additional Protocols. The rules also contain two elements typical for the conventions – military necessity exception and reference to military objective. Military objective is defined as: “*objects which by their nature, location, purpose or use make*

³³⁶ NAFZIGER James, A., R., SCOVAZZI, Tullio. *The Cultural Heritage of Mankind*. Leiden: Martinus Nijhoff Publishers, 2008. p. 428.

³³⁷ See FORSYTH, Marion. Casualties of War: The Destruction of Iraq’s Cultural Heritage as a Result of U.S. Action during and after the 1991 Gulf War. *DePaul Journal of Art, Technology & Intellectual Property Law*, 2004, Vol. 14, No. 1, pp. 73-107.

³³⁸ ICRC. IHL Database, Customary IHL. Rule 38, 39, 40.

an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".³³⁹ The rule 38 prohibits attacks against cultural property as long as it does not constitute military objective. This is coupled by provisions of following rules that require existence of military necessity in order to create military objective from protected object.

The most obvious limitation of prosecution of cultural heritage destruction as war crime is war nexus requirement. War crimes are seen as the most serious violations of IHL³⁴⁰ and thus have to be related to international or non-international armed conflict. However how strong the link between the conflict and crime has to be? The question was examined in *Tadić* case before ICTY. The Tribunal stated that to prove existence of the link it is sufficient that *"the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."*³⁴¹

Further the ICTY defines in *Tadić* case the term armed conflict itself: *"armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*³⁴² The definition represents important shift since it includes both international and non-international armed conflict. Traditionally the non-international armed conflicts were understood as internal matter of state and IHL did not pay attention to them. However this has changed with 1949 Geneva Conventions that recognize both types of conflicts. ICRC additionally requires minimum level of intensity and minimum of organisation of involved parties³⁴³ to recognize the event as non-international armed conflict.

Clear conflict definition and determination of war nexus represent crucial feature for protection of cultural heritage under notion of war crime. All the relevant case law in the field is related to armed conflict and despite ICL is able to prosecute even destruction of cultural heritage not related to armed conflict the former case is the most common one.

³³⁹ API. Art. 52 para. 2.

³⁴⁰ STAHN: *A Critical Introduction to..*, p. 75.

³⁴¹ Prosecutor v. Duško Tadić a/k/a "Dule". Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. 2 Octobre 1995. Para. 70.

³⁴² Ibid.

³⁴³ How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008.

As pointed out by O'Keefe³⁴⁴ there are four different types of situations that can give rise to war crimes as a result of cultural heritage destruction under customary International law:

1. Unlawful attacks against cultural property – unlawfully directing attack against cultural heritage,
2. Unlawful incidental damage to cultural property - intentionally launching an attack in the knowledge that it will cause incidental damage to cultural heritage,
3. Unlawful acts of hostility against cultural property other than attack – e.g. demolition by the planting of explosives or by bulldozers, jackhammers or other wrecking equipment,
4. Unlawful appropriation of cultural property - unlawful plunder of public or private property, including cultural heritage.

The division well presents some tricky issues related to protection of cultural heritage under the notion of war crime. The destruction does not have to be a direct result of military operations (like in the first two cases) but caused by unlawful acts with a different purpose (the third case). In such a case we do not protect only cultural heritage *per se* but also another set of values. The mentioned values are more closely linked to protection of civilian population and its rights. The background of the attack is different and as such it requires another kind of attitude. As shall be presented later, possibilities under war crime are very limited in this kind of situation.

Relevant ICL documents seem to be reluctant in the issue of cultural heritage protection. Their understanding of war crimes is based on a traditional attitude to IHL that does not recognize such matter as a priority. In fact, none of them uses the term cultural property or cultural heritage. The Charter of the International Military Tribunal (IMT) in Nuremberg in its Article 6(b) defines war crimes as violations of the laws or customs of war. The definition refers to cultural heritage indirectly: it determines war crime as “*plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.*”³⁴⁵ It is clear that the purpose of the provision is rather protection of civilian population than cultural heritage protection.

³⁴⁴ O'KEEFE, Roger. Protection of Cultural Property under International Criminal Law. *Melbourne Journal of International Law*, 2010, Vol. 11, No. 2, pp. 339-392.

³⁴⁵ Charter of the International Military Tribunal (Nuremberg). 1945. Art. 6(b).

Statute of ICTY represents important shift in the area. In practice of the Tribunal the prosecution of war crimes related to cultural heritage was based on Article 3(d) of the Statute. Similarly to the Charter of Nuremberg IMT war crimes are defined as violations of the laws or customs of war. According to mentioned article the violations include “*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*”³⁴⁶ The Article is clearly based on wording of Hague Regulations and thus represents customary law. There is no doubt it aims to protect cultural heritage (although it does not use the term itself) however the approach might seem too narrow.

Finally the Rome Statute of ICC approaches the issue almost alike. Based on Hague Regulations it defines war crime of “*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 objective*”³⁴⁷ for both international and non-international armed conflict. Both definitions in Statute of ICTY and in Rome Statute respectively represent traditional attitude and do not reflect current development in field of cultural heritage protection. On the other hand the practice of the both courts shows that limited definitions does not mean that more current approach cannot be reflected in their decisions.

Another crucial element is fact that wording of the Articles does not require any *outstanding value* or *great importance* of cultural heritage. Thus every type of cultural heritage is protected during ongoing armed conflict and level of protection is higher than under 1954 Hague Convention.³⁴⁸ In fact Statute of ICTY recognizes three categories of protected objects: (1) general civilian objects, (2) cultural property defined as ‘institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’, (3) cultural property of ‘great importance’.³⁴⁹ This leads to conclusion that ICL provides cultural heritage wider protection than general IHL.

5.2.1. Case Law of the ICTY

The ICTY dealt with number of cases related to attacks against cultural heritage in former Yugoslavia. None of the cases was focused exclusively on matter of cultural heritage

³⁴⁶ Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute). 1993. Art. 3(d).

³⁴⁷ Rome Statute. Art. 2(b)(ix), resp. Art. 2(e)(iv).

³⁴⁸ BRAMMERTZ, Serge et al. Attacks against Cultural Heritage as a Weapon of War. *Journal of International Criminal Justice*, 2016, Vol. 14, No. 5, pp. 1143-1174.

³⁴⁹ Ibid.

protection – the attacks against cultural heritage were rather prosecuted in relation with other acts that constituted war crimes (or crimes against humanity). Nevertheless the Tribunal confirmed importance of cultural heritage protection in several decisions and created ground for future development. With current attitude to cultural heritage protection case law of the ICTY seems to be even more important. It is partly caused by fact that similar cases are not so commonly tried before ICC and ICL can hardly reflect new trends in interpretation of existing rules. The only relevant case before ICC in this moment – the famous *Al Mahdi* case - has been widely criticized from different perspectives as shall be presented later. Thus to present different possible approaches towards cultural heritage protection under notion of war crime case law of the ICTY is crucial.

5.2.2. Old Town of Dubrovnik Cases: *Jokić* case and *Strugar* case

One of the most infamous examples of cultural heritage destruction during the conflict in former Yugoslavia is Dubrovnik Old Town. The city is well known for its rich architectural heritage and often referred as ‘Pearl of the Adriatic’. In 1979 it was inscribed in the World Heritage List³⁵⁰ and there is no doubt it represents site of outstanding universal value. Shelling of the city in December 1991 that resulted in extensive damage of structures and death of civilians caused public outcry and cases tried before the ICTY related to the event are regarded as some of the most important. *Jokić* case and *Strugar* case helped to clarify significant issues in protection of cultural heritage during armed conflict but also brought new elements into the protection.

Miodrag Jokić was, among other crimes charged with “*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*” under Article 3(d) of the ICTY Statute.³⁵¹ Jokić was at the time commander of the Ninth Naval Sector of the Bosnian Serb Army, and he conducted military campaign aimed at Dubrovnik. On 6 December 1991 forces of Yugoslav army under his command fired hundreds of shells upon the Old Town which resulted in extensive damage of many historic structures (over 100 buildings have been damaged including city walls).³⁵² Jokić also admitted that he was aware of protected status of the Old Town as place inscribed in UNESCO World Heritage List.³⁵³ The Trial Chamber stressed that

³⁵⁰ UNESCO. Old City of Dubrovnik (online). UNESCO, visited 25 February 2021. Available: <<https://whc.unesco.org/en/list/95/>>.

³⁵¹ Prosecutor v. Miodrag Jokić. Judgment. Trial Chamber. 18 March 2004. IT-01-42/1-S. para. 8.

³⁵² Ibid. Para. 53.

³⁵³ Ibid. Para. 23.

the entire Old Town of Dubrovnik was considered “*an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history*”.³⁵⁴ The attack against the place did not constitute only attack against history and heritage of region but also against the cultural heritage of humankind.³⁵⁵

Even more interestingly the Trial Chamber describes the Old Town as ‘living city’ where local population is closely related to its ancient heritage.³⁵⁶ The expression reminds the ‘human element’ of cultural heritage that was discussed in previous chapter. However in *Jokić* case this element is not further developed and the Tribunal focuses on different aspects of acts. The Trial Chamber repeats several times that the attack is of great seriousness since it was directed on especially protected site³⁵⁷ and damage will be hard to remedy because many buildings cannot be fully returned to their original state.³⁵⁸ The Tribunal also points out that such place enjoys additional level of immunity from attack comparing to ordinary civilian objects.³⁵⁹

The second case related to attack against Dubrovnik in December 1991 is the *Strugar* case. It is connected with *Jokić* case and provides a lot of similarities. Alike in *Jokić* case the accused was charged with violations of the laws or customs of war under Article 3(d) of the Statute. Responsibility of Pavle Strugar was based on his position as commander of the Second Operational Group. According to Trial Chamber Judgment forces of the 3rd Battalion of the 472nd Motorised Brigade under the command of Captain Vladimir Kovačević, unlawfully shelled the Old Town on 6 December 1991. The unit commanded by Kovačević was at the time directly subordinated to the Ninth Military Naval Sector, commanded by Miodrag Jokić, and the Ninth Military Naval Sector, in turn, was a component of the Second Operational Group, commanded by the accused.³⁶⁰ In the case the Trial Chamber concluded that shelling of Old Town cannot be justified by military necessity and thus was unlawful. The accused had both legal and effective control of the forces that shelled Dubrovnik. Although Strugar was noticed that the forces are shelling the city by communication from

³⁵⁴ Ibid. Para. 51

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Ibid. Para. 53.

³⁵⁸ Ibid. Para. 52.

³⁵⁹ Ibid. Para. 50.

³⁶⁰ Prosecutor v. Pavle Strugar (*Strugar Trial Judgment*). Judgment. Trial Chamber. 31 January 2005. IT-01-42-T. para. 146.

Jokić he failed to order to stop the attacks. In fact the Trial Chamber found that there were no steps taken to stop the attacks for several hours.³⁶¹

The Tribunal in *Strugar* case also discussed nature of the protection of cultural property. The Trial Chamber argues that protection under Article 3(d) - crime of destruction or wilful damage of cultural property – constitutes *lex specialis* with respect to offence of unlawful attacks on civilian objects. The inflicted damage or destruction of cultural property has to be done wilfully and the attack has to be directed against the cultural property.³⁶² The Tribunal requires direct intent of perpetrator to destroy or damage cultural property in question but does not discuss option of indirect intent.³⁶³

Importantly the Tribunal in *Strugar* case also clarifies the term cultural property as understood under its jurisdiction. It includes both property “*of great importance to the cultural heritage of every people*” as defined in 1954 Hague Convention and “*historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples*” as described in Additional Protocols I and II to Geneva Convention.³⁶⁴ The possible differences in the definitions are not recognized as significant enough to be examined by the Tribunal.

5.2.3. Stari Most in Mostar: Prlić et al. Case

The destruction of Stari Most in Mostar during the conflict in former Yugoslavia has been already discussed in previous chapter from human rights protection perspective. However the case is highly interesting from IHL and ICL point of view as well. The bridge was truly iconic site and the approach chosen by the Tribunal reflects it. There are at least two curious aspects of the case: issue of military necessity and consequences of human dimension of the bridge destruction for whole case. Both questions are closely related and result in truly unexpected outcome.

The bridge was destroyed by Bosnian Croat military forces in November 1993. The Trial Chamber in *Prlić et al.* case recognized its unique value and symbolic role in connecting different communities in Bosnia-Herzegovina.³⁶⁵ Surprisingly the accused were charged with wanton destruction of cities, towns or villages or devastation not justified by military

³⁶¹ Ibid.

³⁶² Prosecutor v. Pavle Strugar. Judgment. Appeals Chamber. 17 July 2008. IT-01-42-A. para. 277.

³⁶³ Ibid. Para. 278.

³⁶⁴ Strugar Trial Judgment. Para. 307.

³⁶⁵ Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Čorić and Berislav Pušić (Prosecutor v. Prlić et al.), Volume 2. Judgment. Trial Chamber. 29 May 2013. IT-04-74. para. 1282.

necessity (wanton destruction) under Article 3(b) of the Statute of the ICTY and not under Article 3(d) of the Statute that was used in other cases when destruction of cultural heritage has been involved. The ICTY defined elements of the crime wanton destruction as: (1) the destruction of property must occur in large scale, (2) the destruction was not justified by military necessity, (3) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.³⁶⁶ There evolves obvious question whether the destruction of one structure (the bridge) constitutes 'large scale' destruction however the Tribunal focused on the matter of military necessity instead.

The Trial Chamber found that the bridge was essential to the Army of Bosnia and Herzegovina (ABiH) for combat activities of its units on front line, evacuations, sending of troops, food and material and that ABiH was holding position in its immediate vicinity. On this basis the Trial Chamber held that the bridge was military objective because the Bosnian Croat forces had military interest in its destruction.³⁶⁷ On the other hand the Tribunal argues that the destruction of the bridge had significant psychological impact on Muslim population of Mostar and left residents of Donja Mahala (Muslim enclave on right bank) in total isolation.³⁶⁸

The Trial Chamber concludes that despite the destruction of the bridge might have been justified by military necessity the impact of the act on local Muslim civilian population was disproportionate to concrete and direct military advantage anticipated from the destruction.³⁶⁹ The Tribunal also stressed that the purpose of the act of destruction was undermining morale of local Muslim population³⁷⁰ and thus constitutes crime of wanton destruction.³⁷¹ The logical conclusion is that the destruction of the bridge was not justified by military necessity.

The issues of wanton destruction and military necessity are also discussed in Appeal Judgment. Particularly interesting is dissenting opinion of judge Pocar. He argues that that crime of wanton destruction requires large scale destruction not justified by military necessity. According to the Trial Chamber findings the bridge was military target and its destruction

³⁶⁶ Prosecutor v. Enver Hadžihasanović and Amir Kubura. Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal. Appeal Decision (n 4) fn 53: Prosecutor v Dario Kordić and Mario Čerkez, Case No IT-95-14/2-A, 17 December 2004, Judgment, para. 74.

³⁶⁷ Prosecutor v. Prlić et al. Trial Judgment, Volume 3. IT-04-74-T. para. 1582.

³⁶⁸ Ibid. Para. 1583.

³⁶⁹ Ibid. Para. 1584.

³⁷⁰ Ibid. Para. 1585.

³⁷¹ Ibid. Para. 1587.

offered definite military advantage thus judge Pocar concludes that the destruction of the bridge cannot result in crime of wanton destruction not justified by military necessity. Additionally he points out that when outlining the damage caused to civilian population the Trial Chamber does not provide any findings about collateral damage inflicted to other property during the attack. In his opinion there is no destruction not justified by military necessity.³⁷²

To sum up the question is whether there is proportionality between consequences of the attack for local population and concrete and direct military advantage. As pointed out by Maurice Cotter the problem was that the bridge was in the moment of attack dual-use object.³⁷³ It was used for military purposes by the ABiH but in the same time it still had its function and importance for civilian population. Definition of military objective provided in Additional Protocol I³⁷⁴ to Geneva Convention is not helpful in this matter. It distinguishes two categories of objects only: the property that constitutes military objective and civilian objects which is all property that is not military objective. The category of dual-use objects is not anticipated at all.

Nevertheless there are possible approaches that can shed light on the whole problem. Shue and Wippman identify three ways how to assess legality of attack on dual-use object under IHL.³⁷⁵ They use terms limited proportionality, enhanced proportionality and protective proportionality. In *Prlić et al.* case the first and second option are relevant.

Limited proportionality follows wording and approach of Article 52(2) of Additional Protocol I. The Article speaks about objects that make effective contribution to military action however does not reflect the possibility that the same object might make important contribution to civil life too. And since the Article 52(2) does not say anything about the civilian contributions they are not included into evaluation of situation. As we can see in *Prlić et al.* case this option has been rejected.

³⁷² Prosecutor v. Prlić et al. (Prlić et al. Appeals Judgment). Judgment (n 1). Appeals Chamber. 29 November 2017. IT-04-74-A. Dissenting Opinions of Judge Fausto Pocar. para. 8.

³⁷³ COTTER, Maurice. Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the *Prlić et al.* Proceedings on the Destruction of the Old Bridge of Mostar. *Journal of Conflict & Security Law*, 2018, Vol. 23, No. 2, pp. 283-305.

³⁷⁴ API. Art. 52(2).

³⁷⁵ SHUE, Henry, WIPPMAN, David. Limiting Attacks on Dual Use Facilities Performing Indispensable Civilian Functions. *Cornell International Law Journal*, 2002, Vol. 35, No. 3, pp. 559-579.

Enhanced proportionality represents attitude used by the ICTY in the case. The evaluation is based on calculus whether gained military advantage is not disproportionate to expected loss of civilian function. The authors note that not only immediate collateral consequences to civilian life have to be considered but also long-term effects. They stress that in case of some dual-use facilities the long-term effect may result in excessive incidental harm to civilians. In case of Stari Most the ICTY obviously shared this opinion and saw the destruction of the bridge as act whose long-term effect is not proportionate to gained military advantage.

The striking fact is that usage of the enhanced proportionality approach highlights how the ICTY understands cultural heritage. The importance of the bridge was not based on its function as bridge but rather on its historic value and meaning for local communities. The psychological impact of the destruction is seen as excessive incidental harm to civilians and prevails over concept of military necessity.

Additionally to the wanton destruction the accused were also charged with infliction of terror on civilians as war crime and persecution as crime against humanity.³⁷⁶ Those crimes were not discussed in such detail however Appeals Chamber assumed that *mens rea* requirements of the crimes were satisfied. The purpose of the bridge destruction was infliction of terror on civilians and attack was based on discriminatory grounds.³⁷⁷ The primary objective of the bridge destruction was “*sapping the morale of the Muslim population of Mostar.*”³⁷⁸ The Tribunal links the bridge destruction with destruction of ten mosques in Eastern Mostar that clearly did not have any military value³⁷⁹ and the only reason behind the act was terror of local Muslim population. Judge Pocar in his dissenting opinion also argues that the bridge destruction shall be considered as act of persecution not wanton destruction.³⁸⁰ This point definitely makes sense since all the attacks can be seen as part of one wider attack against civilian population. The attack was based on discriminatory ground and targeted against local Muslim population.

Similarly in *Hadžihasanović and Kubura* case the Trial Chamber links cultural heritage of religious character with local community so the victim of the attack is the whole

³⁷⁶ Prlić et al. Appeals Judgment (n 1). paras. 415-417.

³⁷⁷ Ibid. paras. 422-426.

³⁷⁸ Prlić et al. Trial Judgment (n 3) Volume 3, para. 1586.

³⁷⁹ Prlić et al. Appeals Judgment (n 1) para. 425.

³⁸⁰ Prlić et al. Appeals Judgment (n 1). Dissenting Opinions of Judge Fausto Pocar, para. 23.

community.³⁸¹ This assumption is based on “*spiritual value*”³⁸² of this kind of heritage for local community and the Trial Chamber notes that consequences of destruction of such property can go beyond material extent of damage.

5.2.4. Ethnic Cleansing in Lašva Valley: *Blaškić case, Kordić and Čerkez case*

The events that took place in Bosnian Lašva Valley in period 1991-1994 represent classic example of ethnic cleansing campaign during conflict in former Yugoslavia. In order to create ethnically monolithic society local civilian population was systematically oppressed and massive violations of IHL occurred. The events were discussed in number of cases before the ICTY and accused were usually charged with both violations of laws or customs of war and crimes against humanity. In this section we shall focus on violations of laws or customs of war related to destruction of cultural heritage of persecuted groups.

Comparing to previously examined cases (*Jokić, Strugar, Prlić et al.* cases) there is important difference in type of targeted cultural heritage. Old Town of Dubrovnik and Stari Most in Mostar represent important cultural heritage of mankind that possess outstanding universal value and thus the protection seems to be self-evident. On the other hand the cultural heritage of Lašva Valley is of different nature. Mosques of local Muslim communities that became target of systematic attacks do not represent cultural heritage of universal value however their role for local communities is crucial. As already pointed out the Statute of the ICTY does not require the cultural heritage to be of outstanding universal value to fit into provided protection so prosecution of such attacks is possible.

Tihomir Blaškić was a Croatian general convicted for offences that included violations of law and customs of war under Article 3 of the ICTY Statute.³⁸³ Among other crimes he was charged with destruction of institutions dedicated to religion or education (under Article 3(d) of the Statute) in 12 towns and villages located in Lašva Valley in Bosnia. The Trial Chamber stated that “*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.*”³⁸⁴ Additionally it requires that “*the institutions must not have been in the immediate vicinity of military objectives.*”³⁸⁵ Toman

³⁸¹ Prosecutor v. Enver Hadžihasanović and Amir Kubura. Judgment. Trial Chamber. 15 March 2006. IT-01-47-T. para. 63.

³⁸² Ibid.

³⁸³ Prosecutor v. Tihomir Blaškić. Judgment. Trial Chamber. 3 March 2000. IT-95-14-T.

³⁸⁴ Ibid. para. 185.

³⁸⁵ Ibid.

argues that it is not totally clear why the Trial Chamber imposes the additional requirement nevertheless we can assume that there would be practical difficulties in determining whether the object serves for military purpose and its destruction or damage can be seen as legit.³⁸⁶

Dario Kordić and Mario Čerkez were respectively political and military leader of the Croatian Defence Council organization responsible for military operations in Bosnia and Herzegovina in 1993.³⁸⁷ In the Trial Judgment they were both convicted for, among other crimes, the war crime of destroying or wilfully damaging institutions dedicated to religion or education under Article 3(d) of the Statute. The Trial Chamber found that Kordić and Čerkez deliberately targeted Muslim mosques and other religious and cultural institutions of local Muslim population during the military campaign. The case is based on same ground as *Blaškić* case however the Trial Chamber delivered deeper analysis of the situation.

The Trial Chamber pointed out that former Yugoslavia was party to 1954 Hague Convention and the Convention continued to apply to both Croatia and Bosnia-Herzegovina. Thus the “*movable or immovable property of great importance to the cultural heritage of every people*” was under the protection.³⁸⁸ According to the Trial Chamber opinion the educational institutions constitute immovable property of great importance to the cultural heritage of every people because they are centres of learning, arts and sciences and keep valuable collections of books and works of art.³⁸⁹ However this idea was rejected by the Appeals Chamber that concluded that not all educational institutions deserve this level of protection.³⁹⁰

The Trial Chamber also examined scope of Article 3(d) of the ICTY Statute. It assumes that the offence overlaps to certain extent with the offence of unlawful attacks on civilian objects. The difference is that the object of the offence under Article 3(d) is more specific – the cultural heritage of certain population. The Trial Chamber concludes that the offence against cultural heritage is *lex specialis*.³⁹¹

³⁸⁶ TOMAN: *Cultural Property in...*, p. 746.

³⁸⁷ Prosecutor v. Dario Kordić and Mario Čerkez (Kordić and Čerkez Trial Judgment). Judgment. Trial Chamber. 26 February 2001. IT-95-14/2-T.

³⁸⁸ Ibid. Para. 359.

³⁸⁹ Ibid. Para. 360.

³⁹⁰ Prosecutor v. Dario Kordić and Mario Čerkez (Kordić Appeals Judgment). Judgment. Appeals Chamber. 17 December 2004. IT-95-14/2-A. para. 90.

³⁹¹ Kordić and Čerkez Trial Judgment. Para. 361.

5.2.5. Timbuktu: *Al Mahdi* case

Probably the most famous case concerned with cultural heritage destruction (and the only one tried before ICC so far) is *Al Mahdi* case. There is no doubt that the case represents real breakthrough – it was the first time when the accused was charged solely with attacks against cultural heritage. There was number of cases related to cultural heritage destruction before the ICTY however in none of them the cultural heritage destruction was principal charge. In majority of the cases the attacks against cultural heritage were seen as part of larger attack and were related to other war crimes or crimes against humanity.

On the other hand it has to be said that the *Al Mahdi* case is also seen as controversial. It was celebrated by many scholars like the case that shows importance of cultural heritage protection and might prevent similar attacks in future nevertheless significant number of scholars also pointed out that there are crucial theoretical contradictions in the decision.

Apart from the fact that the case shows growing importance of cultural heritage protection it presents another significant feature – efficiency. The trial was short and on low budget comparing to many other cases before ICC.³⁹² However that was mostly result of the plea of guilty of accused. Regardless many scholars³⁹³ expressed hope that *Al Mahdi* case can improve reputation of ICC as being slow, inefficient and without any real power. The second group of scholars criticized mostly impetuous attitude of the Court that wanted to create model case of cultural heritage destruction prosecution but omitted number of crucial features in order to deliver decision as soon as possible.³⁹⁴

Another curious yet crucial element is type of targeted cultural heritage in the case. Historic mosques and shrines of Timbuktu are registered in the World Heritage List³⁹⁵ thus they constitute common heritage of humanity but in the same time Timbuktu is still living city. The mosques and shrines are part of daily lives of local population and are related to its religious practices and beliefs. It is uneasy task to relate those two aspects in one decision and final position of the Court remained somewhere in the middle which also resulted in criticism.

³⁹² KERSTEN, Mark. *Some Thoughts on the al Mahdi Trial and Guilty Plea* (online). Justice in Conflict, 24 August 2016, visited 25 February 2021. Available: <<https://justiceinconflict.org/2016/08/24/some-thoughts-on-the-al-mahdi-trial-and-guilty-plea/>>.

³⁹³ STERIO, Milena. Individual Criminal Responsibility for the Destruction of the Religious and Historic Buildings: The Al Mahdi Case. *Case Western Reserve Journal of International Law*, 2017, Vol. 49, No. 1, pp. 63-73.

³⁹⁴ See SCHABAS, William. Al Mahdi Has Been Convicted of a Crime He Did Not Commit. *Case Western Reserve Journal of International Law*, 2017, Vol. 49, No. 1, pp. 75-102.

³⁹⁵ UNESCO. Timbuktu (online). UNESCO, visited 24 February 2021. Available: <<https://whc.unesco.org/en/list/119/>>.

5.2.5.1. Contextual Background of the Case

In January 2012 conflict of non-international character erupted in Mali. In context of the conflict armed violence took place in northern regions of Mali while different armed groups aimed to take control over the area. Following retreat of Malian army in April 2012 Timbuktu fell under control of groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM). The groups ruled the city until January 2013 – they imposed strict Islamic rule based on religious and political edicts. They also established Islamic Tribunal, Islamic police force, media commission and morality brigade called *Hesbah*.³⁹⁶

Ahmad Al Mahdi was viewed as expert of religious matters and was in close contact with leaders of Ansar Dine and AQIM. He was particularly active in administration of city under Ansar Dine and AQIM rule and became leader of *Hesbah*.³⁹⁷ As head of morality brigade Al Mahdi was asked by governor of Timbuktu to monitor religious behaviour of local population in relation to shrines (mausoleums) of local saints.³⁹⁸ As pointed out by the Court the mausoleums were integral part of religious life of local people and constituted common heritage of community. They were visited both by locals and pilgrims alike.³⁹⁹

In June 2012 leader of Ansar Dine decided to destroy the mausoleums. He consulted the matter with Al Mahdi who presented opinion that all Islamic jurists agree on the prohibition of any construction over a tomb nevertheless he advised against the destruction in order to maintain good relations with locals. However leader of Ansar Dine insisted on his decision and gave Al Mahdi instructions to destroy the sites.⁴⁰⁰ Despite his initial reservations Al Mahdi agreed to commit the attack. He wrote sermon dedicated to destruction of mausoleums and later personally determined order in which objects will be attacked.⁴⁰¹

The attack was carried out in the end of June – beginning of July 2012. In total nine important mausoleums and door of Sidi Yahia Mosque were destroyed.⁴⁰² All the sites were historic monuments dedicated to religion and were not military objective. Additionally all the sites with only one exception were under protection of UNESCO as World Heritage sites.⁴⁰³

³⁹⁶ International Criminal Court. Summary of the Judgment and Sentence in the case of The Prosecutor v. Ahmad Al Faqi Al Mahdi. Art. 14.

³⁹⁷ Ibid. Art. 16.

³⁹⁸ Ibid. Art. 17.

³⁹⁹ Ibid. Art. 18.

⁴⁰⁰ Ibid. Art. 19.

⁴⁰¹ Ibid. Art. 20.

⁴⁰² Ibid. Art. 21.

⁴⁰³ Ibid. Art. 22.

Regarding role of accused in the attack the Court concluded that he exercised control over the attack. He supervised the attack, ensured necessary tools, he was present in all the sites and personally participated in destruction of at least of five sites.⁴⁰⁴ The Chamber found beyond reasonable doubt that the admission of guilt together with other presented evidence satisfies fact to prove that accused is guilty of war crime attacking protected objects under Article 8(2)(e)(iv) of Rome Statute.⁴⁰⁵

5.2.5.2. Reflection of the Link between Local Community in Timbuktu and Targeted Cultural Heritage

One of the most important and distinctive elements of the *Al Mahdi* case is attention that the Court paid to significance of attacked structures for local community. Both in the Judgment and the Statement of the Prosecutor the meaning of destroyed mausoleums for locals is widely discussed. The Chamber also bases its assumption of gravity of the crime on fact that attacked sites were important part of religious life of local people. Although Al Mahdi was charged with crimes against property that are of lesser gravity than crimes against persons⁴⁰⁶ the Chamber assumed that the gravity is sufficient for the trial. This conclusion was based mostly on significance of the sites for both local and international community.⁴⁰⁷

As pointed out by Casaly⁴⁰⁸, the Court mixes cultural universalism and relativism in its approach. On the one hand it stressed value of the sites for whole international community and Malian people as part of the World Heritage but on the other hand it examines psychological impact of the attack on local community.⁴⁰⁹ Expert witnesses before the Chamber described Timbuktu as “*emblematic city with a mythical dimension and that it played a crucial role in the expansion of Islam in the region. Timbuktu is at the heart of Mali’s cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints.*”⁴¹⁰ For local people the mausoleums were of *great importance* and they were closely related to them. The Prosecutor described the mausoleums as feature that shapes identity of the city and local people.⁴¹¹

⁴⁰⁴ Ibid. Art. 23.

⁴⁰⁵ Ibid. Art. 25.

⁴⁰⁶ Al Mahdi Judgment. Art. 77.

⁴⁰⁷ Ibid. Art. 78.

⁴⁰⁸ CASALY, Paige. Al Mahdi before the ICC. Cultural Property and World Heritage in International Criminal Law. *Journal of International Criminal Justice*, 2016, Vol. 14, No. 5, pp. 1199-1220.

⁴⁰⁹ Al Mahdi Judgment. Art. 80.

⁴¹⁰ Ibid. Art. 78.

⁴¹¹ Office of the Prosecutor. International Criminal Court. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Mr Ahmad Al-Faqi Al Mahdi (online).

Additionally is mentioned the collective dimension of regular maintenance works where all the community participates. The Chamber pointed out that the mausoleums are not only religious buildings but also preserve “*symbolic and emotional value*” for the inhabitants of the city.⁴¹² One of the witnesses claimed that the purpose of the destruction of the sites was breaking soul of the people of Timbuktu.⁴¹³ The Prosecutor noticed that it was not just attack against the structures but “*profound attack on the identity, the memory and, therefore, the future of entire populations.*”⁴¹⁴

Even more interestingly the Chamber says that the crime was based on *discriminatory religious motive*. The purpose of the destruction was to stop prohibited religious practices of local inhabitants related to sites.⁴¹⁵ The Prosecutor stressed that the sites were part of daily religious lives of locals and were also often visited by pilgrims.⁴¹⁶ The Chamber assumed that this is another evidence of gravity of the crime.

5.2.5.3. Elements of War Crime Attacking Protected Objects under Article 8(2)(e)(iv) of Rome Statute

The majority of objections against the Court attitude in *Al Mahdi* case is related to way to how the Chamber interpreted some of the elements of crime the accused was charged with. The *Al Mahdi* case was the first case that dealt with cultural heritage destruction before the ICC as already mentioned but there was extensive case law of the ICTY which could be used. However the approach of the ICC was in many ways different as shall be presented.

The elements of war crime attacking protected objects under Article 8(2)(e)(iv) are:

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education,

International Criminal Court, 22 August 2016, visited 25 February 2021. Available: <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822>>.

⁴¹² Al Mahdi Judgment. Art. 79.

⁴¹³ Ibid. Art. 80.

⁴¹⁴ Office of the Prosecutor. International Criminal Court. Statement of the...

⁴¹⁵ Al Mahdi Judgment. Art. 81

⁴¹⁶ Office of the Prosecutor. International Criminal Court. Statement of the...

art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.⁴¹⁷

The first serious objection is related to interpretation of the term 'attack' under the Rome Statute and IHL. In *Al Mahdi* case the Court viewed the attack against protected objects as action of the accused that led to destruction of the objects. The Chamber notes that the attack was executed with bulldozer,⁴¹⁸ pickaxes⁴¹⁹ and other tools that were collected by the accused. Nevertheless does this kind of conduct constitute the attack under Article 8 of the Rome Statute? Schabas notes that in context of war crimes the term attack has to be related to military action and combat. He argues that it cannot be used in case of demolition of objects that happens miles away from front line and has no link to ongoing conflict.⁴²⁰ Generally speaking the term attack has to be interpreted in context of existing IHL treaties.

Additional Protocol I to Geneva Convention defines attack as "*acts of violence against the adversary, whether in offence or in defence*".⁴²¹ This meaning was also confirmed by the ICTY in *Galić* case where the Tribunal defines the attack as "*acts of violence, committed during combat using "armed force" in a "military operation"*".⁴²² Finally the same interpretation is affirmed in commentary on the Elements of Crimes: "*the concept of attack as defined in this provision refers to the use of armed force to carry out a military operation during the course of an armed conflict*".⁴²³ In *Al Mahdi* case the attack was committed in time when Timbuktu was under firm control of the rebel groups and no military operations were

⁴¹⁷ Elements of Crimes. Article 8(2)(e)(iv).

⁴¹⁸ *Al Mahdi* Judgment. Art. 91.

⁴¹⁹ *Ibid.* Art. 38.

⁴²⁰ SCHABAS: *Al Mahdi Has Been...*

⁴²¹ API. Art. 49(1).

⁴²² Prosecutor v. Stanislav Galić. Judgment. Trial Chamber. 5 December 2003. IT-98-29-T. para 52.

⁴²³ DÖRMANN, Knut. *Elements of War Crimes Under the Rome Statute of the International Criminal Court, Sources and Commentary*. Cambridge: Cambridge University Press, 2002. pp. 134, 150-151.

ongoing in the city.⁴²⁴ This leads to conclusion that in the case we speak about different kind of attack.

Aforementioned controversy about the term attack sheds new light on elements of the crime the accused was charged with. The polemic does not change only our understanding of the term attack but even more importantly relativizes role of the conflict in the case. Strictly speaking it shows that existence of the conflict is not relevant for charged acts. Returning to *Tadić* case where the ICTY defined *war nexus* we can assume that there is no evidence that “*the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict*”.⁴²⁵

The *Al Mahdi* case illustrates two relatively new phenomena described by Marina Lostal: role of armed non-state actors (ANSA) in cultural heritage destruction and trend of deliberate targeting of cultural heritage.⁴²⁶ The issue arose in Middle East region in chaos following events of Arab spring that ended up in civil war in several countries. The conflicts were characterized by number of different ANSAs many of whom were radical Islamist movements. Deliberate targeting of cultural heritage was usually based on ideological reasons – under the conservative interpretation of Islam the objects were viewed as false idols that have to be destroyed. Systematic attacks against cultural heritage similar to the one in Timbuktu took part in other countries of region as well – most notably in Iraq, Syria and Libya. Trend of the deliberate targeting shows that there is distinction between attacks against protected objects during military operations and other deliberate attacks based on ideology. In *Al Mahdi* case the ICC did not make any difference among the two options. It is clear that the deliberate targeting trend requires different attitude under ICL.

Possible approach supported by number of scholars views the deliberate targeting of cultural heritage as crime against humanity. In the beginning of investigation in *Al Mahdi* case the Office of the Prosecutor decided not to examine whether crimes against humanity have been committed stating that “*the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in*

⁴²⁴ Al Mahdi Judgment. Art. 31.

⁴²⁵ Prosecutor v. Duško Tadić a/k/a "Dule". Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. 2 Octobre 1995. para 70.

⁴²⁶ LOSTAL, Marina. Armed Non-State Actors and Cultural Heritage in Armed Conflict. *International Journal of Cultural Property*, 2017, Vol. 24, No. 4, pp. 407–427.

Mali".⁴²⁷ However it also adds that "*the assessment may be revisited in the future*".⁴²⁸ As we already know the accused pleaded guilty and more detailed investigation of situation in Mali did not follow.

However as Green Martínez⁴²⁹ notes there is sufficient base to believe (and possibly investigate) that crimes against humanity were committed in Northern Mali during the period when the region was governed by group Ansar Dine. There are reports from witnesses who attested commission of murder, rape, sexual violence, persecution, imprisonment and torture as consequence of application of Sharia Law.⁴³⁰ The attack against cultural heritage of Timbuktu can be seen as part of this wider attack against local population. This approach also solves the problem with the term '*attack*' as described by Schabas – he points out that the word attack is also used in Article 7 of Rome Statute however it has different meaning here.⁴³¹ In the definition of crimes against humanity it means attack directed against civilian population and specifies that "*the acts need not constitute a military attack*".⁴³² To conclude there are two types of attack under the Rome Statute: military attack and attack against civilian population that does not have to be of military nature.

The question whether the conduct in *Al Mahdi* case should be rather considered as crimes against humanity presents complexity of cultural heritage protection under the ICL. However as the attitude of the Prosecutor in the case shows there is growing attention to human element in cultural heritage protection. The Prosecutor clearly sees the attack against the mausoleums as attack against the local community and its rights. Although this view is not reflected in evaluation of the crime it still represent important feature for future development.

5.3. Crimes against Humanity

Origin of crimes against humanity lies in humanitarian principles governing armed conflict.⁴³³ However they are closely related to human rights protection and development of

⁴²⁷ International Criminal Court. The Office of the Prosecutor (OTP). Situation in Mali (Article 53(1) Report). 16 January 2013. para. 128.

⁴²⁸ Ibid.

⁴²⁹ GREEN MARTÍNEZ, Sebastián. A Destruction of Cultural Heritage in Northern Mali. A Crime Against Humanity? *Journal of International Criminal Justice*, 2015, Vol. 13, No. 5, pp. 1073-1097.

⁴³⁰ RAGHAVAN, Sudarsan. '*In Northern Mali, Islamists' Attacks against Civilians Grow More Brutal*' (online). Washington Post, 11 December 2012, visited 25 February 2021. Available: <http://www.washingtonpost.com/world/in-northern-mali-islamists-attacks-against-civilians-grow-more-brutal/2012/12/11/5b74a734-3e46-11e2-8a5c-473797be602c_story_2.html>.

⁴³¹ SCHABAS: *Al Mahdi Has Been...*

⁴³² Elements of Crimes. Introduction to Article 7 of the Statute. para. 3.

⁴³³ BASSIOUNI, M., Cherif. *Crimes Against Humanity: Historical Evolution and Contemporary Application*. Cambridge: Cambridge University Press, 2011.

humaneness in general – they protect individual legal interests such as liberty and human dignity.⁴³⁴ The important difference from war crimes is fact that crimes against humanity can be committed both during armed conflict and in peacetime. The element that distinguishes crimes against humanity from domestic crimes is their context. They have to be committed as part of widespread or systematic attack against civilian population. The term 'attack' has wide meaning here – it includes not only armed attack but also many forms of mistreatment including discriminatory practices. The point is that the civilian population has to be primary object of the attack.⁴³⁵ Term 'widespread' describes fact that the attack is conducted on large scale and results in huge number of victims.⁴³⁶ Notion 'systematic' refers to organized nature of the acts – it can be presented by existence of plan, policy or certain ideology to weaken or destroy community.

There are several normative theories explaining nature of crimes against humanity. One of the most influential argues that crimes against humanity represent both attack on humanity as collective value common for all human beings and quality of individual human being. Thus crimes against humanity target both victim's humanity and common qualities shared by humans.⁴³⁷ Another significant theory points out the aspect that crimes against humanity are often based on abuse of power through state or some other organizational policy. The state or state-like entity fails in its responsibility to protect persons under their control.⁴³⁸

The concept of cultural heritage protection under notion of crimes against humanity was developed in number of cases before the ICTY. As noticed by Luban crimes against humanity are inflicted on victims based on their membership in population.⁴³⁹ The nature of the crimes is discriminatory and persons are targeted irrespective to their individual characteristics. The ICTY viewed some attacks against the cultural heritage as part of wider attack against civilian population. The background of the attacks can be characterized by ethnic cleansing policy⁴⁴⁰ that aimed to create ethnically homogenous areas. However this

⁴³⁴ STAHN: *A Critical Introduction...*, p. 52.

⁴³⁵ Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković. Judgment. Appeals Chamber. 12 June 2002. IT-96-23 & IT-96-23/1-A. para. 91.

⁴³⁶ Prosecutor v. Tihomir Blaškić (Blaškić Trial Judgment). Judgment. Trial Chamber. 3 March 2000. IT-95-14-T. para. 206.

⁴³⁷ LUBAN, David. A Theory of Crimes Against Humanity. *The Yale Journal of International Law*, 2004, Vol. 29, No. 1, pp. 85-168.

⁴³⁸ STAHN: *A Critical Introduction...*, p. 54.

⁴³⁹ LUBAN: A Theory of...

⁴⁴⁰ BRAMMERTZ et al: Attacks against Cultural...

approach towards cultural heritage protection might appear confusing. As explained in the beginning of this chapter not every type of cultural heritage can be protected in this way. There have to exist link between the protected cultural heritage and targeted population so the attack against the cultural heritage represents attack against the population if fact. Comparing to attitude under war crimes the protection under notion of crimes against humanity represents anthropocentric view of cultural heritage⁴⁴¹ and not just protection *per se*. Criminalization of offences against cultural heritage in such way can be described as cultural-value approach which is opposite of civilian-use rationale.⁴⁴² The cultural-value approach reflects cultural value of property for civilian population and results in wider protection that includes cultural aspects.

The discriminatory attacks against cultural heritage were viewed as crime against humanity of persecution by the ICTY. In the Article 5(h) the Statute defines “*persecutions on political, racial and religious grounds*”.⁴⁴³ However the Statute of ICTY still links them to armed conflict.⁴⁴⁴ This attitude was changed in the Rome Statute of ICC that does not require existence of armed conflict anymore.⁴⁴⁵ The definition provided in the Rome Statute also extends possible discriminatory ground that serve as base for persecution – it could be “*political, racial, national, ethnic, cultural, religious, gender... or other grounds that are universally recognized as impermissible under international law*”.⁴⁴⁶ On the other hand the Rome Statute brings significant limitation - the conduct has to be committed in connection with any act referred to in Article 7 para. 1 of the Rome Statute or any crime within the jurisdiction of the Court.⁴⁴⁷ This requirement seems to be logical since the conduct has to be part of widespread or systematic attack directed against civilian population⁴⁴⁸ thus isolated acts cannot constitute crime of persecution.

Finally as Micaela Frulli⁴⁴⁹ claims the crimes against humanity can be considered as more serious than war crimes. She bases the assumption on several features however the most important element is greater gravity of the crimes against humanity and more serious

⁴⁴¹ NAFZIGER, SCOVAZZI: *The Cultural Heritage of...*, p. 876.

⁴⁴² FRULLI, Micaela. The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency. *The European Journal of International Law*, 2011, Vol. 22, No. 1, pp. 203-217.

⁴⁴³ ICTY Statute. Art. 5(h).

⁴⁴⁴ Ibid. Art. 5.

⁴⁴⁵ Rome Statute. Art. 7.

⁴⁴⁶ Ibid. Art. 7(h).

⁴⁴⁷ Elements of Crimes. Art. 7(1)(h).

⁴⁴⁸ Ibid.

⁴⁴⁹ FRULLI, Micaela. Are Crimes against Humanity More Serious than War Crimes? *The European Journal of International Law*, 2001, Vol. 12, No. 2, pp. 329-350.

consequences for civilian population. Crimes against humanity usually represent more complex attack that significantly targets whole community. Reflection of this idea can be seen in decisions of the ICTY.

Although in *Tadić* case was not considered destruction of cultural heritage it represented important step in defining crime against humanity of persecution. The conclusion of the Trial Chamber meant extensive review of customary international law. The Trial Chamber stated that “*the crime of persecution encompasses a variety of acts, including inter alia, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his [or her] basic rights*”.⁴⁵⁰ Additionally the ICTY confirmed in several occasions that crime of persecution requires proof of following elements:

1) an act or omission discriminated in fact on a prohibited ground in the sense that the victim is targeted because of his or her perceived membership in a group; 2) the act or omission denied or infringed upon a fundamental right laid down in customary international law or treaty law; 3) the act or omission constituted an act listed under Article 5 of the Statute, or was of equal gravity to the crimes listed in Article 5 ICTY Statute, whether considered in isolation or in conjunction with other acts; and 4) the act or omission was carried out with the intention to discriminate on one of the prohibited grounds.⁴⁵¹

One of the first cases where the accused was charged with persecution as result of his actions against cultural heritage was *Blaškić* case. As already mentioned Tihomir Blaškić was convicted for violations of laws and customs of war under the Article 3(d) of the ICTY Statute for destruction of institutions dedicated to religion and education in Bosnian Lašva Valley (among other crimes). However he was also charged with persecution as crime against humanity for his participation on the destruction or wilful damage of institutions dedicated to religion and education.⁴⁵² According to the Trial Chamber the destruction of such institutions can provide support for charge that the accused intended to persecute on statutorily enumerated grounds, such as those of race, religion or politics:

persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek

⁴⁵⁰ Prosecutor v. Duško Tadić a/k/a “Dule”. Opinion and Judgment. Trial Chamber. 7 May 1997. IT-94-1-T. para. 710.

⁴⁵¹ Prosecutor v. Radoslav Brđanin. Judgment. Appeals Chamber. 3 April 2007. IT-99-36-A. para. 296.

⁴⁵² Prosecutor v. Tihomir Blaškić. Second Amended Indictment. 25 April 1997. IT-95-14-PT.

to instill within humankind. [Persecution] may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina.⁴⁵³

The reference to the '*symbolic buildings*' shows significance of the cultural heritage for local community recognized by the ICTY. The destruction of such objects committed with discriminatory intent is viewed as persecution of members of community on the grounds of their religion, race or politics. Even more importantly this approach removes difference between injury to humans and damage to property.⁴⁵⁴ The attack against the certain type of property can result in same consequences as direct attack against human being. The Appeals Chamber focused on type of property involved: it concluded that there are different types of property and not every destruction of property has to have so severe impact on population and thus constitutes crime against humanity even when committed with discriminatory intent.⁴⁵⁵ The Appeals Chamber required that the property has to constitute "*an indispensable and vital asset to the owner*"⁴⁵⁶ to treat its destruction as crime against humanity nevertheless it did not provide any proposal how to determine if the property possesses such value.

The ICTY later followed similar rationale in *Kordić and Čerkez* case however the concept was developed. The Trial Chamber stated about the destruction of religious buildings that "*when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects*".⁴⁵⁷ In the Appeal Judgment in the case the Chamber required "*a denial of or infringement upon a fundamental right laid down in international customary or treaty law*"⁴⁵⁸ in order to recognize destruction of civilian property as crime against humanity of persecution.

Another case that follows pattern established by the ICTY in *Kordić and Čerkez* case is *Stakić* case. Milomir Stakić was convicted for having leading role in destruction or wilful damage of seven mosques and two Catholic churches in city Prijedor and close

⁴⁵³ Blaškić Trial Judgment. Para. 277.

⁴⁵⁴ TOMAN: *Cultural Property in...*, p. 747.

⁴⁵⁵ Prosecutor v. Tihomir Blaškić. Judgment. Appeals Chamber. 29 July 2004. IT-95-14-A. para. 146, citing Kupreskić Trial Judgment, para. 631.

⁴⁵⁶ Ibid. para. 138.

⁴⁵⁷ Kordić and Čerkez Trial Judgment. para. 207

⁴⁵⁸ Kordić Appeals Judgment. Para. 103.

surroundings.⁴⁵⁹ The accused was charged with persecution as crime against humanity only. The Trial Chamber concluded that destruction of religious buildings can amount to persecution as crime against humanity.⁴⁶⁰ The Trial Chamber also repeated opinion considering destruction of religious buildings from *Kordić and Čerkez* case that “[the] act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people”.⁴⁶¹

The difference between prosecuting attacks against cultural heritage under war crimes and crimes against humanity is expressed in more complex nature of crimes against humanity. The crime of persecution allows addressing the attacks in more comprehensive way that reflects context of the crimes committed.⁴⁶² It reflects pattern behind the crime that is based on common plan or purpose. Seemingly discrete crimes thus can be related and viewed as part of general plan. The unifying element between the crimes is discriminatory intent against particular group. In Bosnia-Herzegovina the campaign of ethnic cleansing was framework for the majority of the crimes. In order to cleanse the territory various crimes were committed and the attacks against cultural heritage were essential part of them.

The ICTY examined the pattern in more detailed way in *Brđanin* case. Radoslav Brđanin was senior Bosnian Serb political leader at the regional level – president of the Crisis Staff/War Presidency in the Bosnian Serb Autonomous Region of Krajina. In the beginning of the campaign Bosnian Serb forces took control over local political, military and police institutions. Later towns and villages populated predominantly by non-Serbs were attacked by Bosnian Serb military with shelling, burning houses and killing. Finally majority of non-Serbs were expelled from their homes or sent to detention camps. In the camps they faced inhuman treatment and later were deported from Bosnian-Serb controlled territory.

Those who avoided expulsion faced number of discriminatory measures from local authorities. The Trial Chamber concluded that “the evidence shows a consistent, coherent and criminal strategy of cleansing the Bosnian Krajina of other ethnic groups implemented by the SDS and Bosnian Serb forces.”⁴⁶³ and that “persecutorial campaign against Bosnian Muslims and Bosnian Croats included killings, torture, physical violence, rapes and sexual assaults,

⁴⁵⁹ Prosecutor v. Milomir Stakić. Judgment. Trial Chamber. 31 July 2003. IT-97-24-T.

⁴⁶⁰ Ibid. Para. 766.

⁴⁶¹ Ibid. para. 767 (quoting *Kordić* Trial Judgment, para. 207).

⁴⁶² BRAMMERTZ et al: Attacks against Cultural...

⁴⁶³ Prosecutor v. Radoslav Brđanin. Judgment. Trial Chamber. 1 September 2004. IT-99-36-T. para. 118.

constant humiliation and degradation, destruction of properties, religious and cultural buildings, deportation and forcible transfer, and the denial of fundamental rights”.⁴⁶⁴ Speaking about attacks against religious buildings the Trial Chamber concluded that “*the deliberate campaign of devastation of Bosnian Muslim and Bosnian Croat religious and cultural institutions was just another element of the larger attack.*”⁴⁶⁵ This attitude shows how the ICTY fully integrated attacks against cultural heritage into prosecution of crimes against humanity.

Another two interesting cases concerning widespread and systematic attack against civilian population and its cultural heritage are *Šainović and others* case and *Dorđević* case. In *Šainović* was proven that police and military forces of Federal Republic of Yugoslavia committed systematic attack against Albanian civilians of Kosovo.⁴⁶⁶ During this attack against the civilian population, crimes including deportation, forcible transfer, murder and attacks against cultural property were committed. The Trial Chamber concluded that these crimes were committed with the intent to discriminate against Kosovo Albanians because of their ethnicity, and thus constituted the crime of persecution as a crime against humanity.⁴⁶⁷ As reaction to cultural heriatage destruction the Trial Chamber concluded that it was “reasonably foreseeable” to *Šainović*, *Pavković* and *Lukić* that “*the forces of the FRY and Serbia [might] commit wanton destruction or damage of Kosovo Albanian religious sites, cultural monuments, and Muslim sacred sites during their forcible displacement of the Kosovo Albanian population.*”⁴⁶⁸ This approach represents important contribution since leaders and officials are on notice that they might be held accountable for attacks against cultural heritage that they did not intend if it was reasonably foreseeable that forces used to commit other crimes would also attack cultural heritage.

Dorđević case is very similar to *Šainović*. The accused was charged with destruction or damage to 19 mosques in Kosovo however the Trial Chamber found him guilty only in four cases.⁴⁶⁹ Nevertheless the Appeals Chamber in the case provided significant information

⁴⁶⁴ Ibid. Para. 1050.

⁴⁶⁵ Ibid. Para. 118.

⁴⁶⁶ Prosecutor v. Nikola Šainović and others (Šainović et al.). Judgment, Volume II. Trial Chamber. 26 February 2009. IT-05-87-T. para 1181.

⁴⁶⁷ Ibid. paras. 1181-1262.

⁴⁶⁸ Ibid. Vol. III, para. 473.

⁴⁶⁹ Prosecutor v. Vlastimir Đorđević. Judgment. Trial Chamber. 23 February 2011. IT-05-87/1-T. paras. 1808, 1819, 1831, 1836.

about the nature of targeted property. It stated that all attacks against religious property have sufficiently severe impact to constitute crimes against humanity “*without requiring an assessment of the value of the specific religious property to a particular community*”.⁴⁷⁰ This approach opens space for more comprehensive protection of cultural heritage. There is no need to prove specific importance of the heritage for local community – instead there is assumption that the cultural heritage of *religious* character is important for the community. On the other hand this provision probably applies only to religious objects, not to all types of cultural heritage.

5.4. Genocide

The concept of the cultural genocide has been discussed extensively in the previous chapter. This section shall focus on the crime of genocide as defined under current ICL instruments. As previously anticipated definition of genocide in Genocide Convention does not provide almost any space to reflect cultural aspects of the crime. On the other hand there is number of other questions related to crime of genocide that arise from decisions of the ICTY.

Genocide is usually regarded as the most serious international crime, the crime of crimes.⁴⁷¹ Its inherent gravity is personified in intent to destroy certain group. And as pointed out by Stahn it is attack against human diversity.⁴⁷² Targeting of the victims is bases on their membership in certain group so the victim has no chance to influence the selection.

In the Genocide Convention the genocide is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

⁴⁷⁰ Prosecutor v. Vlastimir Đorđević. Judgment. Appeals Chamber. 27 January 2014. IT-05-87/1-A. para. 567.

⁴⁷¹ SCHABAS, William. *Genocide in Interantional Law: The Crime of Crimes*. Cambridge: Cambridge University Press, 2009.

⁴⁷² STAHN: *A Critical Introduction to..*, 32.

- (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.⁴⁷³

The definition was later adopted by both Statute of ICTY and Rome Statute of the ICC and is universally recognized. As already mentioned comparing to original holistic concept of genocide created by Lemkin the current definition seems to be narrow. Schabas proposes two significant imperfections of the definition.⁴⁷⁴ Firstly it is focused exclusively on physical and biological destruction of the targeted group and thus does not provide wider protection of other characteristics of the group. The protection seems to be very limited especially comparing to attitude chosen under the notion of crimes against humanity. Secondly it protects only four enumerated types of groups. Once again, comparing to definition of persecution in the Rome Statute that protects “*any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognized as impermissible under international law*”⁴⁷⁵ it is too narrow.

This opinion was partly confirmed in ruling of the ICTY in *Krstić* case that was dealing with genocide committed in Srebrenica during civil war in Former Yugoslavia. The Trial Chamber stressed that principle *nullum crimen sine lege* has to be respected and that

*despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.*⁴⁷⁶

⁴⁷³ Genocide Convention. Art. 2.

⁴⁷⁴ SCHABAS, William. Defining Genocide. In CONSTANTINIDES, Aristotle, ZAIKOS, Nikos (eds). *The Diversity of International Law*. Leiden: Martinus Nijhoff Publishers, 2009, pp. 535-545.

⁴⁷⁵ Rome Statute. Art. 7(1)(h).

⁴⁷⁶ Prosecutor v. Radislav Krstić. Judgment. Trial Chamber. 2 August 2001. IT-98-33-T. para. 580.

On the other hand the Trial Chamber adds that

*where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.*⁴⁷⁷

As the Trial Chamber explained the attacks against cultural heritage and other kinds of property of the targeted group cannot be recognized as genocide. Nevertheless the Trial Chamber acknowledged the connection between targeted group and its cultural heritage and also pointed out that destruction of cultural heritage often accompanies physical and biological destruction of the group. Finally such attacks against the cultural heritage can serve as evidence of genocidal intent of the perpetrator. This explanation just sums up the previous reservations towards the concept of cultural genocide.

However the fact that the concept of cultural genocide has been rejected does not mean that there is no way how to protect cultural heritage in similar cases. As presented in the previous section of this chapter the same goal can be achieved under crime against humanity of persecution. In fact some authors⁴⁷⁸ argue that crime of persecution can serve as substitute of the concept of cultural genocide. It is relevant point since crime of persecution obviously allows assessing wider context of the criminal conduct and reflect its complex nature.

It is true that crime of persecution and genocide share many common characteristics but they are definitely not interchangeable. In ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries from 1996 the ILC explained that persecution lacks specific intent required for the crime of genocide.⁴⁷⁹ It is the genocidal intent to destroy in whole or in part the targeted group that makes the difference. The concept was developed in *Kupreškić* case where the Trial Chamber examined nature of persecution and genocide and their relationship. It is pointed out that both crimes belong to the same type of offence and are

⁴⁷⁷ Ibid.

⁴⁷⁸ NOVIC: From 'Genocide' to...

⁴⁷⁹ Draft Code of Crimes against the Peace and Security of Mankind with commentaries. 1996. p. 49.

based on intent to discriminate.⁴⁸⁰ However there is different *mens rea*: in case of persecution “*the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder*”.⁴⁸¹ Genocide requires the intent to destroy in whole or in part the targeted group. Nevertheless the Trial Chamber also noted that persecution can escalate to genocide in some cases when the acts of persecution are designed to destroy the group.⁴⁸² The explanation makes it clear that genocide is viewed as more serious crime than persecution under the ICL.

Finally there is one more issue that is closely related to notions genocide and persecution and requires clarification. To describe events and situation during the conflict in Former Yugoslavia the term ‘*ethnic cleansing*’ was widely used. Although it is not strictly defined legal term it was used by journalists, politicians and even by the ICTY. As noted by Schabas there was number of different ways how to define ethnic cleansing.⁴⁸³ He explains that the term has its origin in post-WWII Europe when large areas of Eastern Europe were cleansed of certain minorities (most notably of Germans in Czechoslovakia and Germans and Ukrainians in Poland).

Security Council’s Commission of Experts on violations of humanitarian law during the Yugoslav wars said that “*ethnic cleansing means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.*”⁴⁸⁴ Similarly The Special Rapporteur of the Commission on Human Rights, Tadeusz Mazowiecki, stressed that “*ethnic cleansing may be equated with a systematic purge of the civilian population with a view to forcing it to abandon the territories in which it lives.*”⁴⁸⁵ The Commission itself stated that “*ethnic cleansing at minimum entails deportations and forcible mass removal or expulsion of persons from their homes in flagrant violation of their*

⁴⁸⁰ Prosecutor v. Zoran Kupreškić and others (Kupreškić Trial Judgment). Judgment. Trial Chamber. 14 January 2000. IT-95-16-T. para. 636.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ SCHABAS, William. Ethnic Cleansing and Genocide: Similarities and Distinctions. *European Yearbook of Minority Issues*, 2003/4, Vol. 3, No. 1, pp. 109-128.

⁴⁸⁴ Interim report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992). UN Doc. S/35374 (1993). para. 55.

⁴⁸⁵ Provisional Verbatim Record of the 3134 Meeting. UN Doc. S/PV.3134 (1992). para. 39.

*human rights, and which is aimed at the dislocation or destruction of national, ethnic, racial or religious groups.*⁴⁸⁶

Once again the difference between ethnic cleansing and genocide is represented by *mens rea*. Ethnic cleansing does not intend to destroy targeted group but just to remove it from the area. Different acts committed under the plan of ethnic cleansing can amount to persecution however there is not genocidal intent. As pointed out by the Trial Chamber in *Kupreškić* case “*the killing of Muslim civilians was primarily aimed at expelling the group from the village, not at destroying the Muslim group as such.*”⁴⁸⁷ Thus the Trial Chamber assumed that it is case of persecution, not of genocide. We can conclude that term ethnic cleansing was used as more general notion to cover different actions (including destruction of cultural heritage) with same objective. Some of them can amount to persecution however they do not constitute crime of genocide.

5.5. Concluding Remarks

The chapter presents that the ICL is capable of dealing with destruction of cultural heritage in general. Under current legislation the crime of genocide is not able to cover cultural aspects of the offence and thus cannot protect cultural heritage directly. However notions of war crimes and crimes against humanity proved to be viable options how to address cultural heritage destruction. Prosecution of cultural heritage destruction under the notion of war crimes represents more traditional attitude and covers situations when destruction appears as direct result of military operations or collateral damage. On the other hand prosecution under notion of crimes against humanity presents the approach based on *human element*⁴⁸⁸ of cultural heritage. It reflects the link between community and its cultural heritage and protects cultural heritage as intrinsic part of community protection. The human element seems to be more and more significant aspect of the protection. Even in cases when the cultural heritage destruction is prosecuted as war crime the human element is mentioned – most notably in *Jokić* case (Dubrovnik Old Town damage) and *Al Mahdi* case (Timbuktu shrines destruction).

⁴⁸⁶ The Situation of Human Rights in the Territory of the Former Yugoslavia. UN Docs. CHR Res. 1992/S 1/1. Preamble.

⁴⁸⁷ Kupreškić Trial Judgment. para. 751.

⁴⁸⁸ FRANCIANI, Francesco, LIXINSKI, Lucas. Opening the Toolbox of International Human Rights Law in the Safeguarding of Cultural Heritage. In DURBACH, Andrea, LIXINSKI, Lucas (eds). *Heritage, Culture and Rights*. Oxford: Hart Publishing, 2017, pp. 11-34.

With current trend of intentional targeting of cultural heritage outside military operations as part of wider campaign against civilian population the whole issue received a lot of attention. Although the international tribunals and courts (ICTY and ICC) proved that they are able to handle such cases the ways how to achieve the objective may be complicated. Neither the Statute of the ICTY nor the Rome Statute of the ICC even contain term '*cultural property*' or '*cultural heritage*'. The approach of the courts is based on interpretation of existing wording which can be seen as extensive sometimes. Marina Lostal identifies two possible attitudes towards this matter.⁴⁸⁹ The first one is revisionism that argues that the current situation requires creation of new binding instruments since the present legal regime is unable to deal with the issue. The second one – idealism – is opposing and claims that current legislation is fully capable to address the matter. Revisionists usually propose drafting new document or at least to create new crimes under international law that would directly mention cultural property/heritage.⁴⁹⁰ Another opinion⁴⁹¹ stresses that crimes against cultural heritage should be prosecuted as crimes against humanity since the notion reflects their complex nature and impact on population. Nevertheless as shown not in every case the human element is present.

This leads us to last but not least element that has been already anticipated. The approach of the court highly depends on type of targeted cultural heritage. The link between cultural heritage and local population or community has been mentioned several times as crucial feature. However it also brings difficulties in practical protection: some cases simply cannot be addressed under the ICL. In situation when the attack is committed during peacetime and targeted cultural heritage has no link to local community neither notion of war crimes nor crimes against humanity represent possible option. The matter has been extensively discussed by Francioni and Lenzerini⁴⁹² while considering destruction of great rock sculptures of Buddhas in Bamiyan, Afghanistan by Taliban government in 2001. They came to conclusion that the conduct is not punishable under the ICL and also that there is no

⁴⁸⁹ LOSTAL, Marina. *International Cultural Heritage Law in Armed Conflict*. Cambridge: Cambridge University Press, 2017. pp. 8-10.

⁴⁹⁰ See GOTTLIEB, Yaron. Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes under the Rome Statute of the ICC. *Penn State International Law Review*, 2005, Vol. 23, No. 4, pp. 857-896.

⁴⁹¹ TURKU: *The Destruction of...*, pp. 117-119.

⁴⁹² FRANCIONI, LENZERINI: *The Destruction of...*

customary rule that would prohibit government from destruction of cultural heritage of its own country.

With rise of so called Islamic state similar situation followed in Syria and Iraq. Number of important ancient sites was vandalized or totally destroyed. However there was no real link to armed conflict and these places usually did not represent living culture related to local people but rather common heritage of mankind. Additionally there was a lot of other less important historic sites destroyed. They did not receive so much international attention since they did not represent common heritage of mankind but still their fate should not be ignored. The current ICL is not able to deal with such situations and thus revisionist's opinion gains more importance.

Finally the new attitude of the ICC introduced in Policy on Cultural Heritage issued by The Office of the Prosecutor of the ICC in 2021 links cultural heritage destruction with number of crimes within jurisdiction of the Court. Such protection of cultural heritage is certainly indirect however it shows important shift – cultural heritage is protected as part of protection of population and thus human rights related to cultural heritage are fully recognized. The ICC finds human element of cultural heritage in these crimes: Directing attacks against protected objects, Other forms of unlawful attack, Destruction or appropriation of property as a grave breach of the Geneva Conventions, and destruction or seizure of property of the adverse party to the conflict, Pillage, Extermination, Deportation or forcible transfer of population, Torture, Sexual and gender-based crimes, Persecution, Other inhumane acts, Genocide, Crime of aggression.⁴⁹³ Except for crimes examined in previous part of this chapter there is no relevant case law nevertheless with increasing number of attacks against cultural heritage it might change in future. The new Policy on Cultural Heritage represents important step forward that should bring more effective protection of both human rights and cultural heritage.

⁴⁹³ For details, see Policy on Cultural Heritage. International Criminal Court. 2021.

6. Conclusion

The thesis presents that International Law fully adopted human rights based approach towards cultural heritage protection. Although the current attitude originates in 19th century IHL it underwent significant development and shift. Traditional IHL did not protect cultural heritage in present meaning of the term. It was rather focused on protection of certain types of objects that were generally described as cultural property. The objects constituting cultural property were mixed with other types of protected objects, most notably institutions dedicated to science and educations and hospitals. Cultural property was protected mostly for its aesthetic and economic value. This approach can be described as pure *per se* protection of cultural heritage. Nevertheless this attitude was continuously modified and in the second half of last century started to reflect different sets of values. Rapid development of human rights protection law after WWII had significant impact on cultural heritage protection as well.

Right to access and enjoy cultural heritage is recognized as one of important cultural rights and deeply influences general attitude to cultural heritage protection. This phenomenon is illustrated by replacement of term cultural property by term cultural heritage. The term cultural heritage is more complex and comparing to cultural property includes number of additional aspects – most notably intangible elements and link between community or individual and its cultural heritage. For human rights based approach the link between cultural heritage and community and/or individual is the most important element. However not in every case the link is present – it depends on type of cultural heritage. The cultural heritage has to be part of daily life and possess emotional value for community or individual in order to establish the link. Thus we can conclude that number of world famous heritage sites cannot be protected in this way since there is no real connection between them and community or individuals living around.

The idea of significance of cultural elements for community is not something new – Raphael Lemkin based on it his concept of cultural genocide and despite the concept was not finally included into Genocide Convention it still played role in future development. Lemkin's idea was reflected in human rights protection law, particularly in UNESCO conventions protecting intangible cultural heritage and indigenous communities. Nevertheless acceptance of the idea in the ICL was more reluctant.

However the link between cultural heritage and human rights protection could not exist without another crucial shift that can be explained as holistic approach to cultural

heritage. The attitude stresses that cultural heritage cannot be viewed as isolated phenomenon and different types of cultural heritage cannot be treated separately. The traditional division of cultural heritage into various categories is seen as obsolete and irrelevant for modern understanding of the protection. Distinguishing movable, immovable, tangible and intangible or cultural and natural heritage does not play any role in these days. All those categories are covered by umbrella of term cultural heritage since they are deeply interconnected and cannot be treated separately. The holistic approach also expresses the link to human rights protection – human rights are related to cultural heritage in its unity not just to isolated parts of it. Finally the holistic approach is ultimate expression of the fact that cultural heritage is something related to real daily life, not mere collection of objects in museum showcase separated from people by glass.

The policy of the holistic approach and human rights link to cultural heritage might seem like something limited to field of human rights protection. For some time it was true but after while this attitude started to influence area of ICL. Step by step ICL was more and more focusing on protection of living culture while taking into consideration human element of cultural heritage. Although it has never been expressed explicitly the shift from cultural property to cultural heritage reached ICL. Finally the development was confirmed and for the first time codified in New Policy on Cultural Heritage issued by the ICC in 2021. The Policy adopts human rights based approach towards protection of cultural heritage and confirms that ICL does not protect only cultural heritage *per se* but rather rights of community or individuals related to it. It makes the issue more complex – we do not speak about mere protection of objects anymore but number of other elements is included. Nevertheless certain steps in this direction can be tracked in case law much earlier and are result of activities of the ICTY.

Conflict in Former Yugoslavia has shown the importance of human element of cultural heritage. The policy of so called ethnic cleansing resulted in large scale destruction of cultural heritage of local communities and the ICTY had to find proper way how to address it. Although some of the defendants were charged with war crimes as result of targeting cultural heritage the ICTY established other important concept. The Tribunal assumed that attacks against cultural heritage of local communities were part of widespread and systematic attack against civilian population and concluded that they represent crime against humanity of persecution. The crime of persecution reflects nature of the attacks as attacks against civilian population but also recognizes the link between population and its cultural heritage. In such

case the protection of cultural heritage is protection of civilian population and its human rights in fact.

The ICC in decision in well-known *Al Mahdi* case has chosen different attitude. Although the Prosecutor and Trial Chamber paid huge attention to value of targeted objects to local community and possible impact of destruction on the community the defendant was charged with war crime attacking protected objects. This attitude does not reflect that the attack was targeted against local population and resulted in violation of its rights. There appeared opinions that decision in *Al Mahdi* case was step back.

To sum up the ICL has several ways how to address attacks against cultural heritage. The way how they are treated depends on type of targeted cultural heritage – more precisely on existence of the link between the cultural heritage and community or individuals. In situation when the link is present and the attack results in violation of rights of community or individuals crime of persecution is the most suitable way how to address the case. Advantage of this attitude is that it does not require existence of armed conflict. However when the destruction appears as result of military operations during armed conflict and there is no link between the targeted heritage and community or individuals notion of war crime attacking protected objects is the way how to address the situation. In such case it is protection of cultural heritage *per se* with no connection to human rights protection. In some situations war crime and crime against humanity can coexist and overlap as illustrated in several cases tried before the ICTY. When perpetrator attacks cultural heritage significant for local community (so the link is established) during armed conflict the act can result in both war crime and crime against humanity. Finally although the idea of cultural genocide was rejected the cultural elements still have certain role in prosecution of crime of genocide. The ICTY stated that despite it is not possible to prosecute destruction of cultural heritage itself under the notion of genocide such acts can be still taken into consideration as evidence of genocidal intent of perpetrator.

The established case law provides to the ICL enough tools to prosecute attacks against cultural heritage and sufficiently reflect their real nature. Protection of cultural heritage is not limited to protection *per se* but rather represents effective tool how to protect civilian population and its rights. This illustrates that protection of cultural heritage has two aspects – protection of the cultural heritage itself and human rights protection. They can overlap but it

is not always the case. Nevertheless they share same aim – to protect certain objects that are viewed as cultural heritage.

The logical conclusion is that if more cases concerning attacks against cultural heritage will reach the ICC the Court will focus more on protection of human rights related to cultural heritage and will take into consideration its human element. However after recalling *Al Mahdi* case the statement does not seem so certain. The development of any policy is usually not perfectly direct and the ICL's approach to cultural heritage is no exception. With New Policy on Cultural Heritage we can reasonably expect progress in this direction nevertheless the ICL is still deeply influenced by the traditional IHL and thus it might take while before the human element of cultural heritage will be fully adopted in decisions of the ICC.

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