ACADEMY

KIRIMLI DR. AZIZ BEY COLLECTED COURSES ON INTERNATIONAL HUMANITARIAN LAW

VOL. I

EDITORS

Gökhan Güneysu

Onur Dur

Mustafa Can Sati

M. Emre Hayyar

KIZILAY KÜLTÜR SANAT

KIRIMLI DR. AZIZ BEY COLLECTED COURSES ON INTERNATIONAL HUMANITARIAN LAW – VOL. I

EDITORS
Gökhan Güneysu
Onur Dur
Mustafa Can Sati
M. Emre Hayyar

KIZILAY
KÜLTÜR SANAT

Kırımlı Dr. Aziz Bey Collected Courses on International Humanitarian Law - Vol. I
Kızılay Culture and Arts Publications: 18
Academy Series: 2

Editors
Gökhan Güneysu
Onur Dur
Mustafa Can Sati
M. Emre Hayyar

Publication Coordinators
Hafize Zehra Kavak
Selman Salim Kesgin

Production Coordinator
Fatma Sena Yasan

Graphic Design
Nevzat Onaran

ISBN 978-625-99214-3-3

August 2023, Istanbul, first edition.

Kızılay Culture and Arts Publications
is a registered trademark of the Turkish Red Crescent Association.

Yayınevi Sertifika No.: 15368
Sütlüce Mah. İmrahor Cad. No.: 28
34445, Beyoğlu, Istanbul, Türkiye
Telephone: (+90 212) 263 1868
web: https://www.kizilaykultursanat.com.tr/yayinevi/
e-mail: kks@kizilay.com.tr

Baskı ve Cilt
Betik Dijital Matbaa San. Ltd. Şti.
Matbaa Sertifika No: 69380
Atatürk Mh. Komsanüstü Yolu Sk. No: 4
Quality Residance Çarşı Avm Dükkanları
Dükkan: 5-6-7 Küçükçekmece, İstanbul, Türkiye
Telephone: +90 506 388 7130

Library Cataloging-in-Publication Data

Kırımlı Dr. Aziz Bey Collected Courses on International Humanitarian Law - Vol. I / editors Gökhan Güneysu, Onur Dur, Mustafa Can Sati, M. Emre Hayyar.

Istanbul : Kızılay Culture and Arts Publications, 2023.

230 pages ; 16,5 x 23,5 cm.

Kızılay Culture and Arts Publications ; 18. Academy series ; 2.

Including bibliography.

ISBN 978-625-99214-3-3

1. Law of nations – Enforced settlement of international disputes – Law of war and neutrality. Jus belli – Humanitarian law. 2. Law of nations – Enforced settlement of international disputes – Law of war and neutrality. Jus belli – Air warfare. 3. Law of nations – Enforced settlement of international disputes – Law of war and neutrality. Jus belli – Warfare on land.

I. Güneysu, Gökhan, 1977-. II. Dur, Onur, 1993-. III. Sati, Mustafa Can, 1992-. IV. Hayyar, M. Emre, 1995-.

KZ6440-6530 2023.

KIRIMLI DR. AZIZ BEY COLLECTED COURSES ON INTERNATIONAL HUMANITARIAN LAW – VOL. I

Gökhan Güneysu, Onur Dur, Mustafa Can Sati, M. Emre Hayyar

KIZILAY
KÜLTÜR SANAT

Editors

Prof. Dr. Gökhan Güneysu

Dr. Gökhan Güneysu holds a master's degree from Göttingen University and received his PhD in public law from Anadolu University. He currently works as a Professor at the School of Law, Anadolu University, Eskişehir, Türkiye. He specializes in international humanitarian law and international criminal law.

Onur Dur

Onur Dur is a PhD candidate at the University of Basel, finalizing his thesis on "The Prohibition of Terrorism in International Humanitarian Law". He also serves as the General Coordinator of the Istanbul Center for International Law. Onur holds a Master's degree in International Law (2018) from the Geneva Graduate Institute, where he was awarded the Wilsdorf Scholarship. He received his LLB degree (2018) from the University of Galatasaray. During his bachelor studies, Onur participated in the Jean Pictet International Humanitarian Law Competition (Francophone edition-2016) and the René Cassin Human Rights Moot Court (2015). Currently, Onur is a lecturer at both Ankara Social Sciences University and the University of Basel.

Mustafa Can Sati

Mustafa Can Sati is a PhD Candidate in the International and European Law Department at Maastricht University, specialising in the integration of Artificial Intelligence (AI) technologies into means and methods of warfare and its conceptualisation and legality under international humanitarian law. He serves as the Administrative Director and member of the Executive Board of Directors of the Istanbul Center for International Law. Mustafa holds a Master of Laws (LL.M.) degree in International and European Law from Gent University. Previously, he worked as a research assistant in Public International Law Department at Istanbul Kültür University from 2017 to 2019. He was also elected as a participant in the 54th session of the International Law Seminar organized by the United Nations Office at Geneva and the International Law Commission.

M. Emre Hayyar

M. Emre Hayyar is a PhD Candidate in public international law at the University of the West of England, Bristol, United Kingdom. He has been a board member at the Istanbul Center for International Law since August 2017. Emre holds an LL.M. in Public Law from Istanbul Medipol University (Summa Cum Laude, 2022), an LL.M. in International and European Law from Ghent University (Cum Laude, 2021), and an LL.B. from Istanbul University (2018). He worked as a research assistant in public international law at Istanbul Medipol University between February 2019 – January 2023.

This volume of the Kırımlı Dr. Aziz Bey Collected Courses on International Humanitarian Law is solemnly dedicated to the cherished memories of those who lost their lives in the catastrophic earthquakes that struck Türkiye and Syria in February 2023. Additionally, it is dedicated to the countless innocent souls who have endured the harrowing tribulations of war all across the globe.

Contents

Chapter II: International Legal Protection of Cultural Heritage in Armed Conflict

Riccardo Pavoni[1]

1. Introduction

The recent statement by former United States President Donald Trump,[2] on his readiness to strike at 52 sites in Iran – some of them of primary cultural importance – in response to possible attacks against United States targets following the killing of General Soleimani, has been met with outrage by many international observers, while the Pentagon hastened to distance itself from "its" President.[3] As noted later, the implementation of Trump's statement *tel quel* would undoubtedly constitute a serious international wrong, consisting in the violation of the rules of international humanitarian law (also known as the law of armed conflict or *jus in bello*) which prohibit reprisals against cultural property and, in any case, acts of war against such property, provided that it has not become a military objective.

In general, this episode is extremely indicative of the importance that the international community now attaches to the safeguarding of cultural property in times of armed conflict, in particular that property of outstanding universal value that should be considered part of the world cultural heritage, such as the many Iranian sites that provide testimony of some of the most ancient civilizations.

This contemporary legal consciousness is the result of a long evolutionary process that has spanned the centuries, significantly humanizing the law

1 Full Professor of International and European Law, Department of Law, University of Siena, Italy. This work builds upon and updates an article previously published in Studi senesi, Vol. 132, 2020, p. 335 ff. All websites last accessed on 31 May 2023.

2 See *President Repeats Threat to Target Cultural Sites*, *New York Times*, 6 January 2020.

3 See *Pentagon Rules Out Strikes on Antiquities*, *New York Times*, 7 January 2020. For a fine summary of the legal issues at stake in these events, see N. Ronzitti, *Lo scontro Usa-Iran alla prova del diritto internazionale*, *Affari internazionali*, 13 January 2020, <www.affarinternazionali.it/2020/01/scontro-usa-iran-diritto-internazionale>.

of armed conflict in its entirety, including the rules protecting cultural property. Thus, the ancient doctrine of the destruction and plundering of that property as an integral and fully legitimate aspect of war has given way to the current legal framework which – with a few narrow exceptions – bans such conduct.

For various reasons, however, the present topic has never been as debated as in the past thirty years. First of all, since the wars in the former Yugoslavia in the 1990s, there has been and continues to be a constant proliferation of armed conflicts with a strong ethnic and cultural connotation, where the violence unleashed against monuments, churches, museums and works of art does not merely and principally amount to collateral damage, but is rather a key element of a central aim of military activities, namely the annihilation of the cultural and religious identity of the enemy, regardless of whether that property fulfils the notion of a military objective.[4] Expressions such as "cultural terrorism" and "ethnic-cultural cleansing" have become established in common use, with reference to, for instance, the damage caused by terrorist groups to the mausoleums of the legendary site of Timbuktu in Mali as well as to Syrian heritage of extraordinary importance such as Palmyra and the historic center of Aleppo, or the destruction of dozens of mosques and the bombing of Dubrovnik by the armies (mainly the Serbian army) engaged in the Yugoslav wars.

Secondly, the nature of contemporary armed conflicts has changed profoundly, as the examples now mentioned emblematically recall. Today, in the face of a small number of "classic" international wars between States, the vast majority of conflicts have a non-international character, a protean category encompassing all conflicts involving non-state armed groups as autonomous belligerent parties, including – in addition to the traditional insurgent movements with a definite territorial connection – global terrorist networks, such as ISIS or Al Qaeda. This has led many scholars to question the possibility of applying the well-established rules for the protection of cultural heritage in the

4 See eg K. Schmalenbach, *Ideological Warfare against Cultural Property: UN Strategies and Dilemmas*, *Max Planck Yearbook of United Nations Law*, Vol. 19, 2015, p. 3 ff. On the tragic iconoclastic destruction of the giant Buddha statues in Bamiyan (Afghanistan) by the Taliban in March 2001, although not in the context of an armed conflict, see F. Francioni and F. Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, *European Journal of Int. Law,* 2003, p. 619 ff.

event of international conflicts to non-international conflicts, which implies, above all, determining whether and to what extent these rules can be considered binding on non-state actors.[5]

Thirdly, the present topic is of pressing interest because never before has it been so clear that war is one of the main causes of illicit trafficking in cultural goods and that the profits generated by such trafficking contribute significantly to the financing of the war effort, in particular, of terrorist networks and other non-state armed factions (think only of the systematic looting, resulting in sales in international markets, of Syrian and Iraqi archaeological artefacts by ISIS). In order to meet this crucial challenge for the preservation of cultural heritage, effective measures are clearly needed to impose – through States – obligations and sanctions on all actors in the art market who come into contact with looted objects from areas of armed conflict. Fortunately, also in this area we have recently witnessed a significant reaction by the international community represented at the highest political level, namely by the UN Security Council.

The following sections will first summarize the existing legal framework for the protection of cultural property in times of war and the main problems associated with it. That framework will then be revisited in light of the various developments arising from the normative and judicial practice which has emerged, to an unprecedented extent, in the context of recent cultural crises and tragedies caused by armed conflict.

2. Treaty Obligations Concerning the Protection of Cultural Property in Armed Conflict

The regime for the protection of cultural property in armed conflict has evolved mainly through the progressive adoption and modernization of treaty rules. As a matter of fact, the pertinent treaties are the primordial and most visible source of international law applicable in this field. However, the traditional limitations to the binding effect of treaty rules and the relentless contemporary developments in this area call for an inquiry into whether customary international norms for the protection of cultural heritage in times of war have emerged and are

5 See *ex multis*, K. Hausler, *Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups*, *Santander Art and Culture Law Review*, 2015, No. 2, p. 117 ff.

therefore mandatory for all international law subjects irrespective of their consent. Prior to this, it is necessary to briefly illustrate the relevant treaty framework.

The most important treaty is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Historically, it was the first treaty with a universal vocation entirely devoted to this subject matter. Its enduring relevance is shown by the constant, albeit slow, process of ratification and accession associated therewith. There are currently 133 States Parties to the Hague Convention, that is, just under three-quarters of existing States. Some of the most significant ratifications have taken place recently, namely those of the United States in 2008 and the United Kingdom in 2017.[6] As a result, all permanent members of the UN Security Council – and all major military powers – are bound by the Convention.

The Hague Convention, like the overall treaty system in question, raises three fundamental problems. The first relates to the scope of the obligations laid down therein, the second to the identification of cultural property of the highest importance,[7] worthy as such of special protection, and the third to the availability of effective mechanisms for the enforcement of obligations and the implementation of the responsibility of the perpetrators of violations.

The central rule of the Convention, and the only one apparently applicable in non-international armed conflicts,[8] is Article 4 on respect for cultural property. This respect translates into the following four obligations on States Parties involved in an armed conflict: (i) to refrain from acts of hostility against cultural property (prohibition of acts of hostility); (ii) to refrain from any use of cultural property and surrounding areas for purposes that expose it to destruction or damage by war (prohibition

6 If only symbolically, the Holy See's accession to the Convention (in 1958) is particularly worthy of note. The last ratification in chronological order (dated 2018) is currently that of Ireland.

7 The authoritative general definition of "cultural property" in the Convention refers to: (i) movable and immovable property of great importance to the cultural heritage of every people, such as monuments, archaeological sites, works of art; (ii) buildings whose main and effective purpose is to preserve or exhibit movable cultural property, such as museums and refuges intended to shelter property endangered by an impending or ongoing armed conflict; (iii) monumental centers, such as historic city centers, Art. 1, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention 1954).

8 Art. 19, para. 1, Hague Convention 1954.

of use for military purposes); (iii) to prohibit, prevent and stop theft and looting of cultural property, as well as acts of vandalism against it; (iv) to refrain from reprisals against cultural property. Unlike the latter two obligations, the prohibition of acts of hostility and the prohibition of use for military purposes are not of an absolute nature, since they may be derogated from in cases of imperative military necessity.[9] The problem is that the notion of military necessity is in no way defined or objectively circumscribed, thus lending itself to being abused as a clause capable of justifying any offence against cultural property on the basis of subjective assessments of military convenience.

Despite appearances, the situation remains essentially unchanged even for cultural property subject to special protection under Chapter II of the Convention, i.e., that property of very great importance which – provided certain requirements are met – can be entered in an International Register maintained by the Director-General of UNESCO. Apart from the fact that this Register has substantially proved to be a failure,[10] the so-called "immunity" of the property included therein translates in reality into the usual prohibitions of acts of hostility and use for military purposes, which here can be derogated from in the presence of "exceptional cases of unavoidable military necessity".[11]

Finally, the Convention is very lenient[12] about issues of enforcement and responsibility, in particular with regard to the mechanism commonly considered to be the most effective for the prosecution and punishment of war crimes and similar serious violations of international humanitarian law, namely the individual criminal liability of the perpetrators of such offences.

In 1999, in the wake of the indignation caused by the cultural destruction during the Yugoslav wars, the Second Protocol to the 1954 Hague Convention was adopted with a view to overcoming the

9 Art. 4, para. 2, Hague Convention 1954.

10 In addition to the Vatican City (since 1960), the Registry includes only nine more monumental centers, that is, nine pre-Hispanic sites registered in 2015 at Mexico"s request. See <https://en.unesco.org/sites/default/files/Register2015EN.pdf>.

11 Art. 11, para. 2, Hague Convention 1954.

12 See Art. 28, Hague Convention 1954, which envisages the criminal or disciplinary responsibility of perpetrators of violations of the Convention, while not providing clear hypotheses of universal jurisdiction over the same violations.

foregoing weaknesses of the treaty framework in question. The 1999 Second Protocol is currently far from achieving a satisfactory level of ratifications and accessions.[13] Most probably, this is largely due to the fact that it is a particularly advanced and ambitious humanitarian law instrument, starting with its full applicability to non-international armed conflicts occurring within the territory of one of the States Parties.[14]

The Second Protocol aims to overcome the weaknesses of the Hague Convention, basically acting on three fronts. First, it clarifies the notion of military necessity by anchoring it to that of a military objective. Thus, the prohibition of acts of hostility against cultural property can only be derogated on that basis if that property has become a military objective by virtue of its function and there are no feasible alternatives for achieving the military advantage expected from the conduct in question.[15] Generally, "military objective" means an object which, by its nature, location, purpose or use, makes an effective contribution to military action and whose destruction offers a definite military advantage.[16] It is evident how, in this context, the adoption of the novel and ambiguous criterion of the function of (cultural) property arises from harsh negotiations and leaves open the possibility that, according to the Second Protocol, such property can be attacked, not only because of its actual use for military purposes, but also because of considerations tied to its nature, its purpose and even its strategic location. This is, for instance, Canada's understanding as reflected in an interpretative declaration made at the time of accession to the Protocol. Moreover, also the prohibition of use of cultural property for military purposes continues to be generally derogable in the name

13 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol 1999). As of 29 August 2022, there are 86 States Parties to the Protocol. The last ratification in chronological order (dated 2022) is currently that of Iraq. The most significant accessions certainly correspond to those recently deposited by France and the United Kingdom (in March and September 2017, respectively), being the only ones so far made by permanent members of the Security Council. In general, many key States from a military and cultural point of view – just think of India, Israel, and Turkey – have not become States Parties to the Second Protocol for the time being.

14 Art. 22, para. 1, Second Protocol 1999. To refer to contemporary events, the Second Protocol is thus applicable to the conflict in Libya (which has been a party thereto since 2001), but not to the war in Syria (non-party State), obviously to the extent that such conflicts are to be considered as non-international in nature.

15 Art. 6(a), Second Protocol 1999.

16 Art. 1(f), Second Protocol 1999; Art. 52, para. 2, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

of military necessity, although only when such use constitutes the only option available to achieve a given military advantage.[17]

Coming to the second salient aspect of the 1999 Protocol, the latter marks clear progress in relation to the enhanced protection regime for cultural property introduced therein and intended to replace the unsuccessful special protection regime of the 1954 Convention. The Protocol establishes an intergovernmental Committee of experts to decide on applications for inclusion of property of the "greatest importance for humanity"[18] in a List of Cultural Property under Enhanced Protection, a system largely modelled on the World Heritage List envisaged by the 1972 World Heritage Convention. This Enhanced Protection List currently consists of 17 sites located in Armenia, Azerbaijan, Belgium, Cambodia, Cyprus, Czech Republic, Georgia, Italy, Lithuania, and Mali.[19]

The protection afforded to these sites is – indeed – enhanced as compared to that concerning cultural property in general. A site on this List can be the object of an armed attack only if it has become, by virtue of its use, a military objective.[20] In essence, the ambiguity due to the term "function" as the criterion capable of making cultural property – generally protected – into a military objective has been removed here. In other words, the notion of military objective is retained in the most appropriate and favourable way for the protection of cultural property: provided it is included in the Enhanced Protection List, such property constitutes a military objective, thus implicitly bringing into play the doctrine of military necessity, only when it is actually used for military purposes, for example as a weapons and ammunition store or as a refuge for combatants.[21] A sort of synallagmatic or reciprocal relationship is thereby established between the obligation

17 Art. 6(b), Second Protocol 1999.

18 Art. 10(a), Second Protocol 1999.

19 International List of Cultural Property under Enhanced Protection, see <https://en.unesco.org/sites/default/files/Enhanced-Protection-List-2019_Eng_04.pdf>.

20 Art. 13, para. 1(b), Second Protocol 1999.

21 It should be noted that another interpretative declaration made by Canada at the time of accession is intended to frustrate this achievement of the Protocol. According to the declaration, any cultural property (ie, even if it is subject to enhanced protection) that has become a military objective (without any specification of criteria) can be attacked. A similar declaration has been attached by France to its instrument of accession. However, the French declaration contains the significant clarification that the cultural property in question must constitute a military objective "within the meaning of the Protocol". The declarations and reservations made by States upon becoming parties to the Second Protocol are available at <https://en.unesco.org/node/297970/#edit-sort-by>.

not to launch attacks against cultural property and the obligation not to use it for military purposes: a violation of the former obligation is justifiable only if and when the latter obligation is violated.[22] At the same time, it is clear that the effectiveness of such a scheme is closely linked to the strictness of the obligations relating to the use of cultural property in the event of armed conflict. Accordingly, one of the greatest merits[23] of the Second Protocol is that it lays down an absolute ban on the use of property under enhanced protection for military purposes. There is no provision in the Protocol that justifies, by virtue of military necessity or otherwise, exceptions to this prohibition.

The third major innovation resulting from the Second Protocol concerns the formulation of highly advanced rules on individual criminal responsibility for breaches of its obligations. A whole chapter of the Protocol is devoted to this crucial aspect.[24] States Parties are required[25] to provide in their legislation for the following criminal offences/war crimes,[26] accompanied by appropriate penalties: (i) attack against cultural property under enhanced protection; (ii) use of cultural property under enhanced protection or its surroundings in support of military action; (iii) extensive destruction or appropriation of generally protected cultural property; (iv) attack against generally protected cultural property; (v) theft, pillage or misappropriation of generally protected cultural property, as well as acts of vandalism against it. Although this list may appear redundant, in reality a different regime of jurisdiction is linked to the various criminal offences. As a matter of fact, the principle of conditional universal criminal jurisdiction concerns only the three cases under (i), (ii) and (iii), two of which – attack and use for military purposes – significantly relate to property under enhanced protection. Crimes against generally protected property are subject to this principle only if they consist in its extensive destruction or appropriation. In these three cases, the judicial

22 A. Gioia, *La protezione dei beni culturali nei conflitti armati*, in *Protezione internazionale del patrimonio culturale: interessi nazionali e difesa* del *patrimonio comune della cultura* (F. Francioni, A. Del Vecchio, and P. De Caterini eds.), Milan, 2000, p. 71 ff., pp. 84-86.

23 A. Gioia, *The Development of International Law Relating to the Protection of Cultural Property in the Event of Armed Conflict: The Second Protocol to the 1954 Hague Convention*, *Italian Yearbook of Int. Law*, Vol. XI, 2001, p. 25 ff., p. 45.

24 Chapter 4, Articles 15-21, Second Protocol 1999.

25 Art. 15, para. 2, Second Protocol 1999.

26 Art. 15, para. 1, Second Protocol 1999.

authorities of the States Parties must prosecute and punish perpetrators who are present in their territory, irrespective of their nationality and the place where the crime was committed.[27] In the other two cases under (iv) and (v) the exercise of criminal jurisdiction is anchored to the classic criteria of territoriality and active nationality, i.e. the crime must have been committed in the territory of the forum State or by a national of that State.[28] Although, in some respects, the discipline in question goes beyond what is established by the most important instruments of international criminal law,[29] it is not free from ambiguities and controversial aspects. Bearing in mind what has been pointed out above, it is at least worth emphasizing that the prohibition on the use of cultural property for military purposes is not criminalized,[30] except by reference to that tiny portion of property that enjoys enhanced protection.

A different historical trajectory has concerned the safeguarding of cultural property against thefts and illicit exports originating from war, especially from situations of military occupation of the territory of one State by another. The protection offered in this area by treaty rules is partial and unsatisfactory. This is not due to the absence of primary rules prohibiting theft, looting and illegal transactions in these contexts. As seen, a general prohibition in this sense is laid down in Article 4(3) of the 1954 Hague Convention. This provision is now reinforced by the 1999 Second Protocol, which sets out precise obligations on the occupying States to prevent and prohibit illicit exports and transfers of property, as well as archaeological excavations and changes of use of cultural property in the occupied territory.[31] However, these rules appear to be incomplete, since they are not accompanied by correlative and incisive obligations of restitution of cultural property which has been illicitly trafficked in time of war.

The problem of restitution was so controversial at the time of conclusion of the Hague Convention that it was addressed in a separate Protocol – of the same date – to the Convention, which was subject to an *ad hoc*

27 Art. 16, para. 1(c), Second Protocol 1999.

28 Art. 16, para. 1(a) and (b), Second Protocol 1999.

29 Suffice it to note that the International Criminal Court (ICC) cannot exercise jurisdiction on a universal basis, except when a situation concerning the commission of international crimes is submitted to the ICC Prosecutor by the UN Security Council, Art. 12(2), Rome Statute of the International Criminal Court (Rome Statute 1998).

30 See Art. 21, Second Protocol 1999.

31 Art. 9, Second Protocol 1999.

ratification process. For one thing, this has resulted in a lower number of States Parties to the 1954 Protocol than to the Convention.[32] Basically, the Protocol, after laying down a general duty on the occupying State to prevent the exportation of cultural property from the occupied territory,[33] establishes an automatic obligation to return to the State of origin property that has nevertheless left that territory.[34] In a particularly questionable and unrealistic way, the Protocol then obliges the former occupying State, not the State of origin and not necessarily the State in which the property in question is located, to compensate any *bona fide* holders of the returned property.[35] In short, the difficult conciliation of these rules with the private law systems of many States, the widespread perception of their non self-executing nature and the scarce relevance of the Protocol in contentious cases, explain the marginal impact of this instrument on the evolution of the legal framework concerning the fight against illicit trafficking of cultural goods in times of war.[36]

3. Protection of Cultural Heritage in Times of War between Customary Law, International Crimes and Security Council Resolutions

3.1 Destruction and Use for Military Purposes

It is certainly worth revisiting the state of customary law on the protection of cultural property in times of war in light of the multiple developments in recent practice. Moreover, as has already emerged from previous considerations, the principle of consent, which permeates the

32 Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol 1954). As of 29 August 2022, there are 110 States Parties to the Protocol. An important example of a non-Party State is offered by the United States, which, when ratifying the Hague Convention in 2008, deliberately discarded a similar decision with respect to the 1954 Protocol.

33 Para. 1, First Protocol 1954.

34 Para. 3, First Protocol 1954.

35 Para. 4, First Protocol 1954.

36 For the sake of completeness, it should be recalled that the much more important and more widely ratified 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is commonly considered applicable in times of war (see Art. 11). However, in the event of incompatibility, the 1954 Protocol should take precedence over that Convention as a *lex specialis*. Moreover, the obligation to return cultural objects under the same Convention applies only to those stolen from a museum or a religious or secular public monument (Art. 7(b)).

law of treaties, is likely to significantly limit the effectiveness of the treaty regimes illustrated above, in particular by requiring their ratification or equivalent acts in order to become binding, or by allowing reservations or denunciations.[37]

In addition, treaty law offers a fragile legal basis for requiring non-state actors involved in armed conflicts to comply with the rules on the protection of cultural property. Scholarship is divided on this point and various manifestations of practice militate in favour of excluding that, especially by virtue of the principle *pacta tertiis neque nocent neque prosunt*, treaty rules may as such bind non-state actors. On the contrary, customary law, for which the principle of consent is not relevant,[38] is considered almost unanimously applicable to such actors, especially when they effectively control portions of territory, as has long been the case with ISIS. At any rate, the importance of this problem in our context is at least mitigated by the rules of international criminal law which provide for cases of individual responsibility for war crimes and crimes against humanity concerning offences against cultural heritage. Such crimes are undoubtedly punishable (also) when committed by non-state armed groups.

The core of the relevant customary law is the prohibition to intentionally attack and/or destroy cultural property in times of international or non-international armed conflict, provided that such property has not become, by virtue of its use, a military objective. Various elements of the treaty practice examined above militate in favour of this conclusion. Article 27 of the Regulations concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 should be added. That norm requires the belligerent States to spare, as far as possible, buildings dedicated to religion, the arts and sciences, and historical monuments, provided they are not used for military purposes. Moreover, Article 56 of the Regulations prohibits, in situations of war occupation, the intentional destruction or damage of institutions dedicated to religion, the arts and sciences, as well as historical monuments and works of art. The latter rule was deemed to correspond to customary law by the Eritrea-Ethiopia Claims Commission, which was thus able to affirm,

37 Art. 37, Hague Convention 1954; Art. 45, Second Protocol 1999; para. 13, First Protocol 1954.

38 At least and certainly not to the same extent with which it operates under treaty law.

in a situation denoted by the absence of military necessity, Ethiopia's responsibility for the felling of, and consequent serious damage to, the ancient Stela of Matara.[39] Neither of the two States in question had at the time ratified the 1954 Hague Convention, which, as we know, clearly prohibits such conduct.

The rules of international criminal law which identify the destruction of, and damage to, cultural property as an autonomous war crime – the commission of which engages both State and, particularly, individual responsibility – also militate in favour of the customary norm under discussion. In addition to the penal chapter of the Second Protocol examined above, it is necessary to recall Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia, which essentially reproduces the aforementioned Article 56 of the 1907 Hague Regulations, and above all the provisions of the Statute of the International Criminal Court (ICC) which in identical terms punish, in international[40] and non-international[41] conflicts, intentional attacks against historic monuments and buildings dedicated to religion, art and science, provided they are not military objectives.

Crucially, these rules have given rise to an especially relevant international judicial practice. In the jurisprudence of the Tribunal for the former Yugoslavia, the most important case – if only because it relates to a site on the UNESCO World Heritage List since 1979 – concerned the bombing, with related damage and destruction, of the Old City of Dubrovnik by the Serbian army in December 1991. As a result, two officers of that army were sentenced to imprisonment for the crime of destruction and wilful damage done to cultural property under Article 3(d) of the Statute.[42] Particularly, the judgment at first instance in the *Strugar* case confirms in full the characterization of the customary norm in question as set out above. The Trial Chamber, after having ruled out that military necessity could justify the attack on the Old

39 Eritrea-Ethiopia Claims Commission, *Central Front*, *Eritrea's Claims 2, 4, 6, 7, 8 and 22*, Partial Award of 28 April 2004, para. 113.

40 Art. 8, para. 2(b)(ix), Rome Statute 1998.

41 Art. 8, para. 2(e)(iv), Rome Statute 1998.

42 *Prosecutor v. Jokić*, Judgment of 18 March 2004 (Trial Chamber), Judgment of 30 August 2005 (Appeals Chamber); *Prosecutor v. Strugar*, Judgment of 31 January 2005 (Trial Chamber), Judgment of 17 July 2008 (Appeals Chamber).

City,[43] nevertheless wished to stress that the crime in question cannot be committed when cultural property is used for military purposes. In other words, military necessity arises when the property has become a military objective and this only occurs when it is used for military purposes, not also by virtue of other criteria, in particular, that of the location of the property itself.[44]

Another emblematic case, only recently completed by the Tribunal for the former Yugoslavia, involved the bombing by Bosnian Croat troops and the subsequent collapse in November 1993 of the Old Bridge of Mostar, a spectacular 16th century Ottoman bridge. The Tribunal, in accordance with the Prosecutor's submissions, questionably examined this subject-matter in light of the crime of wanton destruction of cities, towns or villages not justified by military necessity,[45] rather than with reference to the *lex specialis* represented by the crime of destruction of cultural property. According to the Trial Chamber's judgment, even if the destruction of the Mostar Bridge was justified by military necessity, it had a disproportionate impact – compared to the expected military advantage – on the Muslim civilian population of Mostar, with the resulting conviction of some defendants for the crime in question.[46] This ruling and related convictions were overturned on appeal on the assumption that, in the presence of military necessity, a constitutive element of the crime was lacking.[47]

Although this decision may formally appear to be correct, it did not spare the majority of the Appeals Chamber from the lashing criticism of the dissenting Judge Pocar, who pointed out the absence of any consideration of the cultural dimension of the case – concerning a monument of immense historical, cultural and symbolic value – and of the corresponding international legal framework, starting from the 1954 Hague Convention.[48] He also stigmatized the substantive failure to take the general principle of proportionality into account on the part

43 *Strugar* (n 41), paras. 193-194, 214, 279-280, 288, 309.

44 Ibid., para. 310. See also ibid., para. 295.

45 Art. 3(b), Statute of the International Criminal Tribunal for the Former Yugoslavia.

46 *Prosecutor v. Prlić et al.*, Judgment of 29 May 2013, Vol. 3, para. 1584.

47 *Prosecutor v. Prlić et al.*, Judgment of 29 November 2017, Vol. 1, para. 411.

48 Ibid., Dissenting Opinions of Judge Fausto Pocar, Vol. 3, paras. 12-17.

of the majority.[49] The latter could have corrected the Trial Chamber judgment on this point, thus making it clear that a proportionality test is now inherent in the notion of military necessity and that the expected military advantage must be balanced, if not with the impact on the civilian population, at least with the extent of the damage – most plausibly excessive – caused to the cultural property in question and other civilian objects.

The case of the Mostar Bridge can thus be regarded as a setback to the otherwise progressive jurisprudence of the Tribunal for the former Yugoslavia on the safeguarding of cultural property in times of war. Nevertheless, it is telling that, even on this occasion, military necessity was considered as a clause justifying war violence against that property only because, objectively, the Old Bridge had become a military objective by virtue of its actual use as a means of communication and military supply by the troops of Bosnia and Herzegovina.[50]

For its part, the ICC issued its first conviction in 2016 for the crime of intentional attack against cultural property under the provisions of the Rome Statute mentioned above. In the *Al Mahdi* judgment,[51] a member of a so-called "Islamic" extremist group linked to Al Qaeda was held responsible for the destruction and serious damage, between May and June 2012, of 10 religious buildings – nine mausoleums and a mosque – in Timbuktu (Mali), a UNESCO World Heritage site since 1988. This case is highly significant for the consolidation of the legal framework for the protection of cultural property in times of war. Crucially, it concerned crimes committed in the context of a non-international armed conflict by a non-state armed group.[52] The decision did not focus on the application of the notion of military necessity in the field of the protection of cultural property, but merely noted that the mausoleums and the mosque were not military objectives.[53] In fact, no military necessity whatsoever could come into play here, since the proceedings concerned a paradigmatic example of iconoclastic destruction of

49 Ibid., paras. 9-11.

50 *Prlić et al.* (n 45), Vol. 3, para. 1582.

51 *Prosecutor v. Al Mahdi*, Judgment of 27 September 2016.

52 Ibid., paras. 49-50.

53 Ibid., para. 39.

cultural property,[54] thus deriving from an ideological motive extraneous to considerations associated with the pursuit of a military advantage *stricto sensu*. The ICC itself pointed out that the destruction was the result of a discriminatory religious motive aimed at annihilating the cultural diversity of the population of Timbuktu.[55]

The last mentioned part of the judgment allows us to recall a consolidated legal achievement in this area: in addition to representing a distinct war crime, the destruction of cultural property may fulfil the objective element of the crime against humanity of persecution of a human group on political, ethnic, cultural and religious grounds, in particular.[56] As such, it can be committed in any armed conflict, as well as in peacetime. Since the central element of persecution is the intention to discriminate against a certain group on the basis of its identity, it is clear that the decision of the ICC to examine the *Al Mahdi* case solely in light of the crime of attack against cultural property[57] may appear highly questionable.[58] In any case, this reluctance on the part of the ICC can certainly not diminish the importance of the existing, well-settled jurisprudence on the link between crimes against cultural heritage and persecution.[59] In addition, it cannot be forgotten that, according to authoritative case law, the large-scale destruction of cultural property is also relevant to the crime of crimes, i.e., genocide. Although genocide presupposes the performance of acts capable of causing the physical destruction of a national, ethnical, racial or religious group, thereby ruling out cultural genocide as such, systematic offences against the cultural

54 The iconoclastic destruction perpetrated on a large scale by ISIS on Syrian and Iraqi territory could only trigger the jurisdiction of the ICC if the alleged perpetrators were foreign fighters with the nationality of one of the States Parties to the ICC Statute or if that situation were referred to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter, see Arts. 12-13, Rome Statute 1998. The criterion of the territoriality of crimes cannot operate in this context at present, as Syria and Iraq have not ratified the ICC Statute.

55 *Al Mahdi* (n 50), para. 81.

56 Art. 7, para. 1(h), Rome Statute 1998.

57 The above finding of the discriminatory religious motive underlying the defendant"s conduct was appreciated by the ICC only as an indication of the particular gravity of that conduct, i.e., when determining the appropriate sentence.

58 See S.A. Green Martínez, *Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?*, *Journal of Int. Criminal Justice*, 2015, p. 1073 ff.; P. Rossi, *The* Al Mahdi *Trial Before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity*, *Diritti umani e diritto int.*, 2017, p. 87 ff.

59 For all references, especially to the extensive case law of the Tribunal for the former Yugoslavia, see R. O'Keefe, *Protection of Cultural Property*, in *The Oxford Handbook of International Law in Armed Conflict* (A. Clapham and P. Gaeta eds.), Oxford, 2014, p. 492 ff., pp. 516-519.

heritage of one of these groups can be considered significant evidence of the *dolus specialis* required for the crime in question, namely the specific intent to physically destroy the group itself.[60]

The close relationship between attacks on cultural property and international crimes, *a fortiori* when it comes to crimes against humanity targeting sites of outstanding universal value such as those on the UNESCO World Heritage List, also implies that the prohibition of destruction of such property in times of war can plausibly be considered to fall within the particular category of customary rules from which *erga omnes* obligations arise, i.e. obligations relating to the protection of fundamental values of the international community as a whole. Accordingly, any State – even if not directly injured – may invoke the responsibility of, and seek reparation from, the wrongdoer.

Among the many elements of practice which support this assertion,[61] the *Al Mahdi* jurisprudence of the ICC is again particularly instructive. Certain aspects of it can be seen as an authoritative recognition of the *erga omnes* nature of the prohibition in question, albeit in a non-interstate context. At the same time, it should be recalled that the *Al Mahdi* case referred to a site on the UNESCO World Heritage List, thus to a situation that appears ontologically relevant in terms of *erga omnes* obligations.

In its 2017 Reparations Order, the ICC – given the specific nature of the crime of attack against cultural property – granted the status of victim, in addition to the inhabitants of Timbuktu, to the entire population of Mali, as well as to the international community as a whole.[62] This

60 In the case law of the Tribunal for the former Yugoslavia, see *Prosecutor v. Krstić*, Judgment of 2 August 2001, para. 580, and, in its wake, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 344; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, paras. 388-390.

61 To confine ourselves to an example of particular importance, the UN General Assembly has characterized attacks on the cultural heritage of any country as attacks on the common heritage of humanity as a whole, Res. 69/281 of 28 May 2015 (*Saving the Cultural Heritage of Iraq*), eleventh preambular paragraph.

62 *Prosecutor v. Al Mahdi*, Reparations Order of 17 August 2017, para. 53; for a comment, see F. Capone, *An Appraisal of the* Al Mahdi *Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage*, *Journal of Int. Criminal Justice*, 2018, p. 645 ff. For the appeal decision against this order, see *Prosecutor v. Al Mahdi*, Judgment of 8 March 2018. The latter decision is not relevant for our purposes.

notwithstanding that no Malian citizen, other than the inhabitants of Timbuktu, nor, above all, any representative of the international community – and UNESCO in particular – had submitted any request for reparation.[63] Consequently, the ICC acknowledged the suffering endured by the Malian population and the international community as a result of the destruction of the religious buildings in question[64] and awarded reparations – certainly symbolic yet replete of legal implications – both to the former (through the State of Mali) and to the latter (through UNESCO), in the form of one Euro for each of them.[65]

Beyond the ban on attack and destruction of cultural property in wartime, the state of customary law in this area is uncertain. In particular, one can rightly doubt the emergence of a well-defined customary rule on the prohibition of use of cultural property for military purposes, *a fortiori* with reference to non-international armed conflicts and property not covered by special protection regimes recognizing its exceptional value. Practice is unable to shed light into a rule which, on the basis of certain treaty provisions such as those in the 1954 Hague Convention and the 1999 Second Protocol, outlines precisely the contours of a customary obligation not to use cultural property for military purposes, especially when it comes to establishing whether and how military necessity may constitute an exception to that obligation. Moreover, the absence of rules about individual criminal liability for breaches of the obligation in question militates against the existence of a customary rule. While the pertinent provisions of the Second Protocol are unsatisfactory, the constitutive instruments of international criminal courts and tribunals, and particularly the ICC Statute, do not punish the use of cultural property for military purposes as a war crime. This is certainly a significant loophole that may undermine the effectiveness of the legal framework for the protection of cultural heritage in armed conflict. It is enough to reiterate that respect for the prohibition on attacking cultural property is intimately linked to that property's extraneousness to wartime activities.

63 *Al Mahdi*, Reparations Order (n 61), para. 52.

64 Ibid., para. 53.

65 Ibid., paras. 106-107.

3.2. Illicit Trafficking

The obligations concerning illicit trafficking in cultural goods in times of war deserve separate consideration. In this field, it is certainly possible to identify a customary rule prohibiting theft, looting, confiscation and illegal transactions involving such goods and committed during international or non-international conflicts. The prohibition in question has gradually emerged in the wake of a uniform and consistent set of acts, declarations and treaty rules proclaiming the unlawfulness of such conducts as particularly important *species* of the *genus* of the spoliations of civilian property. For example, the aforementioned Article 56 of the 1907 Hague Regulations imposes a prohibition of seizure – alongside destruction and damage – of works of art located in territories under military occupation.

The customary rule in question is stringent, since it is based on a presumption of illegality – only exceptionally rebuttable – of any transaction concerning cultural property which takes place in time of armed conflict and leads to the transfer of its ownership or possession.[66] Moreover, various cases of individual criminal liability and corresponding war crimes play a valid deterrent function with respect to the violation of the primary rule at stake. These may be either crimes specifically related to the unlawful removal of cultural property[67] or crimes concerning property generally understood, which may, however, be prosecuted in proceedings involving cultural property.[68]

Yet, as noted above, the *punctum dolens* of the legal framework relating to trafficking in cultural goods in wartime is the absence of a clear and unconditional obligation to return property, which despite the rules prohibiting its circulation has been the subject of unlawful transactions, to the States of origin. The fragmentary nature of practice and the

66 The milestone of this approach is represented by the famous London Declaration of 5 January 1943, with which the Allies reserved their right to consider invalid all transactions – including those "apparently legal in form" – concerning property situated in the territories occupied by the Axis Powers during the Second World War. This Declaration has an enduring, considerable impact on the litigation relating to the illicit trafficking and restitution of cultural property plundered by the Third Reich during the Second World War, especially in the context of the Holocaust.

67 See Art. 3(d), Statute of the International Criminal Tribunal for the Former Yugoslavia.

68 See Art. 8, para. 2(a)(iv) ("Extensive… appropriation of property, not justified by military necessity") and Art. 8, para. 2(b)(xvi) and (e)(v) ("Pillaging a town or place"), Rome Statute 1998.

uncertainties revealed by the relevant treaty law (in particular the 1954 Protocol) make it considerably difficult to identify a customary rule in this area. In addition, international criminal law is clearly irrelevant here, and any potential obligation to return property plundered in armed conflict is essentially incumbent upon States, whose cooperation is therefore essential.

At any rate, one of the most significant developments arising from recent practice about cultural property and armed conflict is represented by the adoption of UN Security Council resolutions envisaging, *inter alia*, restitution obligations on States. Given the scale of the phenomenon of trafficking in cultural goods in wartime as a criminal business aimed at fueling armed violence and terrorism, a particularly authoritative source of international law has thus gradually been mobilized, that is, a source with almost universal[69] binding effects and largely free of the limitations and negotiating constraints affecting the life of treaties.

The first historical manifestation of the role acquired by the Security Council in this field is Resolution 1483 (2003), approved in the aftermath of the acts of vandalism and looting perpetrated on a large scale in April 2003 inside the Iraqi National Museum in Baghdad, at the time when Iraq was invaded and militarily occupied by the United States. Among the measures set out in the Resolution, which are certainly binding on States as they are based on Chapter VII of the UN Charter, is the obligation to facilitate the return to Iraq of cultural property illegally removed from its territory since 2 August 1990, i.e., the date of the Iraqi invasion of Kuwait, in particular by introducing a ban on trade in such property, including property for which there is reasonable suspicion of unlawful removal.[70] From a substantive point of view, it is worth highlighting the broad scope of this obligation: *ratione temporis*, it applies retrospectively to all illegal transactions carried out since August 1990,[71] while *ratione materiae* it covers cultural objects of

69 Essentially all States are members of the UN.

70 Para. 7 of Res. 1483 (2003).

71 As is well known, the retroactivity of restitution obligations has always been one of the thorniest issues in negotiations on treaties on the illicit movement of cultural property, both in times of war and peace. No treaty provides, at least unconditionally, for retrospective restitution obligations.

doubtful provenance. In general, Resolution 1483 set a precedent of absolute importance, also on a symbolic level, given that the destruction and trafficking of cultural goods during armed conflicts were for the first time considered as integral aspects of a threat to international peace and security capable of triggering the enforcement and law-making powers of the Security Council.

In recent years, and on the basis of this precedent, the Security Council has reacted firmly to the cultural crises caused by the iconoclastic destruction and systematic looting committed by ISIS and similar extremist groups, moving mainly on two fronts. First, under pressure from UNESCO, it sought to strengthen the protection of cultural property in times of war by incorporating a cultural dimension into the mandate of UN peacekeeping operations.[72] Specifically, such a key development concerned the peacekeeping force (MINUSMA) established by Resolution 2100 (2013) in the context of the war in Mali. Thus, the mandate of this force, as established by that Resolution and subsequently reiterated, includes support for cultural preservation, i.e., assistance to the Malian authorities in protecting Mali's historical and cultural sites from attacks, in cooperation with UNESCO.[73]

The option of including a cultural *volet* in the mandate of peacekeeping forces is now generalized by Resolution 2347 (2017), which is a milestone in this area, being entirely dedicated to the protection of cultural heritage in armed conflict.[74] Insofar as material, Resolution 2347 provides that the mandate of UN peacekeeping forces may include, where authorized by the Security Council and in accordance with the relevant rules of engagement, assistance to States – at their request – in protecting cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts.[75] The Council also urges these forces to exercise caution when they operate in the vicinity of historical and cultural sites.[76]

72 See L. Pineschi, *Tutela internazionale del patrimonio culturale e missioni di pace delle Nazioni Unite: un binomio possibile? Il caso MINUSMA*, *Rivista di diritto int.*, 2018, p. 5 ff.

73 Para. 16(f) of Res. 2100 (2013).

74 See K. Hausler, *Cultural Heritage and the Security Council: Why Resolution 2347 Matters*, *Questions of International Law*, No. 48 (Zoom-in), 2018, p. 5 ff.; A. Jakubowski, *Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level*, *Questions of International Law*, No. 48 (Zoom-in), 2018, p. 21 ff.

75 Para. 19 of Res. 2347 (2017).

76 Ibid.

The emergence of the "blue helmets of culture" can only be regarded as a welcome development.[77] If they are consistently institutionalized in the coming crisis situations, it is entirely reasonable to expect reinforced protection of cultural heritage which finds itself hostage to armed conflict, for example by means of an *ex ante* creation of "protected cultural areas" manned by UN troops around major archaeological zones, museums and monumental centers, or an *ex post* effective contribution to the demining of cultural sites[78] and other operations aimed at restoring such sites and requiring military techniques and capabilities.

Secondly, the Security Council has ultimately stepped up its action against trafficking in cultural goods, particularly in response to the escalation of the ISIS military campaign and in the knowledge that such trafficking is a valuable source of revenue for the terrorist network in question. The Council has first of all made it clear that ISIS represents a global and unprecedented threat to international peace and security, not least because of its responsibility for the uprooting of cultural heritage and trafficking in cultural goods,[79] thus confirming that these crimes may well correspond to a manifestation of terrorism worthy of condemnation and reaction at the highest level of the international community. Resolution 2199 (2015), containing a package of sanctions and other measures against ISIS and associated entities, deals with cultural heritage in a separate section.[80] In this section, the Council reiterates the obligation on States to prevent trade in cultural property illegally transferred from Iraq since 6 August 1990 and extends it to property unlawfully removed from Syria since 15 March 2011,[81] the day on which a devastating war – that is still ongoing – began in that State. The obligation, however, appears less stringent

77 The activities of the Security Council are, however, only one aspect of this issue. To these must be added the intensive work carried out by UNESCO in this area. For example, UNESCO and Italy signed a Memorandum of Understanding in February 2016 to set up an Italian task force of civilian and military personnel to be deployed in – and at the request of – States affected (in particular) by armed conflicts that endanger cultural and natural heritage. See *Memorandum of Understanding on the Italian National "Task Force in the framework of UNESCO's Global Coalition Unite4Heritage" for initiatives in favour of Countries facing emergencies that may affect the protection and safeguarding of culture and the promotion of cultural pluralism*, 16 February 2016; see M. Mancini, *The Memorandum of Understanding between Italy and UNESCO on the Italian "Unite4Heritage" Task Force*, *Italian Yearbook of Int. Law,* Vol. XXVI, 2016, p. 624 ff.

78 See para. 18 of Res. 2347 (2017).

79 Res. 2249 (2015), fifth preambular paragraph.

80 Res. 2199 (2015), paras. 15-17.

81 Ibid., para. 17.

than that laid down in Resolution 1483 (2003). It directly concerns the prevention of the trade in Iraqi and Syrian property endangered by illicit trafficking, not their restitution, which is regarded as a mere eventuality favoured by the implementation of the former obligation.[82] At the same time, although the same obligation retains a retrospective scope also with respect to the Syrian situation, it does not apply – at least *expressis verbis* – to goods of suspicious provenance.

The last piece of Security Council's practice in this area is Resolution 2347 (2017), which deals exclusively with cultural heritage and armed conflict. The binding force of this Resolution may well be questioned, as it is not based on Chapter VII of the UN Charter. However, the key provision on illicit trafficking in cultural goods is precisely formulated as an obligation under which the prohibition of trade, as previously set out in relation to Iraqi and Syrian property, is extended to any similar unlawful transaction that occurs in any armed conflict, whether ended, ongoing or future. Thus, the Council requests States to take appropriate measures to prevent and combat illicit trade and trafficking in cultural property originating from a context of armed conflict, thereby allowing for its "eventual safe return".[83] Particularly noteworthy is the applicability of the obligation in question to suspicious goods, which should be regarded as such if, in the absence of adequate certification of provenance, their origin can be assumed to be from territories affected by war.[84] This provision authoritatively confirms the presumption of illegality of any commercial transaction concerning cultural goods coming from contexts of armed conflict.

It is clear that the foregoing Security Council resolutions do not go so far as to establish an absolute obligation to return cultural property unlawfully removed during wartime. As a matter of fact, and for a number of reasons, such an obligation seems impracticable, whereas it is reasonable to leave room for manoeuvre, albeit limited, to the States actually involved in specific controversies, especially as regards the substantive and procedural details of the pertinent legal rules. Whatever their nature and precise wording, however, the Security Council resolutions in question have

82 Ibid. ("thereby allowing for their eventual safe return").

83 Res. 2347 (2017), para. 8.

84 Ibid.

already given and will continue to give impetus to the law-making and law-enforcing activities of States and international organizations engaged in the fight against the illicit trafficking in cultural goods.[85]

4. Concluding Remarks

The protection of cultural property in times of armed conflict is a fascinating field of study and research. Given the ancient origin of the relevant rules, it is in this area that progress in the theory and practice of international law on the protection of cultural heritage can best be appreciated. Theory and practice today converge towards the recognition that the fundamental interest of the international community in the safeguarding of cultural heritage deserves to be guaranteed by all means, even during wartime, and that the same heritage should be spared from wartime activities to the highest possible extent.

This recognition implies that some of the most significant doctrines of international law can and should be called into play with regard to the protection of cultural property in armed conflict. It has thus been shown that customary law has gradually entered the field in question, in particular by universalizing the rule prohibiting attacks and destruction of cultural property which does not fulfil the notion of a military objective, as well as the rule prohibiting theft, looting and any unlawful appropriation of such property in times of war. Furthermore, it is at least plausible to consider that these rules now enshrine obligations of an *erga omnes* nature, which legitimize all members of the international community to regard themselves as victims of their violation and invoke the responsibility of the perpetrators.

In the area of responsibility, major and concrete advances have emerged from the doctrine of individual criminal liability, which has been increasingly mobilized through the prosecution of international crimes against culture, thereby allowing convictions of individuals guilty of serious offences against cultural heritage in times of armed conflict. The trials of a few authors of the attack on Dubrovnik and the destruction in Timbuktu appear emblematic in this respect.

85 In this context, special mention should be made of the recent adoption by the European Union of Regulation No. 2019/880 of 17 April 2019 on the introduction and the import of cultural goods.

On the other hand, the magnitude of the iconoclastic destruction and illicit trafficking of cultural goods committed in recent times by terrorist groups – such as ISIS in particular – has clearly shown the quantity and quality of the threats to which cultural heritage continues to be exposed in times of armed conflict. However, it should be noted that the reaction of the international community to this rampant cultural terrorism has been extremely significant. In this context, the activities of the UN Security Council have enormous symbolic, political and legal value. Thus, especially through resolutions that are generally binding on all UN Member States, the Council has first and foremost considered the offences against cultural property to be an integral part of the threat to international peace and security posed by terrorism and its military actions. It then endorsed the extension of the mandate of peacekeeping forces to tasks of cultural heritage preservation and imposed obligations on States to prevent trafficking in cultural property and to return property stolen in times of armed conflict.

Ultimately, all conditions are in place for the protection of cultural heritage in armed conflict to take further steps forward, for example, by strengthening the ban on the use of cultural property for military purposes or by increasing the legal and political synergies between UNESCO's work, particularly in safeguarding the world heritage, and that of the institutions most involved in the military and humanitarian field.

Bibliography

1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February 2015.

Capone F, An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage, Journal of Int. Criminal Justice, 2018.

Eritrea-Ethiopia Claims Commission, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22, Partial Award of 28 April 2004.

Francioni F and Lenzerini F, The Destruction of the Buddhas of Bamiyan and International Law, European Journal of Int. Law, 2003.

Gioia A, La protezione dei beni culturali nei conflitti armati, in Protezione internazionale del patrimonio culturale: interessi nazionali e difesa del patrimonio comune della cultura (F. Francioni, A. Del Vecchio, and P. De Caterini eds.), Milan, 2000.

—— The Development of International Law Relating to the Protection of Cultural Property in the Event of Armed Conflict: The Second Protocol to the 1954 Hague Convention, Italian Yearbook of Int. Law, Vol. XI, 2001.

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention 1954).

Hausler K, Cultural Heritage and the Security Council: Why Resolution 2347 Matters, Questions of International Law, No. 48 (Zoom-in), 2018.

—— Culture under Attack: The Destruction of Cultural Heritage by Non-State Armed Groups, Santander Art and Culture Law Review, 2015, No. 2.

International List of Cultural Property Under Enhanced Protection <https://en.unesco.org/sites/default/files/Enhanced-Protection-List-2019_Eng_04.pdf>.

International Register of Cultural Property under Special Protection <https://en.unesco.org/sites/default/files/Register2015EN.pdf>.

Jakubowski A, Resolution 2347: Mainstreaming the Protection of Cultural Heritage at the Global Level, Questions of International Law, No. 48 (Zoom-in), 2018.

Mancini M, The Memorandum of Understanding between Italy and UNESCO on the Italian 'Unite4Heritage' Task Force, Italian Yearbook of Int. Law, Vol. XXVI, 2016.

Martínez SA, Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?, Journal of Int. Criminal Justice, 2015.

Memorandum of Understanding on the Italian National 'Task Force in the framework of UNESCO's Global Coalition Unite4Heritage' for Initiatives in Favour of Countries Facing Emergencies that may Affect the Protection and Safeguarding of Culture and the Promotion of Cultural Pluralism, 16 February 2016.

O'Keefe R, Protection of Cultural Property, in The Oxford Handbook of International Law in Armed Conflict (A. Clapham and P. Gaeta eds.), Oxford, 2014.

Pentagon Rules Out Strikes on Antiquities, New York Times, 7 January 2020.

Pineschi L, Tutela internazionale del patrimonio culturale e missioni di pace delle Nazioni Unite: un binomio possibile? Il caso MINUSMA, Rivista di diritto int., 2018.

President Repeats Threat to Target Cultural Sites, New York Times, 6 January 2020.

Prosecutor v. Al Mahdi, Judgment of 27 September 2016.

Prosecutor v. Al Mahdi, Judgment of 8 March 2018.

Prosecutor v. Al Mahdi, Reparations Order of 17 August 2017.

Prosecutor v. Jokić, Judgment of 18 March 2004 (Trial Chamber), Judgment of 30 August 2005 (Appeals Chamber).

Prosecutor v. Krstić, Judgment of 2 August 2001.

Prosecutor v. Prlić et al., Judgment of 29 May 2013.

Prosecutor v. Strugar, Judgment of 31 January 2005 (Trial Chamber), Judgment of 17 July 2008 (Appeals Chamber).

Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol 1954).

Rome Statute of the International Criminal Court (Rome Statute 1998).

Ronzitti N, Lo scontro Usa-Iran alla prova del diritto internazionale, Affari internazionali, 13 January 2020, <www.affarinternazionali.it/2020/01/scontro-usa-iran-diritto-internazionale>.

Rossi P, The Al Mahdi Trial Before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity, Diritti umani e diritto int., 2017.

Schmalenbach K, Ideological Warfare against Cultural Property: UN Strategies and Dilemmas, Max Planck Yearbook of United Nations Law, Vol. 19, 2015.

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

Statute of the International Criminal Tribunal for the Former Yugoslavia.