State Responsibility for the Destruction of Cultural Property

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I. Introduction

There is no question that the inclusion of norms recognising the international responsibility both of States and individuals within treaty regimes increases the effectiveness and enforcement of the substantive obligations established by these regimes.

Yet, while individual criminal responsibility is regulated in detail under international criminal law and in some treaties on the protection of cultural property (cultural property treaties), such as the 1999 Second Protocol to the 1954 Hague Convention for the protection of cultural property in the event of armed conflict (Hague Convention)[1] and the 2017 Nicosia Convention on offences relating to cultural property (Nicosia Convention), adopted within the framework of the Council of Europe and not yet in force,[2] in general, international treaties concerning cultural property do not provide for specific norms on State responsibility. This lacuna also affects international treaties of humanitarian law, which include norms on the protection of cultural property. Therefore, both humanitarian and cultural property treaties cannot be considered as examples of 'self-contained' regimes in which special norms relating to responsibility and dispute settlement accompany substantive obligations applicable to a specific subject-matter of international law in a complete and autonomous manner.[3]

In contrast, proper 'self-contained' regimes exist in the field of human rights, such as, for example, the International Covenants on Civil and Political Rights[4] and on Economic, Social and Cultural Rights,[5] at the global level, and the European Convention on Human Rights,[6] the American Convention on Human Rights,[7] and the African Charter on Human and Peoples' rights,[8] at the

[1] Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) 1954, 249 UNTS 215; and Second Protocol to the Hague Convention 1999, United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO) Doc. HC/1999/7, 26 March 1999.
[2] Convention on Offences relating to Cultural Property 2017, ETS 221.
[3] For this lacuna of international cultural heritage law see Lucas Lixinski and Vassilis P. Tsevelekos, 'The Strained, Elusive and Wide-Ranging Relationship between International Cultural Heritage Law and the Law of State Responsibility: From Collective Enforcement to Concurrent Responsibility', in Alessandro Chechi and Marc-André Renold (eds.), *Cultural Heritage Law and Ethics: Mapping Recent Developments, Studies in Art Law* (2017) 7, at 10. For a similar lacuna affecting international humanitarian treaties see Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law', 846 *International Review of the Red Cross* (2002) 401, at 404.
[4] International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.
[5] International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3.
[6] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.
[7] American Convention on Human Rights (ACHR) 1969, 1144 UNTS 123.

regional level. The institutionalised structure characterising these treaty systems allows to ascertain the responsibility of the Contracting States for the violation of the individual substantive rights, granted in the conventions.[9] Among these rights, the right to take part in cultural life[10] and the right to cultural development[11] demonstrate the importance of culture for the broad understanding of human life.[12] The organs established by human rights treaty regimes have developed significant case-law according to which the obligation of States of safeguarding cultural heritage, including cultural property, is also owed to individuals in order to grant their human rights to cultural life and cultural development.[13] Although human rights treaties play an important role for the protection of the cultural identity at the international level, for the purposes of the present article, these treaties will not be examined as autonomous sources of international norms on State responsibility for illicit conducts affecting cultural property. Yet, the argument emphasising the human dimension of the need to protect cultural heritage can be of assistance to provide further bases to assert State responsibility for the unlawful destruction of cultural property.

The absence of norms on State responsibility within cultural property and humanitarian treaties raises the question whether general international norms on State responsibility are applicable as 'secondary rules' to the violations of the 'primary rules' contained in these treaties.[14] The 2001 International Law Commission (ILC) Draft Articles on State Responsibility (Draft Articles)[15] provide for basic provisions that may be useful to ascertain the legal consequences of the breach of the substantive obligations laid down in cultural property treaties. Although the Draft Articles have never become the content of a legally binding multilateral instrument, they are widely

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[8] African Charter on Human and Peoples' Rights (ACHPR) 1981, 1520 UNTS 217.

[9] For the positive contribution of the institutionalisation of human rights treaties in support of the effective protection of human rights see Dinah Shelton, *Remedies in International Human Rights Law* (2007), at 173.

[10] See Arts. 15(1)(a) ICESCR and 17(2) ACHPR. See also Art. 27(1) Universal Declaration of Human Rights, UN General Assembly (UNGA) Res. 217 A (III), 10 December 1948. For an analysis of this issue see Katja S. Ziegler, 'Cultural Heritage and Human Rights', *Oxford Legal Studies Research Paper* No. 26/2007 (2007).

[11] See Arts. 1 ICCPR, 1 ICESCR, 22(1) ACHPR, and 26 ACHR.

[12] See Ana F. Vrdoljak, 'Human Rights and Cultural Heritage in International Law', in Federico Lenzerini and Ana F. Vrdoljak (eds.), *International Law for Common Goods. Normative Perspectives on Human Rights, Culture and Nature* (2014) 139, at 140. For the opinion of an authoritative international political body recognizing that the conservation of cultural heritage is essential to maintain social cohesion and international peace see Human Rights Council Res. 33/20, (*Cultural Rights and the Protection of Cultural Heritage*), UN Doc. A/HRC/RES/33/20, 30 September 2016.

[13] This is particularly so within the ACHR framework. The Inter-American Court on Human Rights (IACtHR) has in fact repeatedly affirmed that the right of indigenous peoples to live and freely use the territory that was traditionally occupied by their ancestors "must be recognized and understood as the fundamental basis of their cultures". See IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, 31 August 2001, Series C No. 79, at 149. For a thorough overview of the IACHR case-law and the issue of the interaction between culture and human rights see Federico Lenzerini, *The Culturalization of Human Rights Law* (2014), at 174-189.

[14] The distinction between primary and secondary rules was formulated by the Special Rapporteur Ago for the first time during the 32nd Session of the International Law Commission (ILC), see ILC Yearbook 1980, Vol. 2 Part 2, at para. 23. For the relevance of this distinction see Giorgio Gaja, 'Primary and Secondary Rules in the International Law on State Responsibility', 97 *Rivista di Diritto Internazionale* (2014) 981, at 982.

[15] Responsibility of States for Internationally Wrongful Acts (Draft Articles) 2001, UNGA Res. 56/83, 12 December 2001.

recognised as a document reflecting general principles of international law on the responsibility of States for wrongful acts.[16]

Under Article 1 Draft Articles any internationally wrongful act entails State responsibility. Thus, even if cultural property treaties do not provide for a distinctive responsibility regime, the Draft Articles are applicable to the wrongful acts arising from the breach of the obligations established by these treaties.[17] Moreover, to the extent that some norms relating to cultural property have been recognised as part of customary international law,[18] their breach comes within the scope of application of general principles on State responsibility, including those contained in the Draft Articles.

This essay is not aimed at analysing the issue of the legal nature of international norms on cultural property, whether customary or treaty-originated. However, this issue has a considerable impact on the forms and extent of the responsibility of a State for the breach of obligations relating to cultural property. For example, States that are not parties to the 1954 Hague Convention cannot be considered responsible for the breach of the substantive obligations of the Convention of exclusively treaty nature, such as the duty of States parties to mark cultural property under special protection with a distinctive emblem during armed conflicts, which is sanctioned in Article 10.

The aim of the present article is therefore to ascertain, according to international norms on State responsibility, such as the ones included in the Draft Articles, first, which conducts bringing about the destruction of cultural property, both during wartime or times of peace, consist in wrongful acts, from which State responsibility arises, especially with regards to their nature as ordinary or serious breaches of law; second, to which State or States a wrongful behaviour may be attributed; third, in which circumstances such responsibility may be precluded; and forth, which consequences arise from the recognition of State responsibility including, in particular, the determination of the States and persons entitled to invoke such responsibility according to the different character of the obligations that have been violated. As to the diverse types of reparation and countermeasures that may be adopted to respond to State responsibility, this essay will only investigate whether or not general rules of international law, in particular, the Draft Articles, are

[16] For an overview of the issue of international responsibility of States see Robert Kolb, *The International Law of State Responsibility: An Introduction* (2017) and Pierre-Marie Dupuy, 'Quarante ans de codification du droit de la responsabilité internationale des Etats: un bilan', 107 *Revue Générale de Droit International Public* (2003) 305.

[17] For the view that the international responsibility of States is a 'cardinal institution' of international law as it results from the recognition of international legal personality of States see James R. Crawford, 'State Responsibility', September 2016, *Max Planck Encyclopedia of Public International Law*, available at http://opil.ouplaw.com/.

[18] For example, the prohibition of an attack against cultural property both during international and non-international conflicts, which is established in Art. 4(1) Hague Convention, is also recognised as an obligation of customary nature. See Roger O'Keefe, 'Protection of Cultural Property', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2008) 433, at 443.

suitable for application in cases of the breach of the obligations arising in the field of cultural heritage.

Finally, the principle of 'responsibility to protect' (R2P) is worth mentioning. This principle recognises the responsibility, or better to say the duty, of sovereign States to protect their populations by means of positive actions. The R2P was originally formulated with respect to the protection of fundamental human rights in order to legitimise the humanitarian interventions of the international community in the case a sovereign State is unable to secure these rights to its population.[19] Recently, a proposal has been put forward to extend the R2P principle to the protection of cultural heritage,[20] in particular against serious violations, such as intentional destruction and illicit removal in the context of armed conflict, on the assumption that such protection is a fundamental interest both of individuals and the international community as a whole.[21]

Despite its terminology, the R2P principle seems to define the scope of the primary rules establishing the general duties of sovereign States to prevent and prosecute illicit conducts rather than to sanction a new form of State responsibility. Nevertheless, the examination of this principle may be beneficial for the purpose of clarifying some aspects inherent to the issue of State responsibility, such as the definition of the scope of breaches, attribution of illicit conducts, and title to invocation.

In short, although this essay mainly focuses on the analysis of the impact of the application of the Draft Articles with respect to the unlawful destruction of cultural property, other norms of international law may be of assistance in ascertaining the peculiarities of State responsibility in this field.

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[19] For an overview see P. Cunliffe, 'The doctrine of the 'responsibility to protect' as a practice of political exceptionalism', *European Journal of International Relations* (2017) at 466-486.

[20] See UNESCO, Expert Meeting on the 'Responsibility to Protect' and the protection of cultural heritage, Recommendations, 27 November 2015 available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/R2P-Recommendations-EN.pdf.
These Recommendations invite Member States to consider the protection of cultural heritage as an inherent part of the protection of fundamental human rights.

[21] For this dual accountability of States deriving from the responsibilty to protect (R2P) principle see J. Petrovic, 'What Next for Endangered Cultural Treasures; The Timbuktu Crisis and the Responsibility to Protect', *New Zealand Journal of Public and International Law* (2013) 381, at 404. For a thorough analysis of the evolution of the R2P principle see J.M. Welsh *et al.*, *The International Spectator, Special Issue on the Responsibility to Protect* (2016), at 1-85.

II. The Substantive Aspects of State Responsibility for Wrongful Acts Resulting in the Destruction of Cultural Property

A. Defining Cultural Property

Although this essay is not aimed at examining the content of the primary norms relating to the protection and conservation of cultural property, some substantive aspects of these norms must be nevertheless taken into account in order to understand whether or not State responsibility occurs. In fact, according to Article 12 Draft Articles, one of the constitutive elements of international State responsibility is the wrongful conduct of the State resulting in the breach of an international obligation, whether of customary or treaty character.

First of all, one must delimit the category, or, better to say, the categories, of the objects that these norms are aimed at protecting. For the present purpose, the definition of cultural property is meant to include all tangible cultural objects and sites the protection of which must by ensured by States in the interest of States, peoples, and the international community, as a whole.[22] Thus, international norms relating to the protection of the intangible components of cultural heritage, such as the traditions and expressions of culture of peoples, will not be investigated.

Several cultural property and humanitarian law treaties provide for a definition of cultural property highlighting its outstanding value. For example, Article 1 Hague Convention affirms that cultural properties protected by the Convention are "movable or immovable property of great importance to the cultural heritage of every people". Similarly, Articles 53 Additional Protocol I (Geneva Protocol I) and Article 16 Additional Protocol II (Geneva Protocol II) to the 1949 Geneva Conventions[23] mentions "the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples". Despite of the use of different wording, the definitions, provided for both in the Hague Convention and Geneva Protocol I, seem to embrace the same types of cultural properties, i.e. tangible movable and immovable objects of cultural value for the people (and the State) to which they belong.[24] This interpretation of the definitions provided in

[22] For a precise definition of 'cultural property' see K. Odendahl, 'Global Conventions for the Protection of Cultural Heritage', in M. Guštin and T. Nypan (eds.), *Cultural Heritage and Legal Aspects in Europe* (2010) 100, at 101. For the problems relating to the definition of cultural property see L. Prott and P. O'Keefe, 'Cultural Heritage or Cultural Property?' in *International Journal of Cultural Property* (1992) 307.

[23] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609.

[24] See also O'Keefe, *supra* note 18, at 439.

the Hague and Geneva regimes was also endorsed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its appeals judgment of the *Kordić* case while comparing the texts of the abovementioned norms.[25]

The State-centric definition of cultural property embodied in the Hague and Geneva Conventions is justified by the fact that these treaties are aimed at balancing the opposite interests of the parties to an armed conflict.[26]

On the contrary, the development of a definition of cultural property of universal (not merely national) value is envisaged in most recent treaties, such as the 1972 United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO) World Heritage Convention (WHC).[27] Article 1 of this convention circumscribes the scope of the definition of 'cultural heritage' to monuments, buildings, and sites which are of outstanding universal value.[28] In an even broader manner, Article 1(1)(a) 2001 UNESCO Underwater Heritage Convention (UHC)[29] includes in the definition of 'underwater cultural heritage' 'all traces of human existence' of cultural character "which have been […] under water […] for at least 100 years' and which, according to Article 2(3) of the Convention must be preserved 'for the benefit of humanity".

The recognition of the universal value of cultural property, as an essential element of human life under international law, strictly intersects with the protection of human rights, as is explicitly emphasised in some international legal instruments, such as the European Convention on the Value of Cultural Heritage for Society (Faro Convention).[30] In addition, this interconnection between culture and human rights also underlines the need to recognise the seriousness of some breaches affecting cultural property.

Thus, the definition of diverse categories of cultural property entails different obligations, for the violation of which State responsibility may arise.

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[25] ICTY, Appeals Chamber, *Prosecutor v. Dario Kordić and Mario Čerkez*, Judgment 17 December 2004, IT-95-14/2-A, para. 91.

[26] According to a State-centric approach, the value of cultural property is determined by the State to which this property belongs. Thus, the protection of this property must be ensured in the interest of this State. However, although, under the Hague Convention and the two Geneva Protocols, each State has to identify the objects pertaining to its cultural property, this identification can be considered valid only if it is carried out in good faith, i.e. with the only aim of conserving objects and sites of real cultural significance. See O'Keefe, *supra* note 18, at 438.

[27] UNESCO, Convention for the Protection of the World Cultural and Natural Heritage (WHC), Paris, 16 November 1972, in 1037 UNTS 151.

[28] See Article 1 of the WHC.

[29] UNESCO, Convention on the Protection of the Underwater Cultural Heritage (UHC), Paris 2 November 2001, in 2562 UNTS I-45694.

[30] Council of Europe, Framework Convention on the Value of Cultural Heritage for Society, Faro 27 October 2005, CETS 199. For the view that the adoption of international treaties recognising the importance of cultural heritage for human life, such as the Faro Convention, has increased the impact of the cultural dimension on the protection of human rights see Vrdoljak, *supra* note 12, at 171. For an overview of the Faro Convention see K. Odendahl, 'Securing and Enhancing the Common Cultural Heritage', in S. Schmahl and M. Breuer (eds.), *The Council of Europe. Its Law and Policies* (2017), 749, at 762.

As an example, the Hague Convention and its Second Protocol to the Hague Convention identify two specific categories of cultural property with regards to which 'special' and 'enhanced' protection is acknowledged, respectively. According to Article 8 of the Convention 'special protection' must be ensured with respect to cultural property of very great importance for the respective State.[31] Beside, Article 10(a) Second Protocol to the Hague Convention establishes 'enhanced protection' for "cultural heritage of greatest importance for humanity".[32] Both these types of protection entail most stringent obligations *vis-à-vis* States parties,[33] which may be waived in very exceptional circumstances, in particular when property under 'enhanced protection' is at issue.[34] Similarly, the delimitation of the scope of the definition of cultural property appears to be crucial to recognise State responsibility according to the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage (2003 UNESCO Declaration), adopted after the demolition of the Buddhas of Bamiyan by the military and para-military forces of the Taliban government of Afghanistan.[35] Article II 2003 UNESCO Declaration delineates the scope of the definition of cultural heritage so as to include "cultural heritage linked to a natural site". In light of this definition, States must comply with the obligations of adopting preventative measures with the aim of avoiding the destruction of such heritage.[36] Besides, Article VI 2003 UNESCO Declaration only recognises State responsibility in the case of the intentional destruction "of cultural heritage of great importance for humanity", which patently entails a more serious breach of international law.

Thus, the delimitation of the scope of the concept of cultural property is not only essential to ascertain in which circumstances a wrongful conduct affecting such property entails State responsibility, but it also helps to determine the diverse level of gravity of alleged violations.

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[31] The definition of 'cultural property of very great importance', provided for in Article 8 of the Hague Convention, includes refuges intended to shelter movable cultural property and centres containing immovable cultural property.

[32] The greatest importance of this type of cultural property is inferred from the special treatment that this property enjoys according to national legislation and from the fact that this property is eligible for the inclusion in the List provided for in Article 27(1)(b) of the 1999 Hague Protocol.

[33] Both special and enhanced protection entail the immunity of the cultural property concerned. In case of property under enhance protection immunity is almost absolute. See *infra* Section II.B.4.

[34] According to Article 11 of the Hague Convention the immunity of cultural property under special protection can be only withdrawn in case of 'unavoidable military necessity'. Beside, cultural property under enhanced protection only loses its status if it concretely becomes a military objective. For a more extensive analysis of military necessity see *infra* Section II.B.4.

[35] UNESCO, General Conference, 32 Session, *Declaration concerning the Intentional Destruction of Cultural Heritage*, Resolution n. 33, 17 October 2003, available at http://portal.unesco.org/en/ev.php-URL_ID=17718&URL_DO=DO_TOPIC&URL_SECTION=201.html. For a thorough exam of the facts and legal consequences of the Buddhas' demolition see F. Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan and International Law', *European Journal of International Law* (2003) 619-651.

[36] See Articles III and IV of the 2003 UNESCO Declaration.

B. Illicit Conducts Entailing the Destruction of Cultural Property

1. General Remarks

Although the disappearance of cultural property is universally considered as an irreparable loss for humanity, State responsibility only arises when the destruction of cultural objects or sites is the result of a conduct of a State that is in breach of the existing international obligations concerning the protection of cultural property.

Therefore, some concrete features of the conduct of a State entailing the destruction of cultural property must be taken into account in order to ascertain whether or not this conduct results in a wrongful act from which State responsibility arises. These features may affect the time in which destruction occurs, namely wartime or time of peace; the place in which destruction is carried out, i.e. in the territory of the alleged State or in the territory of another State; and finally, the intent with which a State performs a conduct entailing the destruction of cultural property.[37]

In this regard, the intentional destruction of cultural property may be considered as a serious breach of international law in some circumstances. Thus, a distinction between ordinary and serious violations of international law is also needed. In addition, special attention must be paid to the waiver of military necessity with regard to the protection of cultural property during armed conflicts since this waiver entails an intrinsic component of the conduct that otherwise should be considered unlawful. Finally, the element of damage affecting cultural property deserves to be taken into account with respect to some illicit conducts that may only occur in presence of such element.

2. The Relevance of Time and Place

Both customary and treaty norms concerning the protection of cultural property during armed conflicts provide for very clear obligations that are aimed at preventing the destruction of this property. Direct attacks against cultural property located in the territory of another State are prohibited with the exception of the cases in which military necessity requires such attacks or when a cultural site has been turned into a military objective.[38] In addition, during wartime, States cannot use cultural properties located in their territory so as to expose them to destruction.[39]

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[37] For an analysis of the different features characterising conducts entailing the destruction of cultural property see Odendahl, cit. *supra* note 21.

[38] See Art. 4 Hague Convention, Art. 15(1)(c) Second Protocol to the Hague Convention, and Arts. 53 and 16 Geneva Protocol I and Protocol II respectively. For a thorough analysis of international humanitarian obligations owed by States with respect to cultural heritage during armed conflicts see O'Keefe, *supra* note 18, at 499-500.

[39] See Article 4(1) of the Hague Convention.

Cultural property treaties that are applicable during wartime and humanitarian law conventions also provide for specific norms on State responsibility arising from the breach of their substantive obligations. For example, Article 38 Second Protocol to the Hague Convention states that the condemnation of individual illicit conducts, under Article 15, does not exclude State responsibility for the same types of conducts under international law. Thus, State responsibility may be ascertained in accordance with the general provisions of international law in the cases in which a State has violated the substantive obligations of the 1954 Hague Convention and its Protocols.

Most precisely, Section II of Part V of Geneva Protocol I provides for a set of rules sanctioning responsibility deriving from breaches of the Geneva Conventions and Geneva Protocol I. In particular, Article 91 affirms that any party to an armed conflict has the duty to pay compensation in cases of breach of one of the obligations provided for in the Protocol, including, therefore, those established in Article 53 relating to attacks against cultural property. Regrettably, the applicability of Article 91 is limited, as all norms of Geneva Protocol I, to situations occurring during international armed conflicts. Therefore, it is inapplicable with respect to offences perpetrated both during peacetime and non-international armed conflicts, which are regulated by Geneva Protocol II.

Geneva Protocol II does not include a norm dealing with State responsibility corresponding to Article 91 Geneva Protocol I. This lacuna demonstrates that the drafters of the 1977 Protocols considered this subject-matter as an issue only affecting international relations between States and, thus, not to be treated in the context of merely internal conflicts.[40] However, one must recall that Article 16 Geneva Protocol II explicitly recognises the priority of the 1954 Hague Convention as *lex specialis* with regard to the issue of the protection of cultural property during armed conflicts. This clause of subordination of Geneva Protocol II (which also appears in Article 53 Geneva Protocol I) recognises the priority of the application of the norms of the 1954 Convention with respect to States that are parties to both the Hague Convention and Geneva Protocols.[41] In the present writer's view, this clause of subordination of the Geneva Protocols should be interpreted so as to imply the priority of the entire regime arising from the Hague Convention, including the 1999 Protocol and, in particular, its Article 38 acknowledging State responsibility in the case of the breach of the obligations of the Convention. In fact, although the 1999 Protocol was adopted 22 years later with respect to the 1977 Geneva Protocols and, thus, could not be taken into account by

[40] According to this view, when States do not comply with the obligation of protecting cultural property during non-international conflicts, individuals would be the only persons entitled to invoke the breach of this obligation within the domestic legal orders of transgressing States. This discrepancy between States' obligations under Article 1(1) of Protocol I and II is highlighted by Th. Meron, 'The Geneva Conventions as Customary Law', *American Journal of International Law (AJIL)* (1987) 348, at 353, most precisely at footnote 16.

[41] In addition, Articles 19 and 22 of the 1954 Hague Convention and its Second Protocol, respectively, affirm that the regime of the Hague Convention applies to armed conflicts both of international and non-international character.

the drafters of the clause of subordination, the evolving and contextual interpretation of the norms of both the Geneva and Hague regimes leads to the conclusion that the very purpose of the clause of subordination is to ensure the best protection of cultural property during armed conflicts, that is, according to Articles 53 and 16 Geneva Protocols I and II respectively, the protection provided for in the Hague regime as a whole.[42] This conclusion is also consistent with the rules of treaty interpretation laid down in Article 31 Vienna Convention on the Law of Treaties.[43]

Conversely, cultural property conventions that are applicable in time of peace, only provide for individual criminal responsibility, such as, for example, Article 12 2017 Nicosia Convention on offences relating to cultural property (including unlawful destruction),[44] which requires States parties to establish their jurisdiction over individual criminal responsibility arising from the offences which have been perpetrated either in their territory or by their nationals. Although the presence of norms relating to individual criminal responsibility in cultural property conventions must be deemed to be a step forward in the effective enforcement of these conventions, the lack of corresponding provisions concerning State responsibility appears to be slightly paradoxical if one considers that the majority of the substantive obligations of these conventions recognise the primary accountability of States for the management and preservation of cultural property.[45]

In addition, substantive norms of international treaties prohibiting the destruction of cultural property during time of peace have a very vague content although the general duty to preserve cultural property is also envisaged within the WHC, the UHC, and human rights treaties.[46] Moreover, according to Article 4 WHC, the scope of the general duty to protect and conserve cultural property is also narrowed by the fact that States parties must only ensure this protection with respect to cultural property that is located under their jurisdiction. This limitation, which seems

[42] According to Article 2 of the Second Protocol to the Hague Convention the 'Protocol supplements the Convention in relations between the Parties'.
[43] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331; for a similar conclusion see O'Keefe, *supra* note 18, at 446.
[44] See Article 10 of the Nicosia Convention.
[45] See for example Articles 4 of the WHC (*supra* note 25) and 18 of the Convention on the Protection of the Underwater Cultural Heritage (UHC) (*supra* note 27).
[46] See Articles 4 of the WHC and 2(3) of UHC. See also the norms of human rights treaties recognising cultural human rights cit. *supra* notes 10 and 11. Actually the WHC, UHC, and human rights treaties are also applicable during armed conflicts. The duty to ensure the cultural rights of individuals during wartime according to Article 15 of the ICESCR has been explicitly stated by the UN Committee on Economic, Social and Cultural Rights. See UN Committee on Economic, Social and Cultural Rights, General Comment no. 21, Right of everyone to take part in cultural life (Article 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009, at para 50(a). For a doctrinal view recognising the applicability of the WHC and human rights law during armed conflicts see R. O'Keefe 'Protection of Cultural Property', in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (2014) 492, at 507-510.

to reaffirm the supremacy of State sovereignty, appears to be discordant with the recognition of the universal value of cultural property that is one of the fundamental principles of the Convention.[47]

Although the inclusion, in the WHC, of a clear obligation of protecting cultural property wherever it is located would have better reflected the spirit of the Convention, other norms of the WHC seem to be more in tune with this spirit. For example, Article 6(3) requires States parties to refrain from taking measures which might damage cultural property situated in the territory of another State.[48]

Moreover, most recent and up-to-date treaties, such as the UHC, have established general obligations requiring States parties to preserve cultural property for the benefit of humanity.[49] This is particularly so with respect to cultural property located in the Area, which is notoriously out of State jurisdiction.[50]

Finally, the ongoing development of customary international norms and general principles, such as those relating to *erga omnes* obligations and universal jurisdiction, seems to facilitate the recognition of State responsibility for illicit conducts affecting cultural property located in the territory of another State. As an example, in the 2013 ruling of the *Temple of Preah Vihear* case (*Temple* case), the ICJ, recalling Article 6 WHC, has upheld that the prohibition of the destruction of cultural property is an *erga omnes* obligation that does not only bind the State under the jurisdiction of which the injured cultural property is located, but it also affects other States acting in the proximity of this property.[51]

In sum, State responsibility arising from the breach of the international obligations concerning the protection of cultural property during armed conflicts has been repeatedly recognised thanks to the precise content of these obligations. Nevertheless, emerging customary norms recognising the duty to preserve cultural property in the interest of humanity also seem to acknowledge State responsibility irrespective of the time and place in which the violation affecting such property occurs, particularly when this violation consists in a serious breach of international cultural property law.[52]

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[47] For the territorial limit of the international obligations concerning the protection of cultural property during peacetime see Lixinski and Tzevelekos, cit. *supra* note 3, 18.
[48] For the view that Article 6(3) of the WHC overcomes the limit of State sovereignty see G. Carducci, 'Articles 4-7', in F. Francioni (ed.), *The 1972 World Heritage Convention: A Commentary* (2008) 103.
[49] See Article 2(3) of the UHC.
[50] See Article 11 of the UHC. For an overview concerning this convention see G. Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', in *AJIL* (2002) 419, at 424.
[51] ICJ, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand),* Judgment, 11 November 2013, ICJ Reports 2013, para 106. For the view that the duty to protect cultural heritage is an *erga omnes* obligation see A. Ciampi, 'Identifying an Effectively Protecting Cultural Heritage', *Rivista di diritto internazionale* (2014) 699, at 716.
[52] See F. Francioni, 'Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity', in *Michigan Journal of International Law* (2004) 1209, at 1219.

3. The Intentional Destruction of Cultural Property

The condemnation of the acts of hostility against cultural property specially affects intentional destruction when it is not justified by military necessity during wartime or by the need to safeguard an essential interest during times of peace.

Conducts resulting in the intentional destruction of cultural property can amount to a wrongful act only when the intent of the wrongdoer is proven.[53] When State responsibility is at issue, the relevant intent pertains to individuals perpetrating the destruction on behalf of a State.[54] Moreover, acts of intentional demolition of cultural property may sometimes consist in serious breaches of international law due to their particularly hostile character. For this reason, these acts are also classified as international crimes against humanity or war crimes according to international criminal and humanitarian law.

In this regard, the ICTY has repeatedly recognised the responsibility of individuals for serious attacks against cultural property when devastating acts are performed on a systematic basis.[55] In particular, in the *Kordic* case, the ICTY specifies that a conduct envisaging a crime against humanity does not need any connection to an armed conflict.[56] In addition, in the *Strugar* case, the Tribunal upheld that the deliberate and conscious attacks against cultural sites entail war crimes that cannot be considered as less serious breaches of international law than crimes against humanity.[57]

Most recently, the International Criminal Court (ICC) applied Article 8(2)(e)(iv) Rome Statute of the ICC (ICC Statute) prohibiting intentional attacks against cultural property[58] for the first time in the *Al Mahdi* judgment sentencing the head of the terrorist group of Hesbah that perpetrated the destruction of Timbuktu (Mali) historic buildings.[59] The ICC acknowledged the

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[53] In the *Strugar* case, the ICTY considered that the intention of the wrongdoers was an essential element in order to classify the shelling the Old Town of Dubrovnik as a war crime instead of the erroneous targeting of the town. See ICTY, Trial Chamber, *Prosecutor v. Pavle Strugar*, Judgment 31 January 2005, IT-01-42-T, para 214.

[54] See *infra* Section III.

[55] ICTY, Trial Chamber, *The Prosecutor v. Tihomir Blaskic*, Judgment 3 March 2000, IT-95-14, para 227. See also ICTY, Trial Chamber, *Prosecutor v. Radoslav Brdanin*, Judgment 1 September 2004, IT-99-36-T, para 1023.

[56] ICTY, Trial Chamber, *Prosecutor v. Dario Kordic and Mario Cerkez*, Judgment 26 February 2001, IT-95-14/2-T, para. 206. For the view that the ICTY case-law provides support to the doctrine according to which the obligation of safeguarding cultural heritage also exists during time of peace see Vrdoljak, *supra* note 12, at 169.

[57] See the *Strugar* case, cit. *supra* note 51, para 459. For the need to ascertain the intent and knowledge of a conduct of devastation in order to qualify it as a war crime see O'Keefe, *supra* note 46, at 511.

[58] Paragraphs (b)(ix) and (e)(iv) of Article 8(2) Rome Statute of the International Criminal Court (ICC) 1998, 2187 UNTS 90, respectively list 'intentionally directing attacks against buildings dedicated to religion, education, art […] historic monuments […], provided they are not military objective' among war crimes occurring during armed conflicts of international or internal character.

[59] ICC, TC VIII, *The Prosecutor v Al Faqi Al Mahdi*, Judgment, ICC01/12-01/15-171, 27 September 2016. The ICC also issued an order to establish reparation for the hard affecting people and properties. See ICC, TC VIII, *The Prosecutor v Al Faqi Al Mahdi*, Reparations Order, ICC-01/12-01/15-236, 17 August 2017. For a thorough comment of these ICC decisions see K. Wierczynska and A. Jakubowski, 'Individual Responsibility for Deliberate Destruction of

responsibility of Al Mahdi both "for the execution phase of the attack" and "as co-perpetrator".[60] Thus, in the view of the ICC, international criminal responsibility may arise either from the direct activity of a person or from his/her support of the actual perpetrators of a crime.

All these cases patently envisage examples of individual criminal responsibility. However, the types of conducts for which individuals have been sentenced by international criminal tribunals and courts may be also performed by States.[61] Moreover, individuals that are charged with international crimes are, with the exception of terrorists, in some way related to the State apparatus or to an organised group that may be assimilated to a public institution.[62] However, when there is no evidence of the fact that a State was aware of the intention of private persons of performing an international crime, such as the wanton destruction of cultural property, and did not make any effort to prevent it, State responsibility may only arise from the breach of the obligation either of preventing or punishing an international crime. In this case, the illicit conduct of the State does not entail an international crime *per se*, as the ICJ affirmed in the 2007 *Genocide* case.[63] For this reason, both international criminal courts and legal scholarship currently emphasise the relevance of shared responsibility between States and private actors.[64]

In addition, both a 2012 statement of the President of the Security Council and Security Council Resolutions 2085 (2012) and 2347 (2017)[65] point out that the deliberated attacks against cultural property perpetrated during armed conflicts, whether of international or internal character, may be considered as war crimes and, thus, entailing both State and individual responsibility in

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Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case', *Chinese Journal of International Law* (2017) 1.

[60] *Al Mahdi* Judgment, cit. *supra* note 57, paras 53 and 59.

[61] For example, the perpetration of international crimes embracing the wanton destruction and appropriation of property, not justified by military necessity, as sanctioned in Article 8 of the ICC Statute, should be most appropriately attributed to a State or groups acting on behalf of a State rather than to single individuals since the performance of these criminal conducts at least requires the existence of a basic organised structure. For a detailed overview of the issue of crimes affecting cultural heritage see Federico Lenzerini, 'Intentional Destruction of Cultural Heritage, Crimes Against Humanity and Genocide: Towards an Evolutionary Interpretation of International Criminal Law', in *Europa Ethnica* (2017).

[62] See P.M. Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State' in, A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Vol. II (2002) 1085, at 1087.

[63] ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, paras 325-350. For the view that the *Genocide* ruling achieved the positive result of recognising the duty of States to prevent international crimes as an autonomous obligation of a State with respect to the prohibition, affecting both States and individuals, of perpetrating these crimes see B.H. Birkland, 'Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide', *New York University Law Review*, (2009) 1623, at 1648.

[64] For a thorough analysis of the issue of shared responsibility between States and non-State actors see J. D'Aspremont *et al*., 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction', in *Netherlands International Law Review (Neth. ILR)* (2015) 49.

[65] UN SC, Statement by the President, 10 December 2012, S/PRST/2012/26, SC Res. 2085, 20 December 2012 on the situation and entrenchment of terrorist groups and criminal networks in the north of Mali and SC Res. 2347, 24 March 2017 on destruction and trafficking of cultural heritage by terrorist groups and in situations of armed conflict.

accordance with international criminal law.[66] Moreover, in the arbitral award concerning the intentional destruction, on behalf of Ethiopia, of the obelisk known as Stela of Matara,[67] the act of destruction was considered, by the African Unity, as a breach of the African Charter on Human and Peoples' Rights.[68]

Nevertheless, the only very provision asserting State responsibility arising from the international destruction of cultural property may be identified in Article VI 2003 UNESCO Declaration. Article VI of the 2003 UNESCO Declaration provides for State responsibility both in cases of intentional destruction and failure to prevent the "destruction of cultural heritage of great importance for humanity".[69]

Although this declaration is a typical instrument of soft law and, thus, non-binding *per se*, it seems to envisage some obligations of customary international law. Legal doctrine is divided with regard to the extent of the scope and character of the obligations recognised in Article VI 2003 UNESCO Declaration. Some legal author believes that customary international law only recognises both the prohibition of attacking and the duty to prevent attacks against cultural property during wartime, while the same obligations would not exist during time of peace.[70] By contrast, according to a more persuasive legal tenet, these obligations must be assumed to exist under customary international law both in war and peacetime.[71] In fact, it would be illogical to require States to comply with stricter obligations during armed conflicts than during time of peace, in particular when the cultural property affected is an object or a site of universal value.[72] Patently, the content of the prohibition of intentionally destroying cultural property and of the obligation of preventing such destruction during peacetime cannot be as detailed under customary law as in treaty norms. For example, Article 7 Hague Convention compelling Contracting States to adopt regulatory measures to prepare special personnel during time of peace in order to prevent damage of cultural property

[66] For the innovative character of SC Res. 2347 (2017) that, for the first time, includes the protection of cultural heritage among the tasks of a UN mission (MINUSMA) see L. Pineschi, 'Tutela internazionale del patrimonio culturale e missione di pace delle Nazioni Unite', *Rivista di diritto internazionale* (2018) 5, at 8.

[67] Eritrea-Ethiopia Claims Commission, Partial Award, *Central Front – Eritrea's Claims 2, 4, 6, 7, 8 & 22*, Decision 28 April 2004, RIAA XXVI, 115

[68] African Charter; For an analysis of the declaration of the African Unity see Lenzerini, *supra* note 13, at 193.

[69] According to Article VI a State 'bears the responsibility, to the extent provided for by international law'.

[70] See O'Keefe, *supra* note 18, at 462. According to this author the duty to protect and prevent the destruction of cultural heritage during time of peace would entail only a treaty obligation as sanctioned, for example, in Articles 2 and 13 of the Hague Convention and Article 5 of its Second Protocol. For the view that norms relating to the protection of cultural property during peacetime have a too vague content to be effective see E. Posner, 'The International Protection of Cultural Property: Some Skeptical Observations', in *Chicago Journal of International Law* (2007), 213, at 220.

[71] For the view that international practice following the adoption of the cultural property and humanitarian law treaties has developed the conviction that there exists the duty to protect cultural property both in time of war and peace see Francioni, cit. *supra* note 50, 1220 and A. F. Vrdoljak, 'Intentional Destruction of Cultural Heritage and International Law', in K. Koufa (ed.), *Multiculturalism and International law* (2007) 377, at 385.

[72] See F. Lenzerini, 'The UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage', *Italian Yearbook of International Law* (2003) 131, at 139. For the initial doctrine that cultural property must be safeguarded in the public interest of the international community since it cannot be treated as ordinary property see J. Sax, *Playing Darts with a Rembrandt Public and Private Rights in Cultural Treasures* (1999) at 9.

during wartime only envisages a treaty obligation. However, at least, the general duty of States to abstain from and prevent the intentional destruction of cultural property of universal value during peace time seems to be recognised under customary international law due to the extensive practice both of international organisations, primarily the UNESCO, and tribunals.[73] In fact, this general obligation is also acknowledged by some less 'cultural property-friendly' scholars according to whom, in some circumstances, the demolition of cultural property may be justified by the need to vital needs.[74]

In short, the recognition of State responsibility according to Article VI 2003 UNESCO Declaration is aimed both at facilitating to widespread the conviction that the intentional destruction of cultural property of great value should be sanctioned at the international level as a serious breach of international law and at exhorting weaker States to comply with the duty to seek international assistance in order to prevent criminal groups from destroying cultural property in their territory.[75] The latter issue is consistent with the R2P principle that has been developing within the international community.

Thus, the distinction between ordinary and serious breaches of international law appears to be necessary when illicit conducts entail the destruction of cultural property. Draft Articles on State responsibility only recognise the need to draw such a distinction with regard to the issue of the legal consequences arising from the occurrence of the breaches of diverse international norms, namely ordinary or peremptory norms.[76] Article 40 Draft Articles provides for a quite narrow definition of serious breaches of law. In fact, the violations must be 'gross and systematic' and can only affect 'peremptory norms'. This might lead to believe that some grave violations perpetrated against cultural property would remain out of the scope of the Draft Articles. Nevertheless, although the existence of peremptory norms relating to cultural property is not yet generally recognised, some violations affecting cultural property have already been categorised as serious breaches of international law both in international treaties and case-law. As an example, in the abovementioned *Strugar*, *Stela of Matara,* and *Al Mahdi* cases, the ICTY, Eritrea-Ethiopia Claims Commission, and ICC, respectively upheld that the intentional destruction of cultural property during armed conflicts had to be considered as a serious violation of international law due to the fact that the attacks had

[73] See Francioni and Vrdoljak *supra* notes 50 and 69.

[74] For an exponent of this legal tenet see K. Wangkeo, 'Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime', *Yale Journal of International Law* (2003) 183, at 273.

[75] Article VIII of the 2003 UNESCO Declaration invites States to cooperate to provide, among other things, 'judicial and administrative assistance, as requested by interested States, in the repression of intentional destruction of cultural heritage' that has been performed by individuals whose criminal responsibility is sanctioned in Article VII of the Declaration.

[76] According to Article 41 Draft Articles, the serious breach by a State of a peremptory norm may also generate duties for other States, such as the obligation of cooperating to bring to an end such breach and the prohibition of recognising as lawful the situations originated from the breach itself.

been perpetrated against specially protected sites the conservation of which should have been granted in the interest of peoples.[77]

Thus, the Draft Articles may help to confirm the view that a distinction between ordinary and serious breaches of law is necessary, in particular in the field of cultural property law where the interests at issue do not only pertain to States, but also to individuals, communities, and the international society as a whole. Among the illicit conducts entailing the demolition of cultural property, intentional acts of destruction certainly deserve to be considered most severely in consideration of their hostile character.

4. Military Necessity

According to the majority of legal doctrine, military necessity is a constitutive element of a conduct that makes such conduct lawful in its self.[78] As a consequence, belligerent States may invoke the waiver of military necessity only if it is expressly recalled in the norms of international humanitarian law.[79]

Among humanitarian norms relating to the protection of cultural property, Articles 4(2) Hague Convention, 2(d) and 3(b) of the Statute of the ICTY (ICTY Statute),[80] and 8(2)(a)(iv) ICC Statute allow States to invoke this waiver. Actually, the Hague Convention recognises three types of military necessity according to which the possibility of invoking this waiver progressively shrinks: 'imperative' necessity that applies in cases of 'general protection';[81] 'unavoidable' necessity pertaining to properties 'under special protection' the invocation of which must be commanded by

[77] See ICTY, *Strugar* case, cit. *supra* note 51, para. 232, *Stela of Matara* case, cit. *supra* note 65, para 113, and, *Al Mahdi* case, Judgment, cit. *supra* note 57, paras 14-18. For an overview of ICTY case-law sanctioning serious breaches against cultural property see Wierczynska and Jakubowski, cit. *supra* note 57, 12. For the view that the *Al Mahdi* case is a relevant example of the condemnation of the destruction of cultural property as a form of international crime see Pineschi cit. *supra* note 64, 13.

[78] Some other scholars believe that military necessity is an exception, such as other circumstances precluding wrongfulness, that may be invoked regardless of the fact that a norm expressly mentions it. See H. McCoubrey, *International Humanitarian Law: Modern Development in The Limitation of Warfare* (1998). For an overview of legal doctrine relating to military necessity see C.J.S. Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts', in *California Western International Law Journal* (2006) 177.

[79] See among others Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004).

[80] While Article 2(d) Statue of the ICTY 1993, UN Doc. S/25704 Annex, 25 May 1993, condemns the wanton extensive destruction and appropriation of property not justified by military necessity, Article 3(b) is aimed at prosecuting people for the wanton destruction of cities not justified by military necessity.

[81] See Article 4(2) of the Hague Convention.

an high military officer;[82] and the absolute immunity of cultural property 'under enhanced protection' that may be waived only when this property is used as a military objective.[83]

The only concrete attempt at defining military necessity with respect to cultural property can be identified in Article 6 Second Protocol to the Hague Convention, which establishes that 'imperative' military necessity may excuse an attack against a cultural object, if this object has been transformed in a military objective and the attack is the only feasible alternative to obtain military advantage.[84]

Besides, the Geneva Conventions and their Protocols do not mention the waiver of military necessity. Nevertheless, Articles 52 and 53 Geneva Protocol I, dealing with the protection of civilian and cultural objects respectively, formulate the concept of 'military objective' on the basis of which attacks against civilian and cultural property may be justified if such property is concretely used for military purposes and its destruction brings about a definitive contribution to military action.

The ICTY has interpreted the notion of 'military necessity', mentioned in Articles 2(d) and 3(b) ICTY Statute, consistent with Articles 52 and 53 Geneva Protocol I. In line with this interpretative approach, one might argue that the waiver of military necessity and the justification of attacking cultural property, which is actually used for military purposes, overlap. Nevertheless, some legal author has underlined that the 'military exception' provided for in Geneva Protocol I is less permissive than the waiver of military necessity as sanctioned in Article 6 Second Protocol to the Hague Convention. In fact, according to Articles 52 and 53 Geneva Protocol I, cultural objects may be categorised as military objectives only when their actual use is no longer aimed at carrying out cultural activities, but at accomplishing military purposes. Thus, the regime of Geneva Protocol I should be likened to the protection that Articles 12 and 13 Second Protocol to the Hague Convention provides for cultural property 'under enhanced protection'.[85]

Regardless of this doctrinal argument, the ICTY has patently limited the recognition of the admissibility of the waiver of military necessity with respect to serious breaches affecting cultural

[82] Article 11(2) of the Hague Convention. For the view that this norm of the Hague Convention does not draw a significant distinction between 'imperative' and 'unavoidable' necessity see C.J.S. Forrest, cit. *supra* note 76 at 209.
[83] See Articles 12 and 13 of the Second Protocol to the Hague Convention. Article 13 of the Second Protocol specifies the concrete circumstances in which military action may affect cultural property 'under enhanced protection' that mainly correspond to the case in which such property has lost this particular status.
[84] For the relevance of the introduction of a concrete criterion, such as the concept of 'military objective', for the delimitation of the scope of the definition of 'military necessity' in Article 6 of the 1999 Protocol see A. Lopes Fabris, 'Military Necessity under the 1954 Hague Convention', *Santander Art and Culture Law Review* (2015) 275, at 283. For a detailed overview of this issue see also O'Keefe, *supra* note 46.
[85] See O'Keefe, *supra* note 46, at 505.

property.[86] In particular, the ICTY upheld that, even if the attacks against civil and religious buildings were allowed by military necessity, these attacks should have been proportional to the strength of the civilian resistance, which was minimal in this specific case.[87] In this regard, some scholars highlight that, when military necessity is invoked to justify an attack against cultural property, the standard of proportionality should be assessed on the basis of criteria other than the quantity of the objects stricken. In particular, the value of cultural property should be taken into account so as to exclude the legitimacy of the waiver of military necessity in the case of damage or, even worse, destruction of cultural objects of inestimable value.[88]

5. The Element of Damage

In certain circumstances, the ascertainment of the presence of damage may be necessary to classify a conduct as illicit according to international law. In particular, the violation of the prohibition of intentional destruction of cultural property only occurs if harm, most precisely destruction, affects such property.

Conversely, damage does not seem to be required for the breach of the prohibition of performing "acts of hostility directed against the historic monuments" as provided for in Articles 53 and 16 Geneva Protocols I and II respectively. Thus, the deliberate bombing of an area where historic properties are located would *per se* entail a breach of the obligation established in these articles even if this conduct did not bring about detrimental effects.[89]

As to less serious infringements concerning cultural property, State responsibility may arise as a consequence of the mere omission of complying with the obligations of procedural character, such as, for example, the duty of the territorial State to mark cultural property under special protection with an emblem as is provided for in Article 10 Hague Convention.[90] In this case the

[86] In the *Brdanin* case, the Tribunal denied that the massive destruction of private and religious buildings was justified by reasons of military necessity since these building could not be considered as military objectives. *Brdanin* case, cit. *supra* note 53, para 596.

[87] *Ibid.*, para 639. For the view that proportionality must govern military action when goods of special value, such as cultural property, are at issue see Forrest, cit. *supra* note 76, at 194.

[88] See O'Keefe, *supra* 46, at 501. For a recent view upholding that the waiver of military necessity should be only allowed with respect an attack against cultural property of outstanding value only when this attack is the only viable military action see Judge Pocar's dissenting opinion in the ICTY Appeals ruling of the *Prlic* case. ICTY, Appeals Chamber, *Prosecutor v. Jadranko Prlic and others*, Judgment 29 November 2017, IT-04-74-A, Judge Pocar Dissenting Opinion, at 8.

[89] See M. Bothe, K. J. Partsch, and W. A. Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Convention of 1949*, (2013). For the view that the presence of material damage is not necessary to allow States other than the injured State to claim the breach of an *erga omnes* obligation see A. Gianelli 'Il contributo della dottrina italiana al tema della responsabilità internazionale degli Stati per fatto illecito: qualche osservazione', *Rivista di Diritto Internazionale* (2016) 1042, at 1056.

[90] For a thorough exam of the norms of the Hague Convention concerning emblems see Odendahl cit. *supra* note 21, 104.

breach of Article 10 occurs even if no detrimental consequences originate from it. Conversely, when a cultural object or site under special protection is destroyed by another State, the omission of the territorial State of placing the required emblem may envisage a more serious breach of law, such as the violation of the prohibition, sanctioned in Article 4 Hague Convention, of using "the property […] for purposes which are likely to expose it to destruction or damage".

In short, the legal grounds on the basis of which State responsibility is acknowledged may significantly change or be totally excluded depending on whether or not the element of damage is present.

6. Conclusive Remarks

In short, the content of international obligations and the modalities in which the breaches of such obligations occur may affect the application of the 'secondary rules', i.e. the norms on State responsibility. It is therefore essential to ascertain the concrete features of a wrongful act in order to facilitate the prevention and punishment of the violations of the international obligations concerning cultural property, such as, in particular, the most serious breaches that may entail the disappearance of unique or exceptional cultural pieces or sites, especially those of outstanding universal value.

As far as serious violations against cultural property are concerned, while proper international regimes of punishment of individual criminal responsibility have been established and successfully applied in the last two decades, corresponding legal procedures do not yet exist with regard to the "multilateral response to State responsibility" for international crimes.[91]

This lacuna of international humanitarian and criminal law makes the application of general norms on States responsibility the only suitable instrument for ascertaining whether or not an international crime has been perpetrated by a State, in particular during an armed conflict.[92]

Nevertheless, once the applicability of international norms on State responsibility is allowed as a consequence of the breach of an international obligation, such applicability cannot be excluded on the basis of the level of seriousness of the breach. Thus, the existence of treaty norms, such as the abovementioned Article 38 Second Protocol to the Hague Convention, seems to promote the applicability of international norms on State responsibility with respect to the violation of any obligations concerning the protection of cultural property.

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[91] See A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', *International Comparative Law Quarterly (ICLQ)* (2003) 615, 627.

[92] For the need to apply general norms on State responsibility to the cases of responsibility for breaches of humanitarian law in order to fill the lacunae of humanitarian law treaties see Sassòli, *supra* note 3, 404.

III. The Attribution of Wrongful Conducts Entailing the Destruction of Cultural Property to States

A. State Responsibility for the Wrongful Conducts of State Organs

According to Article 2 Draft Articles, internationally wrongful acts, from which State responsibility arises, occur when two essential elements are present: first, these acts are attributable to a State, the so-called subjective element, and, second, they entail a breach of international law, the objective element. The Draft Articles acknowledge several legal grounds allowing the attribution of a wrongful act to a State.

First of all, the responsibility of a State arises from the conduct of its organs, as provided by Article 4 Draft Articles. Thus, when a domestic organ, whether legislative, judicial or administrative, whether central or local, does not adopt preventative measures required under international law for the protection and conservation of cultural property, this may generate the responsibility of the State to which this organ belongs for the damage of such property,[93] as the ICJ expressly stated in its 1962 judgment of the *Temple* case.[94] The only exception to this general principle is shown by Article 34 WHC establishing the so-called 'federal clause' on the basis of which the responsibility of a federal State is excluded when its constituent States have the exclusive competence of managing cultural heritage under domestic law and the federal State has made its member States aware of the duty to adopt implementing measures of international obligations. This norm must be deemed to be *lex specialis* with respect to general international law, under which the wrongful behaviour of constituent States always entails the responsibility of federal States.[95]

According to general international law, a wrongful behaviour of an organ may be attributable to a State even in the cases in which this behaviour also entails the responsibility of the individual

[93] For the view that the definition of the concept of 'State organ' is essential for the ascertainment of State responsibility see F. Salerno, 'Genesi e usi della nozione di organo nella dottrina internazionalista italiana', *Rivista di diritto internazionale* (2009) 921, at 924. According to this author's view, an organ is an individual or a body that is defined as such by domestic law, *ibid.*, 939. For the opinion that the attribution of a conduct with respect to a State has factual nature even in the case in which this conduct is performed by an official State organ see G. Arangio Ruiz, 'State Responsibility Revised. The Factual Nature of the Attribution of Conduct to a State', in *Quaderni della Rivista di diritto internazionale, Supplemento* (2017) 69.

[94] The ICJ recognised the obligation of Thailand to restore, to Cambodia, the objects that had been removed from the Temple by the Thai authorities during their occupation of that area. ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 15 June 1962, ICJ Reports 1962, 35.

[95] The priority of the provisions of special character concerning the attribution of responsibility is also recognised in Article 55 of the Draft articles. For the view that the independence of constituent States with respect to the federal State is not a reason that may justifies the non-attribution of a conduct to the federal State, see ILC, Fifty-third Session Report, Commentaries to the Draft articles on Responsibility of States for Internationally Wrongful Acts, A/56/10, at 42. See also B. Boer, 'Article 34 the Federal Clause', in F. Francioni (ed.), *The 1972 World Heritage Convention: a Commentary* (2008) 355-361.

organ due the strict link existing between the State and its organs, as the ICJ upheld in the *Genocide* case.[96] The same reasoning is also espoused in Article 58 Draft Articles.

Nevertheless, some doubts still arise in literature with regard to the cases in which lower State organs have perpetrated international crimes the occurrence of which is determined by the existence of a specific psychological element, such as *dolus specialis* with respect to genocide or, with reference to the clear intent to destroy in crimes against cultural property. According to some legal author, while the attribution of ordinary breaches of international law of organs is immediate *vis-à-vis* the State to which these organs belong, when the conduct of organs entails aggravate responsibility, a stricter standard of proofs would be required in order to confirm the interconnection between the State apparatus and the conduct of its organs.[97] However, in the view of the ILC, Article 4 Draft Articles must be applied regardless of any distinction between ordinary or aggravated responsibility arising from the different conducts of State organs.[98]

Recent case-law seems to confirm the rule laid down in Article 4 Draft Articles. In the *Stela of Matara* case, the Eritrea-Ethiopia Claims Commission acknowledged the responsibility of Ethiopia although it was not certain whether the destruction was authorised or condoned by the government or it was the result of the autonomous decision of some soldiers.[99]

In sum, international practice has so far provided enough evidence to support the view that a State cannot escape the attribution of an illicit conduct that one of its organs has perpetrated against cultural property.

B. State Responsibility Arising from the Wrongful Conducts of Private Persons

The direct attribution of responsibility to a State also affects the conduct of private persons or entities exercising elements of governmental authority on behalf of this State as contemplated by Article 5 Draft Articles. This is particularly relevant as to the issue of the conservation of cultural property in those cases in which States have formally transferred the competence of managing their

[96] In this case the ICJ acknowledged that individual and State responsibility may co-exist when international crimes are at issue. ICJ, *Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 11 July 1996, ICJ Reports 1996, para 32. Similarly, in the Furundzija case, the ICTY upheld that State responsibility arises when State organs perpetrate or omit to punish international crimes performed by individuals. See ICTY, Trial Chamber, *Prosecutor v. Anto Furundzija*, Judgment 10 December 1998, IT-95-17/1-T, para 142. For an overview of this matter see Dupuy, cit. *supra* note 60, 1096.

[97] For the view that the responsibility for wrongful acts of heads of States and other high officers may be easily attributed to States while crimes of lower organs can be unknown by a State and, thus, their attribution to this State may require higher standards of proof see Nollkaemper, cit. *supra* note 89, 632.

[98] See Commentary to Article 4 of the Draft articles, cit. *supra* note 65, 41. For an overview of the problems following the adoption of the Draft articles see J. Crawford and S. Olleson, 'The Continuing Debate on a UN Convention on State Responsibility', *ICLQ* (2005), at 959-971 and Gaja, cit. *supra* note 14, 981-992

[99] *Stela of Matara* case cit. *supra* note 65, 149.

cultural properties to private agencies. As an example, one can mention the cases in which private persons have been designated by a State to ensure the conservation of buildings of outstanding universal value while, under Article 4 WHC, this obligation of conservation entails a primary duty of a State.[100] The concern for the privatisation and private management of cultural property has been raised by the Parliamentary Assembly of the Council of Europe that has upheld that privatisation and private management should not "absolve the [S]tate from its responsibility to ensure" the protection of cultural property.[101]

Moreover, the violation of the international obligation of protecting cultural property may occur during armed conflicts at the hands of private persons and entities, such as military contractors. In these circumstances, the ground of attribution of the illicit conduct of the contractors with respect to the contracting State may vary according to the diverse strength of the connection between the State and contractors. The attribution of the conduct of private military contractors to the State is based on Article 5 Draft Articles, which relies on the criterion of the contractors being empowered to exercise governmental authority by the law of the State. Conversely, in the cases in which private military contractors enjoy wide autonomy and do not participate in the exercise of governmental functions, State responsibility is founded on the same ground as responsibility deriving from illicit conduct of common private actors. These diverse bases of attribution of illicit conducts may generate some lacunae in the determination of State responsibility even in cases of serious offences perpetrated by private contractors against cultural property, such as intentional destruction.[102] For this reason, some codes of good practices, such as the so-called Montreux Document, have been adopted in recent years in order to guide States in the selection and training of private military companies that are going to operate on behalf of the States themselves.[103]

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[100] For the increasing privatization of the management of cultural heritage see K.G. Siehr, 'Immovable Cultural Heritage at Risk: Past – Present – Future', *International Journal of Cultural Property* (2014) 267, at 274.

[101] Council of Europe, Parliamentary Assembly, Recommendation 1730, 25 November 2005, 'The private management of cultural property', para 6.

[102] For the diverse legal grounds of attribution of the conduct of private military contractors vis-à-vis the contracting State see C. Hopper, 'Passing the Buck: State Responsibility for Private Military Companies', *EJIL* (2008) 989, at 991-2. For a thorough analysis of the issue of the involvement of private military contractors in armed conflicts see A.F. Vrdoljak, 'Women and private military and security companies', in F. Francioni and N. Ronzitti (eds.), *War by Contract. Human Rights, International Humanitarian Law and the Regulation of Private Military and Security Companies* (2011) 280-298. For the view that private contractors generally fall out of a State's organization as it is demonstrated by the fact that they cannot invoke functional immunity as State organs, see Salerno cit. *supra* note 91, 954. In contrast, another legal author recognises that a particularly strict relationship between a State and private contractors may allow to consider the latter as State organs and, thus, attribute private illicit conducts with respect to States according to Article 4 of the Draft articles see M. Hebie, 'L'attribution aux États des actes des sociétés militaires privées et de leurs employés en vertu de l'article 4 du Projet d'articles sur la responsabilité internationale des États', in R. Wolfrum (ed.) *Select Proceedings of the Third Biennial Conference of the European Society of International Law* (2008) 598.

[103] See Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, Montreux, 17 September 2008. The Document was adopted by 17 States, including the UK and US, and was recorded by the UN General Assembly and the Security Council. GA and SC, Agenda item 76, Status of the Protocols Additional to the Geneva Conventions of 1949

In general terms, the conduct of private persons may be only attributed to a State when these persons act on the instructions or under the direction or control of the State itself. This is the rule stated in Article 8 Draft Articles. In these circumstances, the behaviour at issue is a private conduct that is only indirectly recognised to be the conduct of the State in light of the effective control exercised by the State *vis-à-vis* private actors.[104] As the ICJ has highlighted in several rulings, the extent of the scope of the definition of 'effective control' may be determining to attribute the illicit conduct of a private person to a State. According to the 'effective control' standard, which has firstly acknowledged in the *Nicaragua* case[105] and, then, reaffirmed in the *Genocide* case,[106] State responsibility only occurs when the State has control over "the operations in the course of which the alleged violations were committed" and can foresee and, thus, prevent the private conduct.[107] Consistent with the 'effective control' test, the conduct of private military corps entailing a wrongful act cannot be attributed to a State when this act only occurs when the specific intent of the wrongdoer, the so-called *dolus specialis*, exists,[108] such as, for example, in the case of perpetration of the intentional destruction of cultural property. A different conclusion might be reached according to the concept of 'overall control', which was formulated by the ICTY in the *Tadic* case,[109] but that was not embraced by the ICJ in the *Genocide* case.[110]

In keeping with the 'effective control' standard, factors other than the existence of a factual relationship between a State and private actors must be therefore taken into account in order to determine whether or not a private conduct may be attributed to a State.

First of all, the ascertainment of the standard of due diligence of States is essential to acknowledge if a State has violated the obligation of preventing breaches (especially serious

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and relating to the protection of victims of armed conflicts, A/63/467–S/2008/636. For a detailed analysis of this document see A. F. Vrdoljak, 'Cultural Heritage, Human Rights and the Privatisation of War', in A. Durbach and L. Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses* (2017). For an overview on this matter see Francioni and Ronzitti, cit. *supra* note 100.

[104] For a thorough exam of this matter see C. Kress, 'L'organe 'de facto' en droit international: réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents', *Revue Général de Droit International Public* (2001), 93-144 and M. Milanovic, 'State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken', in *Leiden Journal of International Law* (2009) 307.

[105] See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports 1986, at paras 101-2.

[106] *Genocide* case cit. *supra* note 61.

[107] For the view that the 'effective control' test leads to a narrow interpretation of the scope of the responsibility of States with respect to the conduct of individuals acting under State control without precise instructions see Arangio Ruiz cit. *supra* note 91, 95-96.

[108] *Genocide* case cit. *supra* note 61, para 376. For a strong dissenting opinion against this argument see A. Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', in *Journal of International Criminal Justice* (2007) 875, at 879. For an analysis of the attribution of the conduct of private armed groups with respect to a State in the *Genocide* judgment see Milanovic cit. *supra* note 102, 307.

[109] See ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadic*, Judgment 15 July 1999, IT-94-1-A. On the basis of the 'overall control' standard, when a State has the complete control over an organisation or group of private persons, its responsibility cannot be excluded for all the activities performed by these persons even if some of these activities have not been specifically directed by the State.

[110] *Genocide* case cit. *supra* note 61, paras 238-41.

breaches) of international law, in particular when these breaches have been perpetrated during armed conflicts by private persons such as military contractors or foreign paramilitary troops or insurrectional movements supported and led by that State.[111]

In addition, the intent of a State may be also crucial to establish if a private conduct may be attributed to that State. This is particularly so in the cases in which the intent of the private actors is relevant to define the type of breach that has been perpetrated, such as, for example, the intentional destruction of cultural property.[112]

Thus, while in the cases of ordinary violations perpetrated by private actors, the standard of 'effective control' merely asks for the ascertainment of the existence of a strict link between the State and activities performed by the private actors, a stricter standard of review, both of the intent and due diligence of States is required when the attribution of more serious breaches, such as international crimes, is at issue.[113]

This analysis also appears necessary to determine whether the conditions exist to affirm the shared responsibility between States and non-State actors.[114]

C. The Attribution of Responsibility for the Illicit Conducts of Insurrectional Movements

A peculiar case of attribution of a wrongful conduct to a State occurs when this conduct has been carried out by an insurrectional movement and is attributed to the new State originating from

[111] For the view that the scope of the concept of due diligence may vary according to the different international obligations referring to it see E. Fasoli, 'State Responsibility and the Reparation of Non-Economic Losses related to Climate Change under the Paris Agreement', *Rivista di diritto internazionale* (2018) 90, at 94-96. This view is also confirmed by the advisory opinion of the Seabed Dispute Chamber relating to activities performed in the Area. See ITLOS, Seabed Disputes, *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, n. 17, 1 February 2011, at para 117 available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf. For an overall analysis on this matter see R. Pisillo Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', in *German Yearbook of International Law (GYIL)* (1992) 9-51.

[112] In the *Strugar* case, the ICTY attached great importance to the relationship between the official government and the individuals that perpetrated crimes as *de facto* organs, namely the wanton attacks against cultural properties in the city of Dubrovnik. The ICTY also recognised that the superior-subordinate relationship does not necessarily have to arise from the superior's formal or *de jure* status. See *Strugar* case, cit. *supra* note 51, para 362-366. The same reasoning had been embraced in ICTY's previous ruling relating to the *Tadic* case in which the criminal conducts of individuals could be classified as war crimes, only if the perpetrators were considered to act under the control of the government. See *Tadic* case cit. *supra* note 107, para 98. For the difficulty of ascertaining the State's intent and due diligence standard in cases of international crimes performed by individuals see Nollkaemper, cit. *supra* note 89, at 634.

[113] See *supra* Section II.B.3. For a view highlighting the relevance of due diligence for the attribution of the conduct of private actors to States see D'Aspremont *et al*., cit. *supra* note 62, 54.

[114] For the possibility of excluding the shared responsibility between States and private actors as a result of the application of the standards of due diligence with respect to States see Trapp, 'Shared Responsibility and Non-State Terrorist Actors', *Neth. ILR* (2015) 141, at 144.

the insurrection.[115] Article 10 Draft Articles recognises the responsibility of the new State by reason of the continuity existing between the insurrectional movement and the government of this State. This norm may be useful to identify the State to which an illicit conduct may be attributed in the cases in which insurrectional movements had breached the obligations concerning the protection of cultural property while these movements were fighting for their independence and, ultimately, in their successful achievement of statehood. This type of attribution of the conduct of private actors has been also acknowledged by the ICJ, in the *Croatia v. Serbia* case with regard to the violations of customary law perpetrated by the insurrectional group that, subsequently, became the official government of Serbia. Nevertheless, the ICJ did not verify whether or not the rule established in Article 10 Draft Articles reflects a norm of customary nature.[116]

Similarly, such a customary norm cannot even be recognised according to State practice in conclusive terms. In fact, only some French courts implicitly seem to have acknowledged the responsibility of the new-born States for the wrongful acts of insurrectional movements.[117]

In short, the criterion of attribution of responsibility established in Article 10 Draft Articles is scarcely applied in international practice mainly because of political reasons, i.e. the purpose of facilitating the consolidation and development of newly born States. Thus, the alternative is preferred of prosecuting and punishing individuals through criminal law mechanisms, whether of national or international character.[118]

Certainly, this trend within current international practice does not make bode well for the possibility of recognising, in the near future, State responsibility for the illicit destruction of cultural properties perpetrated by the insurrectional movements from which a State originated.

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[115] Under Article 13 of the Draft articles, international responsibility should only arise from the breach of norms that are in force for the State that is charged with such breach. Since the new-born State did not exist at the time of the occurrence of the breach, it should not be considered responsible.

[116] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, Merits, 3 February 2015, ICJ Reports 2015, para 105. The ICJ did not scrutinize Article 10 in depth in this case because it had already denied its jurisdiction over the conduct of insurrectional groups, to which this ground of attribution should have been applied.

[117] The Conseil d'Etat stated that France could not be considered to be responsible for the illicit conducts perpetrated, in the Algerian territory, by the *Front de Libération National* (the Algerian liberation movement that rose up against the French colonial government) due to the fact that these conducts should have been attributed to Algeria, namely the new-born State. Conseil d'Etat, 2/6 SSR, *Hespel* case no. 11092, 5 Dec. 1980 and Conseil d'Etat, *Grillo* case no. 178498, 28 July 1999, as quoted by P. Dumberry, 'New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement', in *EJIL* (2006) 605, at 615.

[118] The scarce application of Article 10 of Draft articles in international practice is highlighted by Sassòli, cit. *supra* note 3, 410.

D. Joint Responsibility of States

The attribution of a wrongful behaviour to a State may also occur as a consequence of the interference of this State with respect to the conduct of another State. Articles 16, 17, and 18 Draft Articles establish that, in the cases of assistance, control, or coercion over the commission of a wrongful act of another State, such act is also attributable to the controlling or coercing State.

The major difference between these situations is identified in the diverse modalities of attribution of illicit conducts. Under Articles 16 and 17, the wrongful behaviour may be attributed to the assisting or controlling State only if it is bound by the international obligation that has been violated by the actions of the assisted or controlled State. Thus, if the obligation that has been violated belongs to a treaty to which the assisting or controlling State is not a party, this State cannot be considered responsible for the breach of such obligation as a result of the application of the *pacta tertiis* principle. In this regard, it appears to be essential to determine whether an international obligation has customary or treaty nature. As observed above,[119] this problem also affects some crucial obligation, such as the prohibition of destroying cultural property during time of peace.

Conversely, under Article 18, the coercing State is considered responsible for the breach of international norms regardless of the fact that it is not bound by these norms. This consequence is due to the fact that coercion usually precludes the attribution of responsibility to the coerced State.[120]

While the case in which a State assists or exercises control over another State perpetrating a breach of international law is quite common so as to allow the ICJ to consider Article 16 Draft Articles as reflecting a customary rule in the *Genocide* case,[121] the coercion of States may appear rare in the contemporary international community, as the ILC has affirmed in its commentary of Article 18.[122]

Nevertheless, domestic instability of many States facing long internal conflicts or economic crises may lead to weaken the capacity of these States to oppose external pressure of third States. Thus, the recognition of the responsibility of weak or failed States may not only be considered unfair with respect to these States, but it also appears to be ineffective for the purpose of ensuring

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[119] See *supra* Section II.B.

[120] For the view that the recognition of the unconditional responsibility of coercing State is an act of fairness with respect to the victims of the wrongful behaviour of a coerced State the responsibility of which is precluded under international law, see ILC Report, cit. *supra* note 93, 70.

[121] See *Genocide* case cit. *supra* note 61, para 420. For a doctrinal view recognising the customary character of the rule provided for in Article 16 of the Draft articles see R. O'Keefe, 'Article 98 Agreements, the Law of Treaties and the Law of State Responsibility', in M. Szabo (ed.), *State Responsibility and the Law of Treaties* (2010) 51, at 53.

[122] ILC Report, cit. *supra* note 93, 69-70.

the compliance with international obligations the breach of which is ascribed to weak States.[123] In these circumstances, the advocates of the R2P doctrine envisage the right of third States to intervene in order to preserve fundamental rights.

Articles 16, 17, and 18 Draft Articles may be helpful for the attribution of wrongful behaviours affecting cultural property, for example, when a State assists or, even worse, obliges another country to destroy objects belonging to its cultural heritage in breach of treaty norms, such as Article 6(3) WHC.

Thus, it appears to be very important to identify the situations in which weak States do not have any concrete means to oppose the instructions of a third State of removing or destroying cultural properties. In these cases, the application of Article 18 Draft Articles, to the extent that international treaty obligations may become binding *vis-à-vis* third States, would be extremely beneficial for the achievement of the final objective of safeguarding cultural property.

Finally, some scholars, and the ICJ itself,[124] have recently hypothesised that the rule established in Article 16 Draft Articles and aimed at regulating the concurring responsibility of the assisting and assisted States for the breach of an international obligation may be also beneficial to recognise State responsibility on the ground of the complicity occurring between a State and private actors.[125] Most precisely, complicity occurs when private persons act autonomously, but concertedly with a State. Although international law has traditionally recognised scarce autonomy of non-State actors, in recent times, the role of private persons has undeniably increased in terms of participation in international policy, as the proliferation of private armed companies and the enhanced military capacity of unofficial armed groups have demonstrated. This is also so with regard to the illicit conducts affecting cultural property. For example, the unlawful destruction of cultural objects perpetrated by unofficial military corps during internal armed conflicts may be assisted by a complicit foreign State that does not nevertheless exercise an effective control over the wrongdoer military groups. Thus, new legal grounds, such as complicity between State and private actors, must be developed in order to attribute illicit conducts to States operating together with

[123] For the relevance of the incapacity of failed and weak States of opposing to the external pressure of third State and non-State actors for the purpose of the attribution of illicit conducts see Trapp, cit. *supra* note 112, 154-155.

[124] See *Genocide* case cit. *supra* note 61, paras 418-436. For an analysis of the issue of complicity as it results in the *Genocide* case see E. Savarese, 'Complicité de l'Etat dans la Perpétration d'Actes de Génocide: le Notions Contiguës et la Nature de la Norme En marge de la décision Application de la convention sur la prévention et la répression du crime de génocide (Bosnie- Herzégovine c. Serbie et Monténégro)', *Annuaire Français de Droit International* (*AFDI*) (2007) 280.

[125] According to the 'complicity' theory, the attribution of responsibility to a State is only envisaged when the relationship between that State and private actors cannot be categorised according to the 'effective control' standard, which remains the primary rule of attribution of a private wrongful conduct to a State. See Savarese cit. *supra* note 122, 290.

persons that may have diverse legal capacity and political power within the international legal order.[126]

Therefore, the enforcement of the substantive obligations relating to the protection of cultural property can be most effectively achieved when the concretely responsible actors are identified.

IV. Circumstances Precluding State Responsibility

Once the breach of an international obligation occurs and is attributed to a State, a wrongful act exists and legal consequences can take place unless the wrongdoer State demonstrates that its conduct is justified by one of the circumstances precluding wrongfulness provided for under international law. These circumstances apply to any breach of international law and, thus, should be also valid for the violation of the obligations concerning cultural property.

Nevertheless, both cultural property, as a whole, and its distinct components are deemed to be goods of special interest under international and domestic law and, thus, are not treated as ordinary belongings.[127] Moreover, the existence of several multilateral conventions safeguarding cultural property in the interest of individuals, peoples, and the international community demonstrates that the breaches of international obligations relating to cultural property must be treated more severely than other violations of international law. This severe approach also affects the application of the circumstances precluding wrongfulness. Actually, Article 26 Draft Articles already establishes a general limitation with respect to these circumstances, that is the exclusion of their application in cases of breach of peremptory norms. As indicated above, the category of peremptory norms is pretty narrow and obligations relating to the protection of cultural property have not so far reached this category.

Under Article 20 Draft Articles, the consent of a State may justify the illicit conduct of the wrongdoer only if this conduct entails an ordinary breach of international law and the State granting the consent is the only entitled person to authorise the derogation from the international obligation at issue.[128] These types of bilateral obligations are quite rare in cultural property law due to the special interests involved. Thus, the violation of the international obligations relating to cultural property, which a State may owe to other States, individuals, and/or the international community, as

[126] For an overall scrutiny of the matter of the complicity between States and private actors see H. P. Aust, *Complicity and the Law of State Responsibility* (2011)

[127] International law recognises the special status of some goods, such as cultural heritage and, in the field of environmental law, biodiversity. This similarity of cultural and environmental common goods is also highlighted by the UN. See UN, Framework Convention on Climate Change, Technical Paper, 'Non-economic losses in the context of the work programme on loss and damage', 9 October 2013, FCCC/TP/2013/2.

[128] For the view that consent is valid only if it is granted by all the right-holders see ILC Report, cit. *supra* note 93, 73 and A. Abbas, 'Consent Precluding State Responsibility: A Critical Analysis', in *ICLQ* (2004) 211, at 215-216.

stated, for instance, in Articles 2(3) UHC, cannot be validly authorised by the mere consent of a State even if such violation does not entail a breach of a peremptory norm.[129] Therefore, although the exclusive right of coastal States "to regulate and authorize activities directed at underwater cultural heritage in their […] territorial sea" is recognised under Article 7(1) UHC, the destruction of cultural objects at sea cannot be validly authorised by a State on the allegation that these objects are located in a marine area under its jurisdiction. The conservation of underwater cultural heritage is in fact an obligation that States parties to the UHC must ensure for the benefit of humanity.[130]

Other circumstances precluding wrongfulness, such as force majeure, self-defence, distress, and necessity also operate in a very stringent manner, particularly with respect to illicit conducts affecting cultural property.

The pleas of self-defence, distress, and necessity, provided for in Articles 21, 24, and 25 Draft Articles, generally allow the preclusion of wrongfulness of intentional behaviours that were performed as the only way to safeguard human lives or other essential interests.[131] In addition, some international treaties of humanitarian law, such as the Geneva Conventions, exclude the applicability of these legal grounds of preclusion with respect to the breaches of the obligations provided therein, the so-called obligations of total restraint. In fact, humanitarian law is, in itself, aimed at preserving essential interests the safeguard of which does not allow any exception. Among these obligations, the duty to protect cultural objects and sites, established in Articles 53 and 16 of Geneva Protocols I and II respectively, is worth mentioning.

Finally, one cannot exclude that the need to preserve cultural property may be invoked as a justification of an otherwise illicit conduct. As an example, some restrictions of property rights of foreign nationals on cultural objects, which *prima facie* may clash with the international standards of justice on the treatment of aliens, may be justified by the need to prevent illicit export of cultural properties of great importance for the national heritage of the State, as British judges upheld in the *Iran v. the Barakat Galleries Ltd.* case.[132] Similarly, the occupation of the territory of another State

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[129] In this regard, some legal authors have formulated the definition of 'legal injury', according to which the breach of the obligations affecting the general interest also brings about the non-material and non-economically quantifiable damage that States other than the concretely injured State may suffer as a consequence of the mere occurrence of the violation. For this view see B. Stern, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.L sur la responsabilité des États', *AFDI* (2001) 3 and Fasoli, cit. *supra* note 109, 111.

[130] See Rules concerning activities directed at underwater cultural heritage, Annex to the UHC. For the view highlighting the general interest in the protection of underwater cultural heritage according to the UHC, see F. Francioni, cit. *supra* note 50 at 1210 and Carducci cit. *supra* note 48 at 432.

[131] The plea of self-defence must always comply with the requirements of proportionality and necessity as well as the obligations of total restraint. See ILC Report, cit. *supra* note 93, 75. For an overall analysis see D. Bowett, *Self-Defence in International Law* (1958).

[132] See *Government of Iran v. the Barakat Galleries Ltd*., 2009 Q.B. 22, as mentioned by R. Kirkwood Paterson and Marc-André Renold, 'Foreign Culture: Export Controls on Material of Foreign Origin', in J.A.R. Nafzinger and R. Kirkwood Paterson (eds.), *Handbook on the Law of Cultural Heritage and International Trade* (2014) 571, at 584. See

could be excused by the necessity of protecting a cultural or religious site that is located in that territory. All these examples mainly affect the plea of necessity. However, even in the case in which an illicit conduct is aimed at preserving cultural property, a State must demonstrate that this conduct is proportionate and necessary in relation to the aim pursued.[133] This argument has been espoused by some domestic courts in order to deny the jurisdictional immunity of foreign States when the acquisition of a cultural object has entailed a breach of international law.[134]

In addition, international illicit conducts, the justification of which is sought on the ground of the need to safeguard cultural property, must be assessed in terms of proportionality in particular when these conducts may entail the violation of human rights. Although the conservation of cultural property is at the present considered as an essential element to guarantee both individual and collective cultural rights, other fundamental human rights, such as the rights to life or to human treatment, cannot be sacrificed in the name of culture and its preservation.[135]

Similar to other international norms, such as those concerning State immunity, international rules on State responsibility, including those dealing with circumstances precluding wrongfulness, must be therefore applied according to the diverse substantive obligations the violation of which is alleged.[136]

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also https://plone.unige.ch/art-adr/cases-affaires/jiroft-collection-2013-iran-v-barakat-galleries. In this case, the British Court allowed the return of some cultural objects to Iran even if the title claimed by Iran was based exclusively on Iranian national ownership law.

[133] For the view that the legitimacy and scope of the invocation of the need to protect superior interests as a reason of preclusion of wrongfulness are still vague under international law see G. Gaja, 'La possibilité d'invoquer l'état de nécessité pour protéger les intérêts de la communauté internationale', in *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007) 417.

[134] In the *Altmann* case, the plaintiff sought the restitution of some Klimt's paintings that had belonged to Altmann's ancestors and had been taken by Austria following the events of Nazi occupation. The US Court of Appeals denied the jurisdictional immunity of Austria on the assumption that the paintings at issue had been appropriated by the then Austrian government in violation of international law. Therefore, this appropriation could not be considered as a valid sovereign act with respect to which US legislation concerning State immunity had to be applied. See *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Circuit, 2002), paras 43-47. For an extensive analysis of domestic case-law concerning State immunity in cases of restitution of cultural property see R.A. Pavoni, 'Sovereign Immunity and the Enforcement of International Cultural Property Law', in F. Francioni and J. Gordley (eds.), *Enforcing International Cultural Heritage Law* (2013) 79-109.

[135] The need to preserve a core set of universal human rights in order to guarantee the existence itself of humanity is recognised by Lenzerini, *supra* note 13, at 244. For an example of an international act condemning serious violations of human rights that are perpetrated with the aim of preserving cultural intangible heritage, such as religious and cultural traditions, see ECOSOC, Commission on Human Rights, Integration of the Human Rights of Women and the Gender Perspective. Violence against Women. Report of the Special Rapporteur Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 2000/49, Cultural practices in the family that are violent towards women, 31 January 2002, E/CN.4/2002/83.

[136] See Gaja, cit. *supra* note 14.

V. Consequences Arising from State Responsibility

A. Invocation of Responsibility and Injured States

The ascertainment of State responsibility needs to bring about legal and practical consequences in order to be effective. These consequences may entail the possibility of other States of invoking the responsibility of the wrongdoer State so as to achieve some form of reparation or adopt countermeasures as a result of the breach of law. This issue is also dealt with in Parts II and III Draft Articles the application of which may be beneficial to identify which legal and practical consequences are allowed under international law with respect to the breaches resulting in the destruction of cultural property.

Consequences may differ with respect to the diverse character and content of the obligations that a State owes to another State, several States, the international community or even persons or entities other than a State.

Article 42 Draft Articles recognises the right of the injured State or States[137] to invoke the responsibility of the wrongdoer State. The status of injured State can be easily identified in the case of the breach of bilateral obligations, such as, for example, the duty to conserve cultural objects that a State has temporarily borrowed from another State according to a loan agreement.[138] However, responsibility affecting bilateral relationships also occurs when the violation concerns a norm of a multilateral treaty or of customary nature the compliance with which may also involve the interest of the international community. In fact, the right to invoke responsibility does not have to be assimilated to the interest in the achievement of the aim for which an obligation was established. For example, although the preservation of underwater cultural heritage must be ensured "for the benefit of humanity" according to Article 2(3) UHC, the right to invoke the responsibility for the damage to cultural objects that are located in the territorial sea of a State belongs to the latter State,[139] which, in this context, has the role of the 'injured State'. A concrete example of the distinction between the right to invoke responsibility and the interest in the compliance with international obligations is provided by the case concerning the Spanish San José galleon, sunken,

[137] Article 46 of the Draft articles establishes that if there are several injured States, each one can invoke responsibility individually.

[138] See, for example, the dispute between the US and China concerning the damage suffered by one of the Great Wall's warrior statues during a temporary exhibition in Philadelphia. See K. Lo, 'China urges US to get tough on man who stole thumb from US$4.5 million terracotta warrior on display in a Philadelphia museum', in *South China Morning Post* available at https://www.scmp.com/news/china/diplomacy-defence/article/2133707/china-urges-us-get-tough-man-who-stole-thumb-us45.

[139] See Article 7 of the UHC.

in the 18th century, off of the coast of what is today Colombia.[140] Following the discovery of the San José shipwreck, Colombia has declared that it intends to rescue the vessel and its cargo with the assistance of a United States (US) private company that will retain some part of the recovered goods as compensation. On the one hand, a typical bilateral dispute has occurred between Spain and Colombia both claiming the ownership of the vessel. Thus, if the title of Spain, as flag State of the San José galleon, were to be recognised, Spain, as the 'injured State', would have the right to invoke the responsibility of Colombia for any illicit act affecting the vessel. On the other hand, the activities of rescue of the San José shipwreck, which the Colombian government seeks to carry out, has raised the concern of the UNESCO, in particular, with regard to the consistency of these activities with the general aims of the UHC, which stipulate that underwater cultural heritage must be safeguarded in the interest of humanity.[141] This initiative by UNESCO is all the more indicative of a general interest to the preservation of underwater cultural heritage for the benefit of humankind since Colombia is not a party to the 2001 UCH Convention. This type of initiative also seems to consolidate the recognition of the status of norm of customary character with respect to the obligation of protecting cultural property in war and peace time.

In addition, the invocation by a single State of the responsibility of another State may also involve collective obligations.[142] In these circumstances, the single State may only invoke responsibility in two specific cases: when it has been specially affected by the breach of a collective obligation or when the obligation is of such a character that its breach "radically changes the position of all the other States to which the obligation is owed", as established by Article 42(b)(ii) Draft Articles.[143]

An example of the first hypothesis is provided by the case in which the illicit conduct of a State entails the damage or destruction of cultural objects that are located in the Area in breach of Article 12 UHC. In this case, while any State party is bound by the obligation of protecting cultural objects in the Area *vis-à-vis* all other parties, the injured State that may be specially affected by the conduct of the wrongdoer State is the one that is recognised to be as the State of the cultural origin of the objects themselves according to Article 11(4) UHC.

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[140] For an overview see A. J. Rengifo, 'Ruling over the San José galleon is unclear', in *UN Periódico digital, Universidad Nacional de Colombia*, available at http://unperiodico.unal.edu.co/pages/detail/ruling-over-the-san-jose-galleon-is-unclear.

[141] For the political reaction of the UNESCO to the potential activity of rescue announced by Colombia see L. Semini, 'UNESCO against Colombia's commercial recovery of a shipwreck', in *Washington Post*, 27 April 2018, available at https://www.washingtonpost.com/world/the_americas/unesco-against-colombias-commercial-recovery-of-a-shipwreck/2018/04/27/ 29ecaae2-4a0a-11e8-8082-105a446d19b8_story.html?utm_term=.dd46c8c8f060.

[142] These obligations are owed by a State towards a group of States or the international community as a whole.

[143] For a definition see ILC Report, cit. *supra* note 93, 118-119.

The second hypothesis concerns the so-called interdependent obligations.[144] In the case of the breach of one of these obligations, all States parties to the regime other than the wrongdoer State must be considered as injured States. An example of these types of obligations relating to cultural property is provided by the regime established by the WHC. The inscription of cultural properties of outstanding universal value in the World Heritage List, as provided for in Article 11 WHC, would be scarcely effective if a State party might treat the cultural properties that are located in its territory as ordinary assets or, even worse, as commercial goods. It is therefore consistent with Article 42(b)(ii) Draft Articles that any party to the WHC is entitled to invoke the responsibility of another party for the breach of the obligations of protection and conservation established in Articles 4, 5, and 6 WHC. The invocation of State responsibility according to this legal ground has so far remained on paper mainly due to the failure of international law to provide collective judicial or administrative instruments for the condemnation of these types of violations. An example of this type of breach is provided by the case concerning the demolition of the Ajyad Fortress, an Ottoman castle, which was built in the 18th century. In 2002, Saudi Arabia tore down this fortress that was located in its own territory in order to enhance the commercial growth of the area. Despite the strong condemnation of the act on the part of Turkey, as historic successor of the Ottoman Empire, and regardless of the fact that Saudi Arabia has been a party to the WHC since 1978, neither unilateral nor collective action was taken against this inconsiderate conduct in order to enforce international rules on State responsibility.[145]

In short, Article 42 Draft Articles appears to be strongly based on the bilateral approach that traditionally applies in international law and identifies two essential actors, namely the wrongdoer and injured State. The only attempt at recognising collective rights corresponding to collective interests, such as those safeguarded in cultural property conventions, may be acknowledged in paragraph (b)(ii) of this article.

B. The Right of a State other than the Injured State to Invoke Responsibility

Article 48 Draft Articles recognises the right of a State other than the injured State to invoke responsibility in cases of the breach of the obligations that are aimed at safeguarding a collective interest and are owed by the wrongdoer towards a group of States or the international community as a whole. As examples of these types of obligations, the ILC Commentary mentions *erga omnes*

[144] These obligations must be implemented by all States parties in a consistent and simultaneous manner and that usually establish international legal regimes.

[145] See J. Palmer, 'Destroying Ottoman castle to build hotel is 'cultural massacre'', in *Independent*, 9 January 2002, available at https://www.independent.co.uk/news/world/middle-east/destroying-ottoman-castle-to-build-hotel-is-cultural-massacre-9162998.html. For an analysis of this case see Lixinski and Tsevelekos, cit. *supra* note 3, 17.

obligations as defined by the ICJ in the *Barcelona Traction* case.[146] Although Article 48 does not adopt the traditional bilateral approach for the attribution of the right to invoke responsibility, the scope of the rights that this article recognises with respect to States other than the injured State is quite limited: in fact, these States may only request the cessation of the breach, guarantees of non-repetition, and reparation in the sole interest of the injured State.[147]

The extension of the right to invoke responsibility *vis-à-vis* States other than the injured State is also provided in common Article 1 Geneva Conventions that allows any State party to claim the breach of one of the obligations established by the Conventions and Geneva Protocol I.[148] Thus, the violation of the obligations provided for in Article 53 Geneva Protocol I with regard to the protection of cultural property during international armed conflicts may be invoked *erga omnes*. Conversely, since this responsibility regime does not apply to Geneva Protocol II, the breaches of the obligations established in its Article 16 concerning offences against cultural property during non-international armed conflicts can be only invoked according to common Article 1 Geneva Conventions if such breaches entail violations that, under common Article 3 Geneva Conventions, are inescapable.[149] In the *Strugar* case, the ICTY included the shelling of the Old Town of Dubrovnik among these types of violations although it was perpetrated during an internal conflict.[150]

In addition, several treaties on cultural heritage consider the protection of cultural properties as a general interest of humanity as a whole, such as, for example, the WHC and UHC. Simultaneously, international practice is increasingly recognising the interest of the international

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[146] See ILC Report, cit. *supra* note 93, 127 and ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) Second Phase*, Judgment, 5 February 1970, ICJ Reports 1970, para 34. For an overview on *erga omnes* obligations see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (2000) and J. A. Frowein, 'Obligations erga omnes', in Wolfrum cit. *supra* note 16.

[147] For the inadequacy of the Draft articles in dealing with the issue of the breach of *erga omnes* obligations see P. Picone, 'Gli obblighi erga omnes tra passato e futuro' in *Rivista di diritto internazionale* (2015) 1081.

[148] Section II of Part V of Protocol I to the Geneva Conventions implements the obligation of repressing the breaches of the Conventions and of Protocol I. For the assimilation of Article 1 of the Geneva Conventions with Article 48 of the Draft articles see Sassòli, *supra* note 3, at 424 and 433. For a detail analysis of the scope of common Article 1 of the Geneva Conventions see L. Boisson de Chazournes and L. Condorelli, 'Common Article 1 of the Geneva Conventions revisited: Protecting collective interests', 837 *International Review of the Red Cross* (2000).

[149] Article 3 mainly prohibits cruel physical injuries to civil population. However, on the basis of an extensive and up-to-date interpretation, serious attacks against cultural property contemplated under Article 16 of Protocol II should be considered as unjustifiable conducts under humanitarian law. For the view that common Article 3 of the Geneva Conventions does not provide an exhaustive lists of grave breaches of international humanitarian law see T. Graditzky, 'Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts', in *International Review of the Red Cross* (1998). For the opinion that serious attacks against cultural property must be considered crimes against peace see Francioni and Lenzerini, *supra* note 35, at 644.

[150] The ICTY upheld that 'cultural property is, by definition, of great importance to the cultural heritage of every people' and, thus, 'the victim of the offence at issue [was] to be understood broadly as a 'people', rather than any particular individual'. See *Strugar* case, cit. *supra* note 51, para 232.

community in the protection of cultural property as it was reaffirmed in the UNESCO Amicus Curiae Observations submitted to the ICC in the *Al Mahdi* case.[151]

The growing acknowledgment of the universal value of cultural property and essential need of its conservation may help to make the traditional bilateral approach adopted by international law more flexible. As an example, Article 45 Draft Articles providing for the waiver or acquiescence of the right to invoke State responsibility of the injured State or the States enjoying such right under Article 48 may be interpreted in different manners according to the peculiarities of the situations in which this article applies. In particular, the recognition of the special character of the obligations concerning cultural property may raise the question whether or not the waiver or acquiescence is admissible when the breach of these obligations is at issue. Again, the applicability of these types of norms varies according to the diverse content of the obligations relating to cultural property. Similar to the operation of consent as circumstance precluding wrongfulness, a valid waiver is only envisaged when the State renouncing to claim responsibility is the only entitled person. If the breach also affects the interests of other States or the international community, a single State cannot waive the invocation of such breach. In addition, the State directly entitled to claim responsibility might waive its right because of its weakness and subjection with respect to the wrongdoer State even in the case of serious breaches affecting its cultural property. In these circumstances, States other than the injured State do not only appear to have the right to invoke the responsibility of the wrongdoer State for the violation of obligations owed to the international community, as a whole. Consistent with the global interest in conserving cultural property of outstanding value and in line with the spirit of the R2P theory, States other than the injured one should also recognise (so far only by means of proclamations of political character) the obligation of advocating the rights of the directly entitled State and the entire humanity that have been heavily trampled.

Thus, although international norms on State responsibility, particularly the Draft Articles, provide a coherent legal system for the ascertainment of States entitled to invoke responsibility, these norms do not seem to fit completely the need to supply the international community the proper instruments to stand against the breaches of the obligations that are aimed at protecting cultural property as a global interest.

[151] ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-194, UNESCO Amicus Curiae Observations submitted pursuant to Rule 103 of Rules of Procedure and Evidence, 2 December 2016, para 2.

C. Reparation for Damage to the Cultural Property

The norms dealing with the implementation of the invocation of State responsibility, namely the rules relating to reparation and countermeasures, also show some lacuna in particular with regard to the reparation of damage to cultural property of universal value.

This is due to the fact that international norms on State responsibility primarily have a reparatory nature, which is based on the abovementioned bilateral approach. Conversely, the most serious breaches of the obligations affecting cultural property would require punitive consequences, in particular, when these breaches are the result of an intentional action.[152] Nevertheless, with the exception of the Convention on the Prevention and Punishment of the Crime of Genocide, which, by recognising ICJ's jurisdiction as primary dispute settlement means,[153] allows sentencing States parties for the breach of its substantive norms, such as in the aforementioned *Genocide* case, and apart from the treaties that States may adopt to resolve some specific disputes, such as the agreement, concluded between Eritrea and Ethiopia, establishing the Claims Commission that dealt with the abovementioned *Stela of Matara* case,[154] no international legal instruments have been so far provided to hold States accountable in the same manner in which individuals are prosecuted before international criminal tribunals. This punitive task has been left to the Charter of the UN and, particularly, to Chapter VII the application of which is notoriously not very effective.[155]

The only consequence of State responsibility that apparently has a punitive character under general international law is satisfaction since it requires the wrongdoer State to recognise its responsibility and to apologise. However, satisfaction cannot be considered as a sufficient remedy for the breaches of the obligations affecting cultural property. First, according to Article 37 Draft Articles, satisfaction only entails some expression of regret that, as the ICJ affirmed in the *LaGrand* case, cannot be regarded as a suitable remedy in cases of violations of fundamental interests.[156] Second, satisfaction embodies a consequence of residual character with respect to restitution and compensation. For this reason, in the abovementioned *Stela of Matara* case, in spite of the request of Eritrea for official apologies as a consequence of the recognition of the responsibility of Ethiopia

[152] See, among others, Dupuy, cit. *supra* note 60, 1097 and Nollkaemper, cit. *supra* note 89, 622.
[153] See Art. IX Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.
[154] See Article 5 of the Eritrea-Ethiopia Agreement. This agreement was concluded in the framework and under the auspices of both the Organisation of African Unity and the UN in order to cease the armed conflict occurring between Ethiopia and Eritrea. See Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, done in Algiers on 12 December 2000, available at https://pcacases.com/web/sendAttach/786.
[155] Charter of the UN 1945, 15 UNCIO 335; see Nollkaemper, *supra* note 89, at 626.
[156] See ICJ, *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports 2001, para. 123. For the view that satisfaction may have the form of an authoritative declaration of an international court with the purpose of reinforcing international obligations see ICJ, *the Nuclear Tests (Australia v. France)*, Judgement, 20 December 1974, ICJ Reports 1974, para 27 and ICJ, *Corfu Channel Case (UK v. Albania)*, Judgement, 9 April 1949, *ibid.*, 1949, 36.

for the destruction of the obelisk, the Eritrea-Ethiopia Claims Commission did not consider apologies as a sufficient remedy for this type of violation and, thus, established monetary compensation. Actually, in this case, the amount of the compensation corresponded to the costs of restoration of the Stela. For this reason, some scholar believes that this monetary compensation should be considered as a form of restitution.[157]

Thus, severe and inescapable consequences of punitive character should be ensured in cases of the serious breach of the obligations affecting cultural property in order to reaffirm the prominence of these obligations.

The same rigorous approach should be adopted to establish other forms of reparation in cases of offences against cultural property. For example, under Article 35(b) Draft Articles, restitution is not due if it involves "a burden out of proportion to the benefit deriving from restitution instead of compensation". When cultural properties are at issue, the assessment of this proportion should accord significant priority to restitution with respect to compensation due to the special nature of the objects involved and the inherent link of these objects with the historical, spiritual or religious heritage of a State and its population.[158] This preference for the return of illicitly removed cultural property as a form of reparation has been embraced in international practice.[159] A first example was provided by the *Temple* case, in which the ICJ upheld that the recognition of Cambodia's sovereignty over the territory in which the Temple was located implicitly entailed the right to the restitution of cultural objects belonging to the Temple that Thailand might have removed during its military occupation of the area.[160] Most recently, UN Security Council Resolution 1483 (2003) concerning the aftermath of the 2003 military intervention in Iraq, urged UN Member States to return any cultural objects that had been illicitly removed from Iraq.[161]

Similar to the rigorous approach adopted with regard to the restitution of cultural property, compensation should be also determined according to the relevance of the interests at issue.[162] This

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[157] See *Stela of Matara* case, cit. *supra* note 65, para 114. For this view see O'Keefe, *supra* note 46, at 502.

[158] A legal author defines, as 'juridical restitution', the re-establishment of the previous legal order as a consequence of the breach of either an international obligation that has not entailed material damage or an obligation affecting the collective interest of States other than the injured State. Among collective obligations, due diligence obligations relating to the conservation of goods of common concern, such as the environment and cultural heritage, are noteworthy. For this view see Fasoli, cit. *supra* note 109, 118.

[159] For the view that since WWI State practice has recognised the duty to return cultural property illicitly removed see O'Keefe, *supra* note 46, at 502. In addition, the recognition of the special nature of cultural property may also be inferred from the international rules regulating war reparations. For example, Art. I(3) First Protocol to the Hague Convention states that "[s]uch property shall never be retained as war reparations". Thus, the link between a population and its cultural heritage can never be discontinued even in tragic historic moments, such as the end of an armed conflict.

[160] *Temple* case cit. *supra* note 92, 36.

[161] UN Security Council, SC Res. 1483 (2003) concerning the military intervention in Iraq and establishing the obligation to return cultural heritage that had been illicitly removed, para 7.

[162] The destruction of cultural property entails both economic and non-economic losses. In particular, non-economic losses are, on the one hand, due to the fact that the violation of the collective interest of the international community in the protection of cultural property does not have an economic value in itself. On the other hand, material damages to

approach has been applied by the ICC in its order establishing reparation in the *Al Madhi* case where the interest of the international community was taken into account to determine both material and moral damage.[163] According to a legal author's view,[164] the recognition of moral damage emphasises the human dimension of the need to protect cultural property and helps to categorise the destruction of the historic buildings in Timbuktu as a crime against humanity rather than a crime against property. We can only hope that this approach will be also applied to cases in which States perpetrate serious breaches against cultural property.

An analogous approach recognising the need for a special consideration of cultural property may be identified in international practice with regard to the topic of the immunity of State property from execution. Article 21(1)(d) and (e) UN Convention on Jurisdictional Immunities of States and their Property[165] establishes that property forming part of a State's cultural heritage must be considered as non-commercial property and, thus, cannot be subject to measures of constraint, such as execution. According to this rule, which entails a norm of customary character, in the *Jurisdictional Immunities* case, the ICJ upheld that objects devoted to culture are governmental property and, thus, immune from execution.[166] The application of this rule is indisputable as long as it is aimed at preserving the integrity of the cultural heritage of a State. Nevertheless, execution seems to be still possible when it points to return cultural property, which has been illicitly expropriated by the State claiming immunity, to the legitimate owner. As a US District court affirmed in the *Chabad* case,[167] the recognition of the immunity of the State concerned, or better to say of the State's property, would have entailed the violation of the rights of the legitimate owner that was also the genuine guardian of the cultural property at issue.[168]

Thus, both international norms on State immunity and State responsibility seem to recognise that cultural property has a special value and significance as such, and that the serious breaches that may be perpetrated by States against such property must entail different consequences with respect to ordinary violations.

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cultural property cannot be economically quantified with ease due to the inestimable value of cultural objects. For an analysis of the issue of non-economic losses deriving from the damage to common goods, such as biodiversity and cultural heritage, see Fasoli cit. *supra* note 109, 108.

[163] See *Al Madhi* case, Reparations Order, cit. *supra* note 57, paras 53 and 129. For the recognition of the right of the international community to the symbolic compensation of the damage arising from the destruction of Timbuktu's cultural heritage in the *Al Mahdi* Reparations Order see Pineschi cit. *supra* note 64, 25.

[164] See A.M. Thake, 'The Intentional Destruction of Cultural Heritage as a Genocidal Act and a Crime against Humanity', in *European Society of International Law Conference Paper Series* Vol. 10 n. 5, 1, at 18.

[165] UN Convention on Jurisdictional Immunities of States and their Property 2004; UNGA Res. A/RES/59/38, 2 December 2004.

[166] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 3 February 2012, ICJ Reports 2012, paras. 118-120.

[167] District Court, District of Columbia, *Agudas Chasidei Chabad of US v. Russian Federation*, 798 F. Supp. 2d 260 (D.C. 2011). For a thorough analysis of the case see Pavoni, *supra* note 126, at 21-22.

[168] See also the *Altmann* case, *supra* note 132.

Actually, according to Article 41 Draft Articles, serious breaches of international law may entail different consequences with respect to ordinary violations. Nevertheless, the category of serious breaches that is identified in this article is limited to the violations of peremptory norms. So far, even the intentional destruction of cultural property does not seem to have been included in this category. Although Article 41 is apparently inapplicable, as such, with respect to the violations perpetrated against cultural property, a distinction exists between serious and ordinary breaches affecting such property that necessarily entails different consequences corresponding to the diverse gravity of illicit behaviours.

D. Countermeasures as Response to State Wrongful Acts

Among the practical consequences that international law recognises as a legitimate response to State wrongful acts, special attention must be paid to countermeasures. Under Articles 49 and 54 Draft Articles, these measures may be adopted both by the injured State and States entitled to invoke responsibility according to Article 48 Draft Articles with the aim of inducing the wrongdoer State to stop its conduct. Thus, countermeasures cannot entail punitive actions.[169] For example, they should not be adopted as a consequence of the destruction of cultural property because the illicit conduct no longer needs to be ended. Moreover, States other than the injured State may only adopt countermeasures in cases of breach of collective and *erga omnes* obligations that, as observed above, include rules safeguarding the interests of the international community as a whole.[170]

In short, the possibility of taking countermeasures is limited by the same State-centric approach characterising general international norms on State responsibility. This approach in particular limits the possibility of States other than the injured State to stand for the protection of cultural property before judicial organs and dispute settlement means of bilateral character.[171] Thus, new means seem to be needed to respond to State responsibility arising from the breach of the obligations affecting cultural property when the interest of the international community as a whole is at issue.

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[169] For the view that countermeasures may be adopted to compel States to comply with the obligations relating to the protection and conservation of cultural heritage see Francioni and Lenzerini, *supra* note 35, at 629. For the temporary nature of countermeasures see Gianelli, cit. *supra* note 87, 1052.

[170] See Sassòli, *supra* note 3, at 433.

[171] For a thorough analysis concerning dispute settlement means see Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (2014).

VI. Conclusions

Existing international norms on State responsibility, such as the ILC Draft Articles, do not completely resolve the lacunae that cultural property treaties and international criminal and humanitarian conventions have so far left with regard to the violations, perpetrated by States, of the obligations relating to the conservation of cultural property. However, these norms at least provide some general principles that can help to determine, according to the scope of the illicit conducts affecting cultural property, how these conducts may be attributed to States, which States and persons are entitled to invoke State responsibility, and, finally, which legal and practical consequences may arise from this invocation.

First of all, the determination of the scope of the illicit conducts entailing the destruction of cultural property has emphasised the need to make a distinction between ordinary and serious breaches of law. In this regard, some substantive elements, such as the psychological element, damage, and the peculiarities of the objects that are under protection, may help to draw this distinction. Although no peremptory norms so far seem to have emerged with regard to cultural property, some violations have been already categorised by international tribunals and domestic courts[172] as serious breaches of international law, in accordance with the special status that has been recognised to cultural property as an international public good the protection of which must be carried out in the interest of the international community as a whole and, in particular, of humankind.

Second, the analysis of the issue of attribution has highlighted that, the illicit destruction of cultural property may be only attributed to a State on the basis of the examination of the concrete elements inherent to such conduct, such as, on the one hand, the form of direct control that a State exercises over the individuals acting in its name both as official and *de facto* organs and, on the other hand, the different types of contribution that diverse States make with respect to the perpetration of the same illicit conduct. While the control of a State over private actors may take different forms according to the varying intensity of the relationship occurring between the State and these actors, the responsibility of States for the same conduct must be assessed with regard to the concrete capability of each State of determining its own actions. Therefore, while State sovereignty appears to be the governing principle for the identification of the State that is accountable for the protection of cultural property, the evaluation of the concrete circumstances and characteristics of a conduct may reveal other responsible States.

[172] See Sub-section IV.B. of this article and the abovementioned *Strugar* case, cit. *supra* note 51, *Stela of Matara* case, cit. *supra* note 65, and *Al Mahdi* case, cit. *supra* note 57.

In view of the complexity of the relations, both between States and States and private actors, the recognition of some forms of shared responsibilities seems to be the best solution to respond the perpetration of breaches against cultural property, in particular, when these breaches entail international crimes.

In light of this special status of cultural property, the regulation of both issues concerning the invocation of State responsibility and the consequences arising from such invocation should set aside the traditional bilateral and State-centric approach that has been adopted by the ILC in the Draft Articles. As the R2P doctrine emphasises, a State is not only accountable towards other States, but also *vis-à-vis* its population and the international community as a whole when fundamental interests are at issue, such as the conservation of cultural property.

Thus, new multilateral systems could be developed to permit the effective enforcement of State responsibility in cases of offences against cultural property. International treaties safeguarding cultural heritage, such as the conventions adopted within the UNESCO framework, already establish predetermined standards regulating the conduct of States. Nevertheless, these treaties rarely set up analogous enforcing mechanisms so as to prevent harms with respect to essential interests.

To sum up, in consideration of the serious breaches that have affected cultural property in the last decades, effective instruments both of control and repression are required in order to compel States to grant the protection of cultural property in the interest of the international community as a whole.